

Financial Law Institute

Working Paper Series

WP 2011-06



Reinhard STEENNOT

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advice: the Belgian Consumer Credit Act**

January 2011

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Abstract

The Consumer Credit Directive requires the creditor or the credit intermediary on the one hand to provide certain information and adequate explanations to consumers before they are bound by a consumer credit agreement and on the other hand to assess the consumer's creditworthiness before the conclusion of the credit agreement. The aim of this paper is to discuss the transposition of the European Consumer Credit Directive into Belgian legislation. We will analyze the pre-contractual obligations – and their sanctions in case of violation - as applied by the courts/in legal practice. Also, we will examine whether the Belgian Act is compatible with the Consumer Credit Directive, the latter being based on the principle of targeted full harmonization.



Protecting borrowers through information and advice: the Belgian Consumer Credit Act

Reinhard Steennot
Hoofddocent UGent, Instituut Financieel Recht

Introduction

The Consumer Credit Directive (CCD: Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, *OJL* 22 May 2008, 133/66) contains several information requirements in order to protect consumers. This contribution will focus on the recent implementation of both the articles 5 and 8.1 CCD into the Belgian Consumer Credit Act (CCA: Act of 12 June 1991 on Consumer Credit, as amended in 2003 and 2010). Article 5 CCD requires creditors (and where applicable credit intermediaries) to provide certain information and adequate explanations to the consumer, allowing the consumer to assess whether the proposed credit agreement is adapted to his needs and to his financial situation. Article 8.1 CCD determines that the creditor must assess the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database.

While implementing the aforementioned Directive, the Belgian legislator has, besides adopting the CCD's general information requirements, chosen to maintain two specific creditor obligations: 1) the obligation for a creditor (or credit intermediary) to choose, among the credit agreements he usually offers, the type of credit agreement that is most appropriate for the consumer, taking into account the consumer's financial situation and the purpose of the credit agreement (art. 15.1 CCA) and 2) the obligation for creditors to only provide credit if they can reasonably believe that the consumer will be able to reimburse the credit (art. 15.2 CCA).

This paper describes how the pre-contractual information requirements and obligations are applied in Belgian jurisprudence (see also: Steennot, 2004 and Steennot, 2009). Specific attention is paid to courts' criteria with regard to these obligations, the burden of proof and the application of these rules in two particular situations: centralization of existing loans and overdraft facilities. We will also discuss the sanctions which courts (can) impose on creditors who fail to meet these obligations. Also, this contribution focuses on the compatibility of the Belgian requirements with the CCD, taking into account the principle of targeted full harmonization.

1. Targeted full harmonization

European Directives can be based on minimum or full harmonization. Minimum harmonization implies that Member States have to include into their national legislation the protection which is offered by the Directive. However, in case of minimum harmonization, Member States are entitled to maintain and even introduce measures offering additional protection to consumers, the only requirement being that these additional protection measures are compatible with the European Treaty (i.e. with the principles of free movement of goods and services) (Mak, 2009; Twigg-Flesner, 2007). More specifically, additional protection measures must be non-discriminatory and serve a general interest (general good exception). Also, they must be necessary to reach their goal and must be proportionate to the objective

pursued (see e.g. C.J. 16 December 2008, case C- 205/07, *Lodewijk Ghysbrechts – Santurel Inter BVBA*, <http://europa.curia.eu>¹). In case of full harmonization on the other hand, Member States do not have the possibility to incorporate or preserve additional protection measures into their national legislation (Loos, 2008; Mak, 2009). Therefore, Directives based on full harmonization do not only determine the minimum level of protection which must be offered to consumers, but also the maximum level of protection that can be offered, at least within the field harmonized by the Directive (C.J. 23 April 2009, case C-261/07, *VTB-VAB tegen Total Belgium*, <http://curia.europa.eu>; Gourio, 2008; Wilhelmsson, 2006).

Article 22 CCD determines: “*Insofar as this Directive contains harmonized provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive*”. It is clear that the CCD is based on the principle of full harmonization for those areas of consumer credit law governed by the Directive (targeted full harmonization) (Gourio, 2008; Grundmann & Hollering, 2008; van der Hertten, 2009). In other words, within the harmonized field, Member States transposing the CCD could not maintain additional protection measures (De Muynck, 2011; Raymond, 2008; Terryn & Vannerom, 2009). It seems contradictory that a European Directive, which aims amongst others to guarantee a high level of consumer protection, has led to a reduction of consumer protection in certain Member States (i.e. Member States that already had extensive consumer credit legislation, such as Belgium). However, one must not forget that the primary objective of this Directive is to create an internal market of consumer credit. Anyhow, Member States often try to limit the reduction of consumer protection to a minimum. For instance, in the process of transposing the CCD the Belgian legislator, wanted to maintain as much protection as possible and therefore interpreted the harmonized field very – and even too- restrictively (infra).

We do not intent to discuss the advantages and disadvantages of minimum and full harmonization in this paper into detail (see e.g. Wilhelmsson, 2004; Mak, 2009; Terryn, 2007). Nevertheless, we would like to criticize the European legislators’ choice for full harmonization. Starting point