Pre-Agreement Assessment as a Responsible Lending Tool in South-Africa, the EU and Belgium: Part 2

CM van Heerden* and R Steennot**

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Authors

Corlia M van Heerden and Reinhard Steennot

Affiliation

University of Pretoria
South Africa
Ghent University
Belgium

Email

corlia.vanheerden@up.ac.za
Reinhard.Steennot@UGent.be

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Abstract

Responsible lending has become a very pertinent issue on the agenda of credit regulators across the globe who seek to combat the causes of consumer over-indebtedness. In this context the use of "pre-agreement assessment" as a tool to filter out those instances where, based on a consumer's creditworthiness or ability to repay, credit should not be granted to such a consumer, is a feature common to the lending regimes of various jurisdictions. This contribution consists of two parts: Part 1 provides a critical discussion of the reckless credit provisions of the *National Credit Act* 34 of 2005. Part 2 details the responsible lending measures contained in the EU Consumer Credit Directive and the EU Mortgage Credit Directive and provides an appraisal of the responsible lending measures introduced by Belgium, being a jurisdiction that has always been very pro-active in the context of consumer credit protection.

Keywords

Responsible lending, reckless credit granting, pre-agreement assessment, affordability, creditworthiness.

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1 Pre-agreement assessment as a responsible lending tool in the EU

1.1 Introduction

In the European Union the harmonisation of consumer credit legislation and mortgage credit legislation has taken place in order to realise an internal credit market and in order to protect consumers. The objectives go hand in hand, since directives which aim to realise an internal market must ensure a high level of protection for consumers.

Consumer credit law was first harmonised within the European Union by the Consumer Credit Directive 87/102/EEC (hereafter the CCD).[1] This directive was based on the principle of minimum harmonisation, which implies that the directive determines only the minimum level of protection that must be offered to consumers in each member state and does not prohibit member states from maintaining or introducing rules offering additional protection to consumers.[2] The directive itself did not contain rules on responsible lending, but this did not prevent some member states from enacting rules on responsible lending (for example, Belgium did so in the 1991 *Consumer Credit Act*). Directive 87/102/EEC was replaced in 2008 by Directive 2008/48/EC.[3] Contrary to the first directive, this directive contains several rules on responsible lending[4] and is based on maximum or full harmonisation,[5] implying that within the field harmonised by the directive, member states cannot offer additional protection to consumers.[6] Therefore, Directive 2008/48/EC determines not only the minimum level of protection

* Corlia M van Heerden. B Proc (UP) LLB (UP) LLM (Unisa) LLM (UP) LLD (RAU). Professor, Department of Mercantile Law, University of Pretoria. Email: corlia.vanheerden@up.ac.za.

** Reinhard Steennot. LLM (Ghent) LLD (Ghent). Professor, Department of Interdisciplinary Study of Law, Private Law and Business Law, Ghent University. Email: Reinhard.Steennot@UGent.be.

1 Council Directive 87/102/EEC of 22 December 1986 for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit (the CCD).

2 *Max Rampion and Marie-Jeanne Godard, née Rampion v Franfinance SA and K par K SAS* CJ 4 October 2007, C-429/05, ECLI:EU:C:2007:575. On minimum harmonisation also see Mak 2009 *ERPL* 58-59; Twigg-Flesner 2007 *ERCL* 204.

3 Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 1987/102/EEC.

4 See consideration nr 26 of Drective 2008/48/EC.

5 Article 22 of the CCD.

6 *SC Volksbank România SA v. Autoritatea Naţională pentru Protecţia Consumatorilor* CJ 12 July 2012, C-602/10, ECLI:EU:C:2012:443. See also De Muynck *Consumentenkrediet* 7; Grundmann and Hollering 2008 *ERCL* 49; Steennot 2013 *REDC* 89-90.

that must be offered but also the maximum level of protection that can be offered to consumers (at least within the harmonised field).

Mortgage credit law was harmonised very recently by the European legislator.[7] Like Directive 2008/48/EC, the Mortgage Credit Directive (hereafter the MCD) contains rules on responsible lending. As will be illustrated later, these are somewhat more elaborate than those in the CCD and offer some additional protection to consumers. The MCD is based mostly on minimum harmonisation.[8] Only the provisions on the information to be provided by creditors or credit intermediaries before the conclusion of the credit agreement (ESIS) and those on the annual percentage rate are fully harmonised.

1.2 Scope of application

1.2.1 Ratione personae

The CCD and the MCD have an identical scope *ratione personae*. These directives apply[9] only when a credit agreement is concluded between a consumer and a creditor (either directly or through a credit intermediary[10]).

A consumer is a natural person who concludes a credit agreement for purposes which are outside his trade, business or profession.[11] In European consumer law, juristic persons cannot be considered consumers, not even if they lack specific expertise with regard to the type of (credit) agreement they want to conclude.

In order to determine whether or not a natural person can be considered a consumer, one must examine for which purposes the credit agreement has been concluded. If it is done for private purposes the debtor is considered a consumer. If it is done for professional purposes, he cannot be considered a consumer. The expertise or specific knowledge of a natural person acting

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7 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements for Consumers Relating to Residential Immovable Property and Amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (the MCD**)**. Also see Vannerom and Casier "De Bescherming van de Consument" 257ff.

8 Article 2 of the MCD.

9 Article 1 of the CCD and art 1 of the MCD.

10 A credit intermediary means a natural or legal person who is not acting as a creditor and who, in the course of his trade, business or profession, for a fee, which may take a pecuniary form or any other agreed form of financial consideration (a) presents or offers credit agreements to consumers, (b) assists consumers by undertaking preparatory work in respect of credit agreements other than as referred to in (a), or (c) concludes credit agreements with consumers on behalf of the creditor (see art 3, f) of the CCD and art 4(5) of the MCD).

11 Article 3, a) of the CCD and a 4(1) of the MCD, which refers to the definition in the CCD.

for private purposes is not relevant. This has been acknowledged quite recently by the European Court of Justice in the case of *Costea*, in which the court held that a lawyer concluding a credit agreement can be considered a consumer, even though he has specific knowledge and expertise in this regard, the only requirement being that the credit agreement is concluded for private purposes and not for professional purposes.[12] If a third person provides security, that person cannot be considered a consumer within the meaning of the CCD (since he does not conclude a credit agreement).[13]

Consumers can invoke the protection incorporated in these directives only if the agreement is concluded with a creditor within the meaning of these directives. Basically, this means that protection is offered only if the credit is provided in the course of the credit provider's business.[14]

1.2.2 Ratione materiae

Both the CCD and the MCD define a credit agreement as an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation.[15] The definition is very wide. All types of credit (such as loans, overdraft facilities and credit sales) can be considered credit agreements within the meaning of the European directives.

The broad definition of a credit agreement made it necessary for the European legislator to exclude several types of credit from the scope of the directives.[16] For example, the CCD excludes from its scope (1) credit agreements involving a total amount of credit less than 200 euro or more than 75 000 euro; (2) credit agreements in the form of an overdraft facility if the credit has to be repaid within one month; (3) credit agreements where

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12 *Horațiu Ovidiu Costea v SC Volksbank România SA* CJ 3 September 2015, C-110/14, ECLI:EU:C:2015:538.

13 *Berliner Kindl Brauerei AG v A Siepert* CJ 23 March 2000, C-208/98, ECLI:EU:C:2000:152. However, he might be able to invoke the protection offered by the Unfair Contract Terms Directive (**Directive 93/13/EEC of the European Parliament and of the Council of 5 April 1993 on Unfair Terms in Consumer Contracts) (the UCTD).** The security provider can be considered a consumer within the meaning of the UCTD when he acts outside his trade or profession *when providing security*. This means that he can be considered a consumer even when he guarantees an obligation of a commercial company, the requirement being that he does not provide the security in the course of his own business and does not have a functional link with that company (eg company director, important shareholder): *Pavel Dumitraș and Mioara Dumitraș v BRD Groupe Société Générale* CJ 14 September 2016, C-534/15, ECLI:EU:C:2016:700.

14 Article 3, b) of the CCD and art 4(2) of the MCD.

15 Article 3, c) of the CCD and art 4(3) of the MCD.

16 See art 2.2 of the CCD and art 3.2 of the MCD.

the credit is granted free of interest and without any other charges; and (4) credit agreements which relate to the deferred payment, free of charge, of an existing debt, among others.[17] Although the CCD is based on the principle of maximum harmonisation, member states of the EU can decide to apply the provisions of the CCD to credit agreements that are completely excluded from the scope of the CCD.[18]

As for the scope of application *ratione materiae*, it is also of the utmost importance to determine when the CCD applies and when the MCD applies, since the rules on responsible lending that are incorporated in both directives differ. More specifically, provisions on consumer credit cannot apply if the credit agreement must be considered a mortgage credit.[19] The following can be considered as mortgage credit agreements:[20] (1) every credit agreement that is secured by a mortgage[21] (depending on its purposes, a loan to buy or build a house, as well as a loan to buy a car, if secured by a mortgage) and (2) every credit agreement the purpose of which is to acquire or retain property rights in land or in an existing or projected building (for example. a loan for buying a house secured by the pledge of financial instruments). Therefore, and rather strangely, a credit agreement can be called a mortgage credit agreement even if there is no mortgage, simply because of its so-called immovable purpose. An important exception relates to credit agreements for the purposes of renovating residential immovable property. They fall under the scope of the MCD only if they are secured by a mortgage.

1.2.3 Ratione loci

Which national credit law applies to a cross-border credit agreement has to be determined on the basis of the Rome I Regulation.[22] Of specific interest here is article 6 of the Regulation, which applies when the creditor either pursued his commercial or professional activities in the country where the consumer has his habitual residence, or directed such activities (by any means) to that country or to several countries including that country.[23] More

17 Article 2.2 of the CCD. Certain provisions apply only to some credit agreements (art 2.3 of the CCD).

18 *SC Volksbank România SA v Autoritatea Naţională pentru Protecţia Consumatorilor* CJ 12 July 2012, C-602/10, ECLI:EU:C:2012:443.

19 Article 2 of the CCD.

20 Article 3.1 of the MCD.

21 Or by another comparable security commonly used in a Member State on residential immovable property or secured by a right related to residential immovable property.

22 *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).*

23 On the requirement of directing the activity to the consumer's country, see *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG* CJ 7 December 2010, C-585/08, and *Hotel Alpenhof GesmbH v Oliver Heller* C-144/09, ECLI:EU:C:2010:740. For

specifically, article 6 of Rome I provides that (1) in the absence of a choice of law clause, the law of the consumers' country applies; and (2) a choice of law clause, determining that the law of the creditor's country is applicable, cannot deprive the consumer from invoking mandatory additional protection measures that are laid down in the law of his own country.

1.3 Responsible lending in the EU Directives

The existing European Directives on consumer and mortgage credit contain several rules which relate to the concept of responsible lending. In general, these rules oblige the creditor (or credit intermediary) to provide certain information, as well as an adequate explanation to the consumer, and oblige the creditor (or credit intermediary) to obtain information from the consumer which enables the creditor to assess the consumer's creditworthiness. The MCD offers additional protection as it explicitly states that a creditor may make credit available to the consumer only where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are likely to be met in the manner required under that agreement.

1.3.1 Obligation to obtain information from a consumer in order to assess the consumer's creditworthiness

Both the CCD and the MCD require the creditor to assess the consumer's creditworthiness prior to the conclusion of the credit agreement and prior to the increase of the total amount of credit after the conclusion of the credit agreement.

Article 8 of the CCD determines that such an assessment must take place on the basis of sufficient information obtained from the consumer and where necessary on the basis of the consultation of the relevant database. Article 18 of the MCD states that before the conclusion of a mortgage credit agreement (or before the consumer is bound) the creditor must make a thorough assessment of the consumer's creditworthiness, properly taking into account all factors relevant to verifying the prospect of the consumer to meet his obligations under the credit agreement. Article 18.3 of the MCD adds that the assessment of the consumer's creditworthiness cannot rely predominantly on the value of the residential immovable property's exceeding the amount of the credit or on the assumption that the residential immovable property will increase in value (unless the purpose of the credit agreement is to construct or renovate the residential immovable property).

example, a French creditor using a top-level domain name ".be" will be considered as directing its activities to Belgian consumers.

As for the information to be obtained, article 20 MCD states that the assessment of the consumer's creditworthiness must take place on the basis of information on the consumer's income and expenses and other financial and economic circumstances. It must be obtained from relevant internal or external sources, including the consumer, and including information provided to the credit intermediary or appointed representative during the credit application process. Creditors must specify in a clear and straightforward way at the pre-contractual phase the information that the consumer needs to provide and the timeframe within which the consumer needs to provide the information. Consumers must also be made aware of the importance of giving complete and correct information for a proper assessment.

The MCD also clearly indicates that the information obtained from the consumer must be limited to what is necessary to conduct a proper assessment of the consumer's creditworthiness. For the first time the European legislator recognises that it would be to the consumer's detriment if information that is not relevant for the assessment of the consumer's creditworthiness were to be obtained by the creditor or credit intermediary. This could indeed violate the consumer's right to privacy.

With regard to the CCD, the European Court of Justice held that the directive does not contain an exhaustive list of the information with which the creditor must assess the consumer's creditworthiness.[24] Therefore it affords the creditor a margin of discretion for the purposes of determining whether the information at its disposal is sufficient to demonstrate the consumer's creditworthiness. The creditor must in every case and taking into account the specific circumstances of that case assess whether the information obtained is adequate and sufficient for the purposes of evaluating the consumer's creditworthiness. The sufficiency of the information may vary depending on the circumstances in which the credit agreement was concluded, the personal situation of the consumer, or the amount covered by the agreement.

The CCD does not determine how the information must be obtained. The MCD is somewhat more specific and indicates that the information on which the assessment is based must be documented and maintained. However, the importance of this finding should not be overestimated, since in the context of the CCD the European Court of Justice held that it is up to the creditor to prove that he has assessed the consumer's creditworthiness on the basis of sufficient information (which basically means that the creditor

24 *CA Consumer Finance v Ingrid Bakkaus* CJ 18 December 2014, C-449/13, ECLI:EU:C:2014:2464.

must document the assessment carried out).[25] Although the burden of proof is not dealt with in the CCD, according to the Court of Justice it would be contrary to the principle of effectiveness if the burden of proof were to be imposed on the consumer. If it would be up to the consumer to prove that the creditor or credit intermediary did not obtain all relevant information in order to assess the consumer's creditworthiness properly, it would indeed become excessively difficult for the consumer to enforce his rights. The same goes without doubt for mortgage credits. Moreover, a diligent creditor must be aware of the need to gather and retain evidence.

Although not mentioned in the CCD and mentioned only implicitly in the MCD, consumers need to provide correct and full information.[26] Intentionally withholding relevant information and providing false information can be considered an unlawful act. In this context the question arises to what extent the creditor must verify the information obtained from the consumer. Whereas the CCD is silent on this issue, article 20 of the MCD determines explicitly that the information must be appropriately verified, including through reference to independently verifiable documentation when necessary. Once again, the difference between the two directives may not be exaggerated. Although the CCD itself does not determine explicitly that information obtained from the consumer must be verified, the European Court of Justice argued that mere declarations by the consumer must be accompanied by supporting evidence. However, the court also stressed that the directive does not require the creditor to carry out systematic checks of the veracity of the information supplied by the consumer.[27] In our view, this implies that creditors must verify the information provided by the consumer only where this can easily be done by consulting a database or on the basis of documents that can easily be provided by the consumer (for example, salary slips). In conclusion, when the consumer provides incorrect information which is not verified by the creditor (although it could easily be verified), both contracting parties violate their obligations in the pre-contractual phase.

1.3.2 Mortgage credits only: prohibition to provide credit

While the CCD limits itself to requiring creditors to assess the consumer's creditworthiness, the MCD adds that the creditor may make credit available to the consumer only where the result of the creditworthiness assessment

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25 *CA Consumer Finance v Ingrid Bakkaus* CJ 18 December 2014, C-449/13, ECLI:EU:C:2014:2464.

26 Article 20 of the MCD provides that the MCD does not prevent member states from allowing the termination of the credit agreement by the creditor where it is shown that the consumer knowingly withheld or falsified the information.

27 *CA Consumer Finance v Ingrid Bakkaus* CJ 18 December 2014, C-449/13, ECLI:EU:C:2014:2464.

indicates that the obligations resulting from the credit agreement are likely to be met in the manner required under that agreement.[28] In other words, it is prohibited to conclude a mortgage credit agreement if the consumer cannot reasonably be expected to reimburse the credit, even if that consumer is able to provide sufficient security. (As already indicated, the consumer's creditworthiness cannot rely predominantly on the value of the residential immovable property exceeding the amount of the credit.) However, the Directive does not indicate when consumers can be expected to be able to reimburse the credit. Moreover, within the context of the European Union this would not be feasible, since living expenses differ widely among the member states. General guidelines (for example, that a maximum of 30 per cent of an income can be spent on the reimbursement of credit) are of little use, since the part of the income that can be spent on credit depends on the total income of the consumer. (Those with high incomes can easily spend more than 30 per cent; those with very low incomes, less.)

Anyhow, it seems that in 2008, when the CCD was enacted, the European mind-set was not yet ready to provide for an explicit prohibition to grant credit to consumers that are not sufficiently creditworthy (although such a prohibition was included in the original proposal for a CCD). In 2014, that is, in the post-credit crisis era, the negative impact of the granting of mortgage credit to non-creditworthy consumers had become clear. This made an explicit prohibition politically acceptable and the systemic crisis led to new private law provisions on credit.

1.3.3 Obligation to provide information and adequate obligation

The CCD as well as the MCD require the creditor or credit intermediary[29] to provide the consumer with information in good time before the conclusion of the credit agreement.[30] The objective of this information requirement is to allow the consumer to compare different offers, in order to enable him to make an informed decision on whether to conclude a credit agreement. In the case of mortgage credits, the EU member states are given the possibility

28 Article 18.5 of the MCD.

29 There are some specific information requirements for credit intermediaries. However, these are not discussed in this article. The obligation to provide information does not apply to suppliers of goods or services who act as credit intermediaries *in an ancillary capacity* (art 7 of the CCD).

30 Article 5 of the CCD and art 14 of the MCD However, if a consumer credit agreement has been concluded at the consumer's request using a means of distance communication which does not enable the information to be provided on paper or a durable medium (eg the telephone), the creditor must provide the consumer with the full pre-contractual information using the SECCI immediately after the conclusion of the credit agreement.

of determining that the pre-contractual information must always be communicated to the consumer before the provision of an offer binding upon the creditor.[31]

The information must be provided on paper or in a durable medium.[32] It is therefore not sufficient that the information is made accessible through the website of the creditor or credit intermediary.[33]

The information which is set out in the directives[34] must be provided by means of a standardised form, called SECCI in the case of consumer credit[35] and ESIS in the case of mortgage credit.[36] The use of a standardised form should increase the comparability between different creditors. The MCD indicates clearly that, although the information is to be provided by means of a standardised form, the information must be personalised, taking into account the information provided by the consumer concerning his needs, financial situation and preferences.[37] Although the Consumer Credit Directive is less explicit in this regard – where it refers to information to be provided on the basis of the credit terms and conditions offered by the creditor and, if applicable, the preferences expressed and information supplied by the consumer – it is clear that the CCD also requires that the information incorporated in the SECCI is personalised. If the consumer informs the creditor of his preferences, these must be taken into account. If he does not, the creditor must take into account the preferences of an average consumer and the normal use of that type of credit.[38]

The information that must be communicated includes the annual percentage rate of charge, equating on an annual basis to the present value of all commitments (drawdowns, repayments and charges) future or existing agreed by the creditor and the consumer. The European directives not only require that creditors communicate the annual percentage rate of interest but also determine how the annual percentage rate of charge has to be calculated. The obligation to provide information on the total cost of the

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31 Article 14.4 of the MCD.

32 Article 5.1 of the CCD and art 14.2 of the MCD.

33 Also see *Content Services Ltd v Bundesarbeitskammer* CJ 5 July 2012, C-49/11, ECLI:EU:C:2012:419, where the court held in the context of the former Distance Selling Directive that an ordinary website cannot be considered a durable medium.

34 Article 5 of the CCD and Annex II of the MCD. In the case of consumer credit in the form of an overdraft facility, less information needs to be provided (art 6 of the CCD).

35 Article 5 of the CCD.

36 Article 14 of the MCD.

37 Article 14.1 of the MCD. In addition to personalised information, comprehensible general information about credit agreements must be made available by creditors or, where applicable, by tied credit intermediaries or their appointed representatives *at all times* on paper or on another durable medium (eg on the website) (art 13 of the MCD).

38 De Muynck 2012 *Tijdschrift voor Privaatrecht* 811-812.

credit is considered essential since it allows consumers to compare the actual cost of a credit agreement in a very easy way.

Despite the requirement that pre-contractual information be provided, the consumer may still need additional assistance in order to decide which credit agreement, within the range of products proposed, is the most appropriate for his needs and financial situation. Therefore, creditors must provide assistance in relation to the credit products that they offer to the consumer. Where appropriate, the relevant pre-contractual information, as well as the essential characteristics of the products proposed, must be explained to the consumer in a personalised manner so that the consumer can understand the effect they may have on his economic situation. In other words, adequate explanation must be given to the consumer in order to enable him to assess whether the proposed credit agreement is adapted to his needs and to his financial situation. In the case of mortgage credits adequate explanation must also be provided with regard to ancillary services (if any), such as insurance.[39] The form in which adequate explanation is given (in writing, electronically or orally) is irrelevant.[40]

Further, it is worth mentioning that the European Court of Justice held that the CCD does not preclude a creditor from providing the consumer with adequate explanations before assessing the financial situation and the needs of that consumer. However, it may be that the assessment of the consumer's creditworthiness means that the adequate explanations provided need to be adapted, and that those explanations must be communicated to the consumer in good time before the credit agreement is signed.[41]

Neither the CCD nor the MCD determines who must bear the burden of proof. Is it for the creditor to prove that the information required has been provided and an adequate explanation has been given, or is it for the consumer to prove that this has not been done? In the context of the CCD, the European Court of Justice held that the principle of effectiveness requires that the burden of proof is imposed on the creditor. Moreover, standard terms in which a consumer acknowledges that the creditor's pre-contractual obligations have been fully and correctly performed result in a

39 Article 5.6 of the CCD and art 16 of the MCD.

40 *CA Consumer Finance v Ingrid Bakkaus* CJ 18 December 2014, C-449/13, ECLI:EU:C:2014:2464.

41 *CA Consumer Finance v Ingrid Bakkaus* CJ 18 December 2014, C-449/13, ECLI:EU:C:2014:2464.

reversal of the burden of proof and must be considered null and void.[42] There is no doubt that the same applies in the context of the MCD.

1.3.4 No obligation to provide advice

The duty to assist or to provide an adequate explanation must be clearly distinguished from the duty to advise the consumer on the credit which is most suitable to him.[43]

1.3.5 Information, explanation and advisory services

With regard to consumer credit agreements, article 5.6 of the CCD makes it clear that it is up to the consumer to decide which credit agreement suits his needs and financial situation best, on the basis of the information and explanation received. The responsibility of the creditor ends where sufficient information and explanation has been given. As for mortgage credit agreements, article 22 of the MCD contains some detailed rules on standards for advisory services. However, these do not require creditors or credit intermediaries to actually provide advice. If they decide to do so, several rules apply, including the obligation to inform the consumer about whether advisory services are or can be provided to the consumer.

1.3.6 Consumer credit agreements: right of withdrawal

Article 16 of the CCD offers the consumer the possibility of withdrawing from the credit agreement without giving a reason. The consumer may exercise his right to withdraw from the contract during a 14-calendar-day period, which normally starts on the day of the conclusion of the contract. In the case of withdrawal, the consumer needs to reimburse the capital to the creditor and pay the interest accrued thereon from the date on which the credit was drawn down until the date on which the capital is repaid. The reimbursement of the capital and the interest thereon must take place without an undue delay and no later than 30 calendar days after the despatch by the consumer to the creditor of notification of the withdrawal. The interest must be calculated on the basis of the agreed borrowing rate. The creditor is not entitled to any other compensation from the consumer in the event of withdrawal, except compensation for any non-returnable charges paid by the creditor to any public administrative body.

1.3.7 Mortgage credit agreements: offer with a reflection period

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42 *CA Consumer Finance v Ingrid Bakkaus* CJ 18 December 2014, C-449/13, ECLI:EU:C:2014:2464.

43 De Muynck 2012 *Tijdschrift voor Privaatrecht* 770.

Article 14.6 of the MCD obliges member states to specify a time period of at least seven days during which the consumer will be able to compare offers, assess their implications and make an informed decision. This period must be either a reflection period before the conclusion of the mortgage credit agreement or a period for exercising a right of withdrawal after the conclusion of the mortgage credit agreement or a combination of the two.[44] Where a member state specifies a reflection period before the conclusion of a mortgage credit agreement, the offer must be binding on the creditor for the duration of the reflection period. The consumer may accept the offer at any time during the reflection period. However, member states may provide that consumers cannot accept the offer for a period not exceeding the first 10 days of the reflection period.

The approach is clearly different from that in the CCD, where it is obligatory to provide for a withdrawal period after the conclusion of the contract.

1.3.8 No specific civil remedies

Neither the CCD nor the MCD provides any remedies in case the creditor or the credit intermediary violates its obligation to assess the consumer's creditworthiness or to provide information or adequate explanation. It is up to the member states to decide to which remedy a consumer is entitled. In this regard they have a great discretionary margin. However, according to article 23 of the CCD and article 38 of the MCD, sanctions must be effective, proportionate and dissuasive.

In *Fesih Kalhan*[45] the European Court of Justice had to decide on a national system of penalties under which – in the event of failure on the part of the creditor to comply with its pre-agreement obligation to assess the borrower's creditworthiness by consulting the relevant database – that creditor on the one hand forfeits its entitlement to contractual interest but on the other hand is automatically entitled to interest at the statutory rate.[46]

The court first repeated that the severity of the penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while

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44 As for consumer credit agreements, consumers are entitled to withdraw from the contract. The withdrawal period equals 14 calendar days, normally starting at the time of conclusion of the credit agreement (art 14 of the CCD).

45 *LCL Le Crédit Lyonnais SA v Fesih Kalhan* CJ 27 March 2014, C-565/12, ECLI:EU:C:2014:190.

46 This interest was payable from the date of delivery of a court decision ordering that borrower to pay the outstanding sums, and was further increased by five percentage points if, on expiry of a period of two months following that decision, the borrower had not repaid his debt in full.

respecting the general principle of proportionality.[47] It stated that if it is found (by the national court) that the amounts which the creditor is in fact likely to receive following the application of the penalty of forfeiture of entitlement to contractual interest are not significantly lower than those which it could have received had it complied with its obligation to assess the borrower's creditworthiness, the national remedy is not sufficiently deterrent or dissuasive.

In *Home Credit Slovakia*[48] the Court of Justice focused on the proportionality of private law remedies. It stated that the imposition, in accordance with national law, of a penalty, implying that the agreement is deemed to be interest-free and free of charges, in the event of failure to include information which, by its nature, cannot have a bearing on the consumer's ability to make a decision, such as, *inter alia*, the name and address of the competent supervisory authority, cannot be considered to be proportionate.

1.4 Responsible lending in Belgian credit law

1.4.1 Introduction to Belgian consumer and mortgage credit

The Belgian rules implementing the European directives on consumer credit and mortgage credit are incorporated in Book VII of the *Code of Economic Law* (hereafter the CEL). Before these rules are briefly discussed, it is interesting to emphasise that the Belgian legislator did not limit itself to copying and pasting the rules of the two directives. Such a *modus operandi* was not considered adequate, partly because Belgian law already contained an important set of rules on consumer credit and mortgage credit offering protection to consumers in many regards. Nevertheless, the challenges with which the Belgian legislator was confronted were quite different when implementing the directives.

In regard to *consumer credit*, Belgian law (the former *Consumer Credit Act* of 1991) already contained an extensive set of rules on responsible lending. In some respects, these rules offered more protection to consumers than the provisions of the 2008 CCD. For example, contrary to the directive, Belgian law explicitly prohibited the granting of credit to consumers who were not considered sufficiently creditworthy and obliged the creditor to look for the most appropriate type of credit (that is, to provide advice). The question arose as to whether those rules could be maintained, taking into account the maximum harmonisation character of the CCD. Not willing to

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47 Also see *Texdata Software GmbH* CJ 26 September 2013, C-418/11, ECLI:EU:C:2013:588.

48 *Home Credit Slovakia v Klára Bíróová* CJ 9 November 2016, C-42/15, ECLI:EU:C:2016:842.

reduce the existing level of protection, the Belgian legislator argued that the rules were compatible with the directive and decided to maintain them. In 2014 the protection offered to consumers was even extended with the introduction of a specific prohibition on granting credit to consumers already suffering from a serious delay in repaying one or more consumer credit(s) or (since 2017) mortgage credits with a movable purpose (such as a car loan secured by a (usually already existing) mortgage).

With regard to the transposition of the MCD the situation was clearly different. First, the MCD is based mainly on minimum harmonisation and therefore offers the possibility for a member state to offer additional protection. Secondly, the Belgian mortgage credit legislation did not contain any rules on responsible lending. Therefore, the situation was clearly less challenging as far as the transposition of the provisions of responsible lending was concerned. Once again the Belgian legislator did not simply copy and paste the provisions of the MCD, but created additional protection for consumers, in particular by creating a duty to advise.

In the following sections, we shall briefly point out where Belgian law differs from the provisions of the CCD and MCD and discuss the compatibility of additional protection measures with the CCD.

1.4.2 Obligation to obtain information from the consumer

Like the European Directives, Belgian law requires the creditor or credit intermediary to obtain information from the consumer in order to assess the latter's creditworthiness and his ability to reimburse the credit.[49] Also, the Central Credit Register, which is held by the National Bank of Belgium, must be consulted within a period of twenty days preceding the conclusion of the credit agreement.[50]

There are some important differences between the European and Belgian rules.

First, the Belgian legislator has inserted a formal requirement with regard to the obligation to obtain information. The gathering of the information must be done on the basis of a list of questions. Secondly, the Belgian legislator has determined precisely which information must at least be obtained from the consumer through the use of this list. More specifically, the creditor or credit intermediary must obtain information on the consumer's income, his expenses (including other credit agreements and rental payments), his personal situation (for example, married or single, children) and the

49 Articles VII.69 and VII.126 of the *Code of Economic Law* of 2013 (CEL).
50 Articles VII. 77 and VII.133 of the CEL

objective of the credit agreement. Since the fulfilment of the obligation to obtain the information required can be proven only on the basis of this list of questions soliciting all of the relevant information, this requirement can be considered to have been violated where the creditor cannot provide a completed list containing all the information required by law.

Contrary to the European Directives, Belgian law determines explicitly that consumers must respond correctly and fully to the questions of the creditor or credit intermediary.[51] Consumers who do not comply with this obligation risk the immediate termination of the credit agreement to their detriment,[52] implying that they immediately need to reimburse the outstanding capital, as well as a compensation of up to 10 per cent of the outstanding capital. Case law shows that where the creditor fails to verify the veracity of the information obtained (whereas this information could easily be verified), the consumer needs to reimburse only the outstanding capital (and no other interests or costs), but needs to do so immediately.[53]

As far as consumer credits are concerned, article VII.201 of the CEL contains a specific civil remedy where the creditor or credit intermediary has not complied with this information requirement (or is unable to prove that he has complied with it) or has failed to assess the consumer's creditworthiness.[54] In order for this remedy to apply, the consumer need not prove that he has suffered any damages. More specifically, the obligations of the consumer will be reduced to the amount borrowed and the consumer will retain the benefit of reimbursing the credit in instalments.[55] Basically, this means that the consumer will have obtained credit for free (that is, without any costs or charges). In the case of a mortgage credit, a distinction must be drawn between mortgage credit agreements with a movable purpose (such as a car loan secured by a mortgage) and mortgage credits with an immovable purpose (for example, a loan for buying or building a house or apartment). While the same remedy applies to mortgage credits with a movable purpose, a specific sanction is provided for mortgage credits with an immovable purpose. In the case of a mortgage credit with an immovable purpose not exceeding 20 000 euro, compensation *can* be awarded to the consumer which equals a maximum of 40 per cent of the interest to be paid under the credit. If the mortgage credit (with an immovable purpose) exceeds 20 000 euro, the maximum compensation that

51 Articles VII. 69 §1 and VII.126 §1 of the CEL.

52 Artice VII.204 and 214/4 of the CEL.

53 Rb Antwerp 16 January 2004, 2004 *Nieuw Juridisch Weekblad* 1065.

54 The violation of the provisions regarding credit agreements which are incorporated in Book VII of the CEL can also be sanctioned by administrative and penal sanctions.

55 See eg Court of Appeal Brussels 26 March 2012, 2012 *Rechtspraak Antwerpen, Brussel, Gent* 1152, note Bonnarens; Vred Arendonk 29 September 2009, 2012 *Tijdschrift voor Vrederechters* 281, case note De Patoul.

can be awarded is limited to 30 per cent of the interest to be paid under the credit.[56]

The question arises whether the compulsory use of a list of questions in order to prove the fulfilment of the obligation to obtain information, as well as the minimum content of this list, are compatible with the European Consumer Credit Directive, taking into account its maximum harmonisation character. First, the mere fact that the *burden of proof* is imposed on the creditor does not pose any specific problems, since the European Court of Justice held that it would be contrary to the principle of effectiveness if the burden of proof were to be imposed on the consumer.[57] Further it seems that the specific civil remedy which has been inserted into Belgian law is effective, dissuasive and proportionate.[58] More problematic seems to be the fact that certain minimum information must be obtained from the consumer in respect of all credit agreements exceeding 500 euro. As we have already mentioned, the European Court of Justice held that the CCD does not contain an exhaustive list of the information on which the creditor must assess the consumer's creditworthiness. The information to be obtained depends on the circumstances. By requiring that certain information should always be obtained (for instance, on the objective of the credit) the Belgian legislator went beyond the CCD, which is contrary to the directive, taking into account the fact that it is based on maximum harmonisation.

Finally, it is to be noted that the creditor must obtain information not only from the consumer but also from every person providing a surety with regard to the consumer or mortgage credit.[59] If a surety is provided without any economic interest, the suretyship will be invalid when there is a significant imbalance between the resources of the surety and the obligations arising from the suretyship.[60]

1.4.3 Prohibition on providing consumer credit to non-creditworthy consumers

As we have already indicated, the CCD, contrary to the MCD, does not prohibit the creditor from providing credit if he cannot reasonably believe that the consumer will be able to reimburse the credit. Since the Belgian legislator (logically) believed that avoiding over-indebtedness is possible only to the extent that creditors must refuse credit in certain circumstances,

56 Article VII.209 of the CEL.
57 *CA Consumer Finance v Ingrid Bakkaus* CJ 18 December 2014, C-449/13, ECLI:EU:C:2014:2464.
58 Article 23 of the CCD and art 38 of the MCD.
59 Articles VII.69 and VII.126 of the CEL.
60 Article 2043 *sexies Civil Code* of 1804.

the Belgian legislator maintained its existing prohibition of the granting of credit when a consumer cannot reasonably be expected to reimburse the credit. In this regard, it is accepted that any security provided by the consumer or any other person (including a third party's income) cannot be taken into account when assessing the consumer's creditworthiness.[61] Only the income of a real co-debtor can be taken into account. In this context the Belgian cassation court held that a person can be considered a co-debtor (whose income can be taken into account) only when that person forms a household with the principal debtor.[62] Although this view seems to be a little too strict and one should be able to take into account the income of the co-debtor as soon as that person has an interest in the credit agreement,[63] it is clear that the income of a co-debtor who acts as a financial surety cannot be taken into account.

More recently, when incorporating the former *Consumer Credit Act* in Book VII of the CEL, the Belgian legislator even added some additional rules and a more specific prohibition: the creditor must refuse to conclude a new consumer credit agreement if the consultation of the Central Credit Register shows that the consumer already is already suffering from a delay in reimbursing one or more consumer credit agreements exceeding 1 000 euro. The limited scope of this provision must be emphasised. The prohibition applies only to consumer credit agreements and only if the delay relates to another consumer credit agreement and/or (since 2017) a mortgage credit with a movable purpose. If the delay relates to a mortgage credit with an immovable purpose, the prohibition does not apply. Equally, the delay in reimbursing one or more consumer credit agreements or mortgage credit agreements with a movable purpose, even when they exceed 1 000 euro, does not absolutely prevent the conclusion of a mortgage credit agreement. However, it remains necessary for the creditor to assess the consumer's creditworthiness in general. The prohibition on granting credit to the consumer when the latter cannot be reasonably expected to be able to reimburse the credit remains applicable. The Belgian legislator probably did not want to exclude consumers from mortgage credits merely because a delay of more than 1 000 euro has been registered in the Central Credit Register with regard to consumer credits or mortgage credits with a movable purpose. However, it remains unclear why the strict prohibition to provide new consumer credit does not apply when the consultation of the Central Credit Register shows that the consumer has

61 Rb Luik 21 October 2011, 2014 *Jurisprudence Liège, Mons et Bruxelles* 224; Biquet-Mathieu 2009 *Tijdschrift voor Vrederechters* 285.

62 Cass 7 January 2008, 2009 *Tijdschrift voor Vrederechters* 281, case note Biquet-Mathieu, 2009 *Tijdschrift voor Consumentenrecht (DCCR)* afl 83 71, case note Blommaert and Pletinckx.

63 Biquet-Mathieu 2009 *Tijdschrift voor Vrederechters* 284.

defaulted on his mortgage credit with an immovable purpose for an amount exceeding 1 000 euro.

Although limited in scope, this rule also has important consequences for the practice of restructuring or centralising existing credit debts. If a consumer has delayed reimbursing one or more consumer credit agreements and/or mortgage credit with a movable purpose and this delay exceeds 1 000 euro, it becomes impossible to reimburse the existing credits with a new credit agreement, even if the new one would be more beneficial to the consumer (for example, because interest rates have dropped). If the new credit agreement is a mortgage credit agreement, the prohibition does not apply.

Finally, if the consultation of the Central Credit Register shows a delay in reimbursing one or more credits which do not exceed 1 000 euro, the creditor needs to provide specific motivation for why he reasonably believes the consumer would be able to reimburse the credit.

The burden of proof is explicitly imposed on the creditor.[64] If the creditor cannot prove that he could reasonably believe that the consumer would be able to reimburse the credit, the consumer will be able to apply for a reduction of his obligations to the amount borrowed.[65] As already mentioned, the consumer keeps the benefit of reimbursing the credit in instalments. In order for this sanction to apply, no damages have to be proven by the consumer.

The question arises whether these additional rules and prohibitions are compatible with the European CCD. While some scholars argue that these rules go beyond the directive and are therefore incompatible with it,[66] others have argued they are not, because the consequences of the assessment of the consumer's creditworthiness are not dealt with by the CCD, implying that they do not fall within the field harmonised by the directive.[67] To our knowledge, creditors have not yet challenged the compatibility of article VII.77 of the CEL with the CCD and the courts therefore have not yet had the opportunity to refer this question to the European Court of Justice.

1.4.4 Obligation to re-assess consumer's creditworthiness in a case of a consumer credit

64 Article VII.2 of the CEL.

65 Article VII.201 of the CEL.

66 Terryn and Vannerom "De nieuwe richtlijn consumentenkrediet" 34-37; Van der Herten "De omzetting in het Belgisch recht" 294.

67 Steennot 2013 *REDC* 94. Also see Rott "Consumer Credit" 199, who writes that "the Directive does not state the legal consequences of the consumer's lack of creditworthiness".

When a consumer credit agreement is concluded for an indefinite duration, the creditor has to reassess the consumer's creditworthiness by consulting the Central Credit Register.[68] This rule makes sense in the context of overdraft facilities. If the consultation of the central credit register shows that the consumer is experiencing financial difficulties, the further use of the overdraft facility should be avoided. Unfortunately, article VII.77 of the CEL does not determine explicitly whether and when the creditor must prevent further use of the overdraft facility. In our view, the further use of the overdraft facility must be prevented whenever the consultation of the Central Credit Register shows that the consumer has defaulted on one or more other credit agreements. If the consultation of the Central Credit Register shows that the consumer has concluded additional credit agreements, but there are no delays in reimbursing existing or new credit agreements, creditors cannot be obliged to suspend the overdraft facility (in the absence of any such provision). However, article VII. 98 §2 of the CEL entitles (as a mere possibility) the creditor to suspend an overdraft facility if he believes on the basis of objective grounds that the consumer will not be able to meet his financial obligations.

1.4.5 Obligation to look for the most appropriate credit agreement: duty to advise

Finally, Belgian creditors or credit intermediaries must look for the most appropriate credit for the consumer. This obligation, which is not found in either the CCD or the MCD, comes on top of the obligation to provide information and adequate explanation. It applies to both consumer credits[69] and mortgage credits.[70]

First, it is important to emphasise that creditors and credit intermediaries must determine which credit is most appropriate to the consumer in view of the consumer's financial situation and the purposes for which the credit agreement is being concluded. Logically, they need to take into account only credit agreements which they themselves offer normally or for which they normally intermediate.[71] However, if they cannot offer a suitable credit agreement, taking into account the consumer's financial situation and the

68 Article VII.77 §1 of the CEL.
69 Article VII.75 of the CEL.
70 Article VII.131 §1 of the CEL.
71 Vred Kortrijk 29 June 2004, 2004 *Jaarboek Kredietrecht* 55; Lettany *Het Consumentenkrediet* 68.

purpose for which the credit is being taken up, they should abstain from concluding any credit agreement.[72] The burden of proof is on the creditor.[73]

It is clear that this obligation goes much further than the obligation to provide adequate explanation created by the European legislator (and also copied into the CEL). As for mortgage credits, this does not create any problems since the MCD is based on minimum harmonisation.[74] As for consumer credits, this additional obligation is clearly incompatible with the CCD, taking into account its maximum harmonisation character.[75] In contrast to the position with the prohibition on the granting of credit to consumers who cannot be considered creditworthy, it cannot be argued that this rule falls outside the field harmonised by the directive. The CCD makes it clear that it is the consumer's responsibility to decide which credit agreement is most suitable for him (and not the creditor's responsibility). Also, article 5.6 of the CCD states that member states may adapt the manner by which and the extent to which assistance is given to the particular circumstances of the situation in which the credit agreement is offered, the person to whom it is offered and the type of credit offered. It is impossible to determine that it is the creditor's responsibility to look for the most appropriate credit agreement in all circumstances.

1.4.6 Mortgage credit agreements with immovable purpose: the creditor must make a binding offer

As indicated before, member states were given the option to choose between a reflection period and a withdrawal period. As far as mortgage credits with an immovable purpose are concerned, the Belgian legislator has chosen the latter. More specifically, the creditor must make an offer which is binding upon him for at least 14 calendar days. Once the offer has been made by the creditor, it can be accepted by the consumer at any time. It is clear that the Belgian legislator did not use the opportunity offered by the MCD to determine that the offer cannot be accepted within the first ten days following the offer.

Taking into account the fact that a consumer who concludes a mortgage credit with an immovable purpose is not entitled to withdraw from the credit agreement (*infra*) and the fact that the offer and the ESIS can be

72 Biquet-Mathieu 2008 *Journal de Jurisprudence de Liège, Mons et Bruxelles* 111.
73 Article VII.2 of the CEL.
74 Vannerom 2016 *Tijdschrift Consumentenrecht* 69.
75 De Muynck *Consumentenkrediet* 51-52; Terryn and Vannerom "De nieuwe richtlijn consumentenkrediet" 34-35.

communicated to the consumer at the same time,[76] it is regrettable that the Belgian legislator did not determine that the offer cannot be accepted immediately.

1.4.7 Right of withdrawal

As under the CCD, Belgian consumers are entitled to withdraw from a consumer credit.[77] However, with regard to mortgage credits there is no possibility of withdrawing from the contract. Once the consumer has signed the offer of the creditor, he is bound by the credit agreement. However, there is one important exception. If the mortgage credit agreement has a movable purpose and the mortgage which is used to secure the credit has been constituted before the granting of the new credit (with the movable purpose),[78] the consumer will be able to withdraw from the contract, as is the case for consumer credits.[79]

2 Comparative discussion

2.1 Introduction

Apart from the fact that South Africa takes a consolidated approach to credit regulation and has a single, comprehensive Act in which all credit, including mortgage credit, is regulated, as opposed to the position in the EU and Belgium where the regulation of consumer credit and mortgage credit is done by means of two separate directives, there are also notable differences in the scope of application *ratione personae* between the credit frameworks of these jurisdictions. The South Africa legislature has been considerably liberal in protecting natural persons who participate in the credit market by affording them blanket protection that does not depend on whether they have acquired the credit for private purposes or for business purposes. Even though the NCA does not protect "big business" it does provide limited protection to small juristic persons, thus affording them the

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76 Article VII.127 §2 of the CEL provides that the ESIS must be communicated before the offer is communicated to the consumer, *or at the latest at the same time that the offer is made*. During the voting process of the law, the Belgian Minister of Economic Affairs declared that normally the ESIS must be *communicated in good time before the offer is made* and that the simultaneous communication of ESIS and offer should remain the exception and should be limited to the situation where the consumer requests to receive ESIS and offer at the same time. However, there is no legal basis for this view. Creditors that communicate the ESIS and offer simultaneously cannot be sanctioned.

77 Article VII.83 of the CEL.

78 This is the case, for instance, when a consumer has concluded a (revolving) mortgage credit agreement in the past and the new credit (eg a car loan) is granted within this existing credit, which is secured by the previously constituted mortgage.

79 Article VII.138 of the CEL.

opportunity to obtain credit within a well-regulated framework where the opportunity for exploitation is minimised. The European Directives on consumer credit and mortgage credit do not offer any kind of protection to small businesses obtaining credit. The Belgian legislator, however, decided to offer small and medium-sized enterprises obtaining credit similar protection in the pre-contractual phase.[80] Before the conclusion of the contract the creditor needs to assess the company's creditworthiness, as well as the feasibility of the project for which credit is obtained. Also, the creditor must provide information and adequate explanation. Finally, the creditor must advise on the most suitable type of credit. Contrary to the legislation on consumer and mortgage credit, these rules do not prohibit the creditor from providing credit to over-indebted companies. Also there are no specific civil remedies, except when the duty to advise has not been complied with.

As regards the main features of the credit regimes in South Africa, the EU and Belgium, the following comparative observations can be made:

2.2 Obligation to obtain information from the consumer to assess the consumer's creditworthiness

Like the creditor under the EU CCD and MCD and Belgian law, the South African credit provider is obliged to do a creditworthiness assessment in terms of the NCA prior to the conclusion of a credit agreement with a prospective consumer. What Belgium and South Africa have in common is that the purpose of the assessment is clear, namely, that it serves to avoid consumer indebtedness (or preventing already over-indebted consumers from becoming even more over-indebted through being granted new credit). In Belgium a creditor may not extend credit to a consumer if the outcome of the pre-agreement assessment indicates that the consumer is not creditworthy and will be unable to repay the credit as proposed (in which instance the creditor cannot reasonably believe that the consumer can repay the credit) and specifically also if the consumer is in arrears with payments on consumer credit contracts/mortgage credit contracts with a movable purpose and such arrears exceed 1 000 Euro. Likewise in South Africa the credit provider is also prohibited from extending "reckless credit", meaning that if the outcome of the pre-agreement assessment indicates that the consumer is not creditworthy and is unable to repay the credit as proposed, such a consumer should not be given credit. However, the NCA links no specific monetary amount relating to arrears under other credit agreements to the prohibition.

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80 *Act of 21 December 2013 Concerning the Financing of Small- and Medium-Sized Companies*.

Also, where "new" credit is extended under an existing credit agreement with an indefinite duration, such as an overdraft facility, the credit provider under Belgian as well as South African law is obliged to re-assess the consumer's affordability before extending such further credit. Both South Africa and Belgium have some measures in place that allow a credit provider to suspend or close a credit facility in order to prevent a consumer from further using the same.[81]

As regards the aspect of information gathering, section 81(2) of the NCA does not use terms such as "sufficient information", which is used in the CCD, but specifically requires the credit provider to have regard to the consumer's "financial means, prospects and obligations" as defined in section 78(3). Like article 8 of the CCD, it requires the credit provider to consult a database, in this instance a credit bureaux database, in order to establish the debt repayment history of the consumer. While the CCD appears not to make this database consultation a blanket obligation, it is indeed mandatory for proper assessment under the NCA. Having regard also to the requirement in article 18 of the MCD that a creditor must make a "thorough" assessment of a consumer's creditworthiness and article 20 of the MCD that requires the assessment to be based on information regarding the consumer's income and expenses and other financial and economic circumstances, it is clear that the Belgian approach is more advanced than the general specifications of the EU Directives. The Belgian legislation not only requires that information is gathered through the consultation of the Central Credit Register but also by using a standardised list of questions that enables information to be gathered regarding the consumer's income, expenses, other credit agreements *et cetera*, as well as information regarding his personal circumstances and the objective of the credit agreement (this list then serves to prove whether or not the creditor appropriately conducted the required pre-agreement assessment). It was indicated above that the NCA does not set out specifically which questions must be posed to the consumer but section 81(2) read together with the Final Affordability Regulations makes it clear that those questions must deal with the consumer's gross income, his taxable deductions, his living expenses and all the other debt commitments that must be paid by him every month. Also, where a consumer alleges that his living expenses are lower than those indicated for his income band in Table 1 the credit provider must get the consumer to complete a prescribed questionnaire which is actually quite instructive on the type of expenses that the credit provider should regard as "living expenses".

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81 Section 123(3) of the *National Credit Act* 34 of 2005 (the NCA) entitles a credit provider to suspend a credit facility at any time that the consumer is in default under that agreement or to close the facility.

In comparison with the EU, which requires the credit provider to gather and assess information, and the more intensive and prescribed information gathering approach used in Belgium, the NCA takes an even more prescriptive approach to pre-agreement assessment – some would say *too* prescriptive – much like a "nanny state at work".[82] It requires the credit provider to take "reasonable steps" to make an assessment and then sets out the exact factors in section 81(2) that must be taken into account and further also obliges the credit provider in determining the consumer's affordability (which is done mainly by establishing his financial means, prospects and obligations and checking his debt repayment history on credit bureaux databases) to follow the process and gather the information as set out in the Final Affordability Regulations. It is also important to note here that Belgium and South Africa share a similar view in so far as the income of sureties is concerned, namely that it cannot be taken into account for the purposes of assessing whether the principal debtor under a credit agreement can afford the proposed credit (that is, the surety's income cannot be added to that of the principal debtor). However it must be noted that for the purposes of the NCA and the Belgian rules on consumer and mortgage credit, a surety, upon entering into a suretyship, will be assessed on his own ability to meet the repayment in accordance with the suretyship upon default by the principal debtor.[83] Also neither South Africa nor Belgium takes the value of mortgaged property into account in deciding whether the consumer can afford the proposed mortgage credit.

While article 20 of the MCD requires the creditor to obtain the information from relevant internal and external sources such as the consumer, including information provided during the credit application process, neither section 81(2) of the NCA nor the Final Affordability Regulations specifically has such a requirement. The assessment provisions under the NCA also do not impose any obligation on the credit provider at the pre-contractual phase to specify in a "clear and straightforward" manner the necessary information that the consumer needs to provide for assessment purposes and the time within which the information must be provided, although it is clear that it must be done at least within the time frame that the credit provider is obliged to conduct the assessment, namely, prior to concluding the credit agreement.

In contrast to the provision in the MCD that consumers "must be made aware of the importance of complete and correct information for a proper assessment", the NCA and the Belgian legislation take a much more robust approach by imposing a duty on consumers to answer fully and truthfully.

82 Scholtz "Introduction and Historical Background" para 1.1.

83 *Standard Bank of South Africa Ltd v Herselman* (FS) (unreported) case number 328/2015 of 3 March 2016.

Whereas the Belgian legislation enables the creditor to terminate the credit agreement immediately upon the consumer's not complying with his obligation to provide correct and full information (implying that the consumer must immediately reimburse the outstanding capital and a sum in compensation), the NCA provides the credit provider with a complete defence against an allegation of reckless credit granting where a consumer failed to comply with this "truthfulness obligation". This obligation is fortified by the Final Affordability Assessment Regulations, which require the consumer to answer accurately and provide authentic documentation to the credit provider during the assessment.

While the MCD specifically states that the information obtained from the consumer must be limited to what is necessary to conduct a proper assessment of the consumer's creditworthiness, it is to be noted that the NCA contains no such specific provision. However, it may be argued that by giving details of the information that the credit provider must have regard to as per section 81(2) read with the Final Affordability Regulations, the implication is that the information referred to is what the South African legislature regarded as necessary and relevant and that any information not specifically required by these provisions can be regarded as unnecessary. In any event, where it is clear that a credit provider obtained information that was unnecessary and infringed the consumer's right to privacy, other legislation such as the *Protection of Personal Information Act*[84] serves to assist South African consumers.

Having regard to section 81(2) of the NCA read with the Final Affordability Regulations, it appears that they contain an exhaustive list of information by means of which the consumer's creditworthiness must be assessed, as opposed to the CCD's more flexible approach of not containing such an exhaustive list.

As regards the requirement in the MCD requiring that the information must be documented and maintained, it is to be noted that the NCA does not contain such a specification in section 81(2) read with the Final Affordability Regulations. However, the general regulations issued together with the *National Credit Act* when it came into operation provide that credit providers are obliged, in respect of each consumer, to keep record of documentation in support of steps taken in terms of section 81(2).[85]

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84 *Protection of Personal Information Act* 4 of 2013.

85 Regulation 55(1)(b)(vi) of the National Credit Regulations published under GN R489 in GG 28864 of 31 May 2006 as amended by GN R1209 in GG 29442 of 30 November 2006.

As in Europe (as a result of the case law of the European Court of Justice based on the principle of effectiveness), the onus is on the credit provider to prove that he has complied with the obligation to conduct a pre-agreement assessment as per the provisions of the NCA read with the Final Affordability Regulations. Given how prescriptive the South African assessment approach has become since the introduction of the Final Affordability Regulations, it can be remarked that although it makes sense to impose this onus on the credit provider it is a very difficult onus to discharge – especially since it appears that if the credit provider did not strictly follow the approach as mandated by the Regulations, specifically also relating to the use of Table 1 or, in the alternative, the questionnaire, the assessment process is at risk of being regarded as non-compliant and the credit subsequently extended as reckless.

In respect of the requirement of the verification of information, it appears that the MCD is prescriptive to some extent by requiring that the information must be appropriately verified, including through reference to independently verifiable information. It is to be noted, though, that the MCD does not limit the obligation to verify only to a particular aspect of the assessment such as, for instance, the income of the consumer. However, the Final Affordability Assessment Regulations under the NCA at first glance appear to mandate the verification of the consumer's gross income only and prescribe exactly what documentation is relevant for such purpose. However, it must also be borne in mind that in the process of verifying the consumer's gross income the credit provider will also be able to verify the consumer's statutory deductions and that by undertaking the mandatory consultation of the credit bureau information the consumer's existing debt obligations can be verified.

As pointed out above, the CCD requires a creditor to conduct a pre-agreement assessment whereas the MCD not only requires such assessment but also imposes the further constraint that the creditor may grant credit to the consumer only where the outcome of the assessment indicates that the obligations from the credit agreement are "likely to be met in the manner required under that agreement". Obviously this means that the assessment should indicate that the consumer will be able to repay the credit at the intervals and on the terms as initially agreed. Although the NCA does not specifically state in section 81(2) read with the Final Affordability Regulations that credit may be granted only if the outcome of an assessment indicates that the consumer will be able to repay the debt exactly as agreed, it is clearly the purpose of the assessment to indicate to a credit provider that credit must not be extended to a consumer unless the assessment indicates that the consumer can afford to repay the credit at the intervals and on the terms agreed. The yardstick for not being able to afford

credit in terms of the NCA is provided by the definition of over-indebtedness read with the Final Affordability Regulations. Contrary to what is the case in Europe, the creditor can also be held liable for providing reckless credit when he provided credit although the consumer did not understand the risks, costs and obligations of obtaining the credit.

2.3 Obligation to provide adequate information

Context is a very important theme in the discussion of any legislative requirement. As such, context is also very important in the discussion of the pre-agreement assessment obligation. As indicated above, both the CCD and the MCD require creditors to provide consumers with information "in good time", in order to allow the consumer to compare the proposed credit with other credit that may be on offer. Thus the context of pre-agreement assessment in the EU is that it occurs in an environment where the consumer is given adequate information relating to relevant aspects of the credit for which he is applying. This is also the position under the NCA, which in all instances requires the credit provider to provide the consumer with prescribed information consisting of a written pre-agreement statement and quotation and to afford him the opportunity to compare this information with that pertaining to other offerings.[86] It is to be noted that the information that is required to be provided in the pre-agreement statement and quotation is standardised but individualised for each consumer, like the information that is provided in the EU by means of SECCI and ESIS, and the advantage of using standardised forms is indeed that it facilitates easier comparison.

In addition to the aforementioned mandated disclosures, it has been pointed out that the EU requires a creditor to provide a consumer with an adequate explanation of the proposed credit so that the consumer can decide whether the credit is suitable to his needs. The NCA, however, does not specifically require a credit provider to furnish a consumer with an explanation of the proposed credit although it can be expected that where a consumer indicates that he needs some explanation regarding certain aspects of the proposed credit, the credit provider will render the necessary assistance and that this would be done prior to the conclusion of the credit agreement.

As regards the duty to advise consumers on the suitability of credit (as opposed to the duty to explain the terms and conditions etcetera) it is clear that, unlike Belgium, neither the EU nor South Africa imposes any such onerous duty on the credit provider. Thus, save for otherwise conducting

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86 See ss 92 and 93 of the NCA read with regs 30-33, 42 and 44 of the National Credit Regulations. Merely making this information available on the credit provider's website will thus not constitute compliance with the individual disclosure obligation in the NCA.

the pre-agreement assessment in compliance with the legislative framework and offering explanations regarding the credit, the consumer has to take the decision as to whether the credit is suitable for his purposes or not. At least this obligation under Belgian law relates only to the credit agreements that the specific credit provider itself offers – hence he has a duty to advise only with regard to the suitability of credit from his own offerings and is not required to assist the consumer in shopping around for better credit. Seen in its proper context, the duty to advise does not seem as onerous as it initially appears to be, and what probably happens in practice in South Africa and in the EU is that the credit provider generally *de facto* advises the consumer as to the most suitable credit from the credit provider's own offerings. However, there is no such legislative duty and burden of proof relating to this duty imposed by the overarching legislative framework in the EU or by the South African NCA.

2.4 Right of withdrawal and offers with a reflection period

The CCD entitles consumers to withdraw from the consumer credit agreement without giving any reason during a 14-calendar-day period, starting from the conclusion of the credit agreement. The MCD follows a different approach and allows member states to choose between a withdrawal period after the conclusion of the contract and a reflection period before the conclusion of the contract. The objective is to offer consumers the opportunity to shop around for other credit, being in a position to compare the proposed credit with whatever else is available in the market. As for mortgage credits, the Belgian legislator opted for a reflection period of 14 calendar days, once the offer is made by the creditor. The offer remains binding on the creditor for the entire 14-day period. However, the consumer may freely decide to conclude the credit agreement before the reflection period has elapsed, even immediately after the offer is made (and the pre-contractual information (ESIS) is communicated). If the consumer does so, he will be bound by the credit agreement and no longer have the possibility of withdrawing from the contract. In such a situation the consumer did not truly enjoy a reflection period.

In South Africa the consumer is protected both by a reflection period (applicable to all credit agreements) prior to entering into the proposed credit as well as a cooling-off right that may be exercised after conclusion of the agreement (applicable to lease agreements and instalment agreements only).

2.5 Civil remedies

The EU CCD and MCD do not provide any specific remedies for a violation by the creditor of the obligation to conduct a pre-agreement assessment as

stipulated, but leave this aspect to each member state to decide. As such, it has been pointed out that Belgium has once again made sure that its credit consumers are well protected on the one hand by imposing administrative and penal sanctions on creditors violating the law, and on the other hand by reducing the consumer's obligations to the amount borrowed and allowing the consumer to reimburse the credit in instalments. The NCA is also quite intrusive and elaborate with regard to the sanctions and remedies it prescribes and in addition to administrative penalties and the cancellation of a credit provider's licence it also provides for specific civil remedies in sections 83 and 84. Although not stated in as many words, it can be argued that the civil remedies contained in the NCA have been devised with the principle of proportionality in mind, and that having regard to the factors that the court or Tribunal has to consider in imposing an administrative fine, the NCA also essentially seeks to ensure that the fine that is imposed is proportionate to the specific contravention.[87] It can further be observed that in so far as the reckless lending remedies in the NCA are concerned, the "proportionality" of these remedies also entails that they should appropriately sanction the credit provider for his egregious conduct and be sufficiently serious to deter reckless credit granting by that and other credit providers.

3 Conclusion

Responsible lending has been an integral part of the new regulatory paradigm since the 2008 Global Financial Crisis (GFC), which emphasised the importance of appropriate credit regulation as one of the ways in which to contribute to financial stability. In the context of pre-agreement assessment as a primary tool to promote responsible lending, a number of aspects can be noted: First, it is essential to utilise pre-agreement assessment as a screening tool to detect which consumers are unable to afford to repay the credit for which they are applying. Also, in order to serve its purpose, pre-agreement assessment should be accompanied by a requirement that a negative outcome should prevent the credit provider from granting the proposed credit. In order to ensure that the pre-agreement duty is taken seriously by credit providers, appropriate sanctions should be imposed for non-compliance or inadequate compliance with the pre-agreement assessment duty. The onus should be on the credit provider to gather the relevant information, to assess such information appropriately

87 In terms of s 151 of the NCA the Tribunal must consider the following factors: (a) the nature, duration, gravity and extent of the contravention; (b) any loss or damage suffered as a result of the contravention; (c) the behaviour of the respondent; (d) the market circumstances in which the contravention took place; (e) the level of profit derived from the contravention; (f) the degree to which the respondent has co-operated with the National Credit Regulator and the Tribunal; and (g) whether the respondent has previously been found in contravention of the Act.

and to prove that it has acted accordingly. In this process the consumer should co-operate by also providing the credit provider with accurate information and documentation where such information and documentation is in the consumer's possession. Consultation of databases reflecting the consumer's credit profile and debt repayment history should be mandatory in all cases – even if only to confirm that a consumer has no other existing credit agreements or has never been party to a credit agreement. Responsible lending and responsible borrowing go hand-in-hand although the credit provider's obligations are more loaded in view of considerations such as the information asymmetry and unequal bargaining power between the parties. Clearly it would be best practice for the credit provider to advise the consumer in advance what information should be submitted to the credit provider for assessment purposes. All information capable of verification without undue hardship to the credit provider should be verified. At least in so far as the offerings of credit by the specific credit provider are concerned, he should ensure that the credit is suitable to the needs of the consumer, meaning that he should not for instance induce the consumer to take up more costly credit when a less costly agreement would suffice. In principle the same broad considerations pertaining to pre-agreement assessment should apply regardless of whether consumer credit or mortgage credit is involved. The use of standardised forms could also be instrumental in ensuring proper compliance with the credit provider's assessment obligations. Ideally credit providers should be mandated to explain the features of the proposed credit to the consumer as an informed consumer will be in a better position to decide on the suitability of the proposed credit both in terms of whether it meets his needs and whether he can afford it.

The protection of credit consumers in the EU generally, Belgium and South Africa has been stepped up with the initiatives that these jurisdictions have taken in the context of promoting responsible lending. From these initiatives it is also clear that pre-agreement assessment is viewed as a tool of critical importance in filtering out those instances where the granting of credit is inappropriate, essentially because it would contribute to consumer over-indebtedness with all its terrible social and other consequences.

One has to recognise specifically the role of Belgium, which set an example for many other jurisdictions by embracing the paradigm of responsible consumer credit lending in its *Consumer Credit Act* as long ago as 1991. It also very innovatively established a Central Credit Register that has been operating efficiently since 1987. The provisions aimed at responsible lending at that stage were very protective of consumers, *inter alia* prohibiting credit from being granted to consumers who were not creditworthy and also making the creditor responsible for looking for the most suitable credit for the consumer. This protection in the context of consumer credit was not

reduced but actually increased through the 2014 prohibition on granting credit to already "over-indebted" consumers.[88] However, Belgium lacked responsible lending provisions relating to mortgage credit and it was not until it transposed the MCD into its domestic law that it introduced such provisions. Fortunately the Belgian legislature once again displayed significant pro-activity by not merely copying and pasting from the EU MCD but by carefully considering the imposition of responsible lending rules as per the minimum harmonisation prescription of the MCD and, as indicated above, by affording Belgian mortgage credit consumers additional protection through imposing a "duty to advise" on creditors.

It is also clear that the supranational entity, EU legislature, heeded the concerns raised by the 2008 GFC which illuminated the serious implications of uncontained credit risk especially in the mortgage market, by imposing the responsible lending obligations in the MCD.[89] It is appreciated that the 2008 CCD was drafted at a stage when the full impact of the 2008 Crisis had not yet been revealed. However, it is submitted that it would be a good idea for the CCD to be aligned with the more progressive MCD specifically in so far as the pre-agreement assessment provisions and the prohibition to grant credit to consumers that cannot be reasonably expected to be able to reimburse the credit are concerned.

Even though South Africa is a developing jurisdiction that faces severe economic challenges such as a very high unemployment rate,[90] the country has also shown considerable regulatory progress in the way that it has owned up to the mistakes of its past and is seeking to cultivate a credit landscape that promotes access to affordable credit. Its approach to pre-agreement assessment has developed from fairly *laissez faire* attitude to a more robust and prescriptive one that does not leave much discretion to credit providers. The strict parameters within which the affordability assessment has to occur may be criticised by some as manipulating the risk appetite of credit providers and lacking sufficient balance between the rights of credit providers and consumers. However, although it may be argued that this strict approach should in some respects probably be toned down to alleviate the onerous assessment obligations imposed on credit providers,

88 Consumers who were already substantially defaulting on their existing credit agreements.

89 INTOSAI 2010 https://docmh.com/the-causes-of-the-global-financial-crisis-and-their-implications-for-supreme-audit-institutions-pdf. For a general overview of the causes of the 2008 GFC see the Bank of International Settlements (BIS) *78th Annual Report*.

90 Statistics South Africa 2017 https://www/nationalgovernment.co.za/units/view/43-Statistics-South-Africa-Stats-SA pointed out that in February 2017 the unemployment rate in South Africa averaged 25.37 per cent from 2000 until 2016, reaching an all-time high of 31.20 per cent in the first quarter of 2003 and a record low of 21.50 per cent in the fourth quarter of 2008.

this should not detract from the effort that the South African legislature has made to protect South African consumers against irresponsible lending.

The aspect of responsible lending is dynamic and it has to be refined in accordance with the exigencies of the developments in the modern credit market. Accordingly the features and process of pre-agreement assessment, as an apex tool that can contribute significantly to responsible lending, should remain under continuous review in order to ensure that it serves the objective of responsible lending efficiently and in a balanced manner. Finally it should be pointed out that pre-agreement assessment should always be part of a larger framework of responsible lending measures that all work together to combat the incidence of consumer over-indebtedness.

Bibliography

Literature

Biquet-Mathieu 2008 *Journal de Jurisprudence de Liège, Mons et Bruxelles*
Biquet-Mathieu C "Du financement d'un véhicule par l'octroi d'une ouverture de crédit sans obligation d'apurement périodique du capital" 2008 *Journal de Jurisprudence de Liège, Mons et Bruxelles* 110-112

Biquet-Mathieu 2009 *Tijdschrift voor Vrederechters*
Biquet-Mathieu C "Les revenus des co-débiteurs solidaires peuvent-ils être cumulés pour apprécier la viabilité du crédit au sens de l'article 15 de la loi sur le crédit à la consommation?" 2009 *Tijdschrift voor Vrederechters* 284-291

Bank of International Settlements (BIS) *78th Annual Report*
Bank of International Settlements (BIS) *78th Annual Report: The Financial Turmoil of 2007–?: A Preliminary Assessment and Some Policy Considerations* (BIS Basel 2008)

De Muynck *Consumentenkrediet*
De Muynck M *Consumentenkrediet: de wet van 13 juni 2010 gewikt en gewogen* (Cahiers Antwerpen 2011)

De Muynck 2012 *Tijdschrift voor Privaatrecht*
De Muynck M "Zeilen op het Europees kompas. De implementatie van suitability of assistance in de wet consumentenkrediet" 2012 *Tijdschrift voor Privaatrecht* 761-869

Grundmann and Hollering 2008 *ERCL*
Grundmann S and Hollering J "EC Financial Services and Contract Law – Developments 2005-2007" 2008 *ERCL* 45-64

Lettany *Het Consumentenkrediet*
Lettany P *Het Consumentenkrediet* (Kluwer Deurne 1993)

Mak 2009 *ERPL*
Mak V "Review of the Consumer Acquis: Towards Full Harmonization?" 2009 *ERPL* 55-73

Rott "Consumer Credit"
Rott P "Consumer Credit" in Micklitz H, Reich N and Rott P *Understanding EU Consumer Law* (Intersentia Antwerp 2009) 199

Scholtz "Introduction and Historical Background"
Scholtz JW "Introduction and Historical Background to the National Credit Act" in Scholtz JW (ed) *Guide to the National Credit Act* (LexisNexis Durban 2008) paras 1.1-1.102

Steennot 2013 *REDC*
Steennot R "Case Volksbank România: Limits of the Full Harmonization Approach of the Consumer Credit Directive" 2013 *REDC* 87-100

Terryn and Vannerom "De nieuwe richtlijn consumentenkrediet"
Terryn E and Vannerom J "De nieuwe richtlijn consumentenkrediet en de implicaties voor de Belgische wetgeving" in VRG-Alumni (ed) *Recht in beweging – 16de VRG Alumnidag* (Maklu Antwerp 2009) 19-49

Twigg-Flesner 2007 *ERCL*
Twigg-Flesner C "No Sense of Purpose or Direction? The Modernization of European Consumer Law" 2007 *ERCL* 198-213

Van der Herten "De omzetting in het Belgisch recht"
Van der Herten F "De omzetting in het Belgisch recht van de nieuwe Europese richtlijn inzake consumentenkrediet" in Boddaert C *et al Liber Amicorum Achilles Cuypers* (Larcier Gent 2009) 277-304

Vannerom 2016 *Tijdschrift Consumentenrecht*
Vannerom J "Een bondig overzicht van het hypothecair krediet 2.0" 2016 *Tijdschrift Consumentenrecht (DCCR)* afl 111 61-72

Vannerom and Casier "De Bescherming van de Consument"
Vannerom J and Casier E "De Bescherming van de Consument in Hypothecair Krediet in Europees Perspectief" in Straetmans G and Steennot R (eds) *Wetboek Economisch Recht en de Bescherming van de Consument* (Intersentia Antwerpen 2015) 235-256

Case law

Belgium

Cass 7 January 2008, 2009 *Tijdschrift voor Vrederechters* 281, case note C Biquet-Mathieu, 2009 *Tijdschrift voor Consumentenrecht (DCCR)* afl 83, 71, case note D Blommaert and Z Pletinckx

Court of Appeal Brussels 26 March 2012, 2012 *Rechtspraak Antwerpen, Brussel, Gent* 1152, note F Bonnarens

Rb Antwerp 16 January 2004, 2004 *Nieuw Juridisch Weekblad* 1065

Rb Luik 21 Oktober 2011, 2014 *Jurisprudence Liège, Mons et Bruxelles* 224

Vred Arendonk 29 September 2009, 2012 *Tijdschrift voor Vrederechters* 281, case note F de Patoul

Vred Kortrijk 29 June 2004, 2004 *Jaarboek Kredietrecht* 55

Court of Justice of the European Union

Berliner Kindl Brauerei AG v A Siepert CJ 23 March 2000, C-208/98, ECLI:EU:C:2000:152

CA Consumer Finance v Ingrid Bakkaus CJ 18 December 2014, C-449/13, ECLI:EU:C:2014:2464

Content Services Ltd v Bundesarbeitskammer CJ 5 July 2012, C-49/11, ECLI:EU:C:2012:419

Home Credit Slovakia v Klára Bíróová CJ 9 November 2016, C-42/15, ECLI:EU:C:2016:842

Horațiu Ovidiu Costea v SC Volksbank România SA CJ 3 September 2015, C-110/14, ECLI:EU:C:2015:538

Hotel Alpenhof GesmbH v Oliver Heller CJ 7 December 2010, C-144/09, ECLI:EU:C:2010:740

LCL Le Crédit Lyonnais SA v Fesih Kalhan CJ 27 March 2014, C-565/12, ECLI:EU:C:2014:190

Max Rampion and Marie-Jeanne Godard, née Rampion v Franfinance SA and K par K SAS CJ 4 October 2007, C-429/05, ECLI:EU:C:2007:575

Pavel Dumitraș and Mioara Dumitraș v BRD Groupe Société Générale CJ 14 September 2016, C-534/15, ECLI:EU:C:2016:700

Peter Pammer v Reederei Karl Schlüter GmbH & Co KG CJ 7 December 2010, C-585/08

SC Volksbank România SA v Autoritatea Naţională pentru Protecţia Consumatorilor CJ 12 July 2012, C-602/10, ECLI:EU:C:2012:443

Texdata Software GmbH CJ 26 September 2013, C-418/11, ECLI:EU:C:2013:588

South Africa

Standard Bank of South Africa Ltd v Herselman (FS) (unreported) case number 328/2015 of 3 March 2016

Legislation

Belgium

Act of 21 December 2013 Concerning the Financing of Small- and Medium-Sized Companies

Civil Code of 1804

Code of Economic Law of 2013

Consumer Credit Act of 1991

South Africa

National Credit Act 34 of 2005

Protection of Personal Information Act 4 of 2013

Government publications

GN R489 in GG 28864 of 31 May 2006

GN R1209 in GG 29442 of 30 November 2006

International instruments

Council Directive 87/102/EEC of 22 December 1986 for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit

Directive 93/13/EEC of the European Parliament and of the Council of 5 April 1993 on Unfair Terms in Consumer Contracts

Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 1987/102/EEC

Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements for Consumers Relating to Residential Immovable Property and Amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)

Internet sources

INTOSAI 2010 https://docmh.com/the-causes-of-the-global-financial-crisis-and-their-implications-for-supreme-audit-institutions-pdf
International Organizations of Supreme Audit Institutions (INTOSAI) 2010 *The Causes of the Global Financial Crisis and Their Implications for Supreme Audit Institutions* https://docmh.com/the-causes-of-the-global-financial-crisis-and-their-implications-for-supreme-audit-institutions-pdf accessed 17 April 2017

Statistics South Africa 2017 https://nationalgovernment.co.za/units/view/43-Statistics-South-Africa-Stats-SA
Statistics South Africa 2017 *Statistics Unemployment Report* https://nationalgovernment.co.za/units/view/43-Statistics-South-Africa-Stats-SA accessed 18 April 2017

LIST OF ABBREVIATIONS

CCD	Consumer Credit Directive
CEL	Code of Economic Law
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
ESIS	European Standardised Information Sheet
EU	European Union
GFC	2008 Global Financial Crisis
INTOSAI	International Organizations of Supreme Audit Institutions
MCD	Mortgage Credit Directive
NCA	National Credit Act

REDC	Revue Européenne de Droit de la Consommation / European Journal of Consumer Law
SECCI	Standard European Consumer Credit Information
UCTD	Unfair Contract Terms Directive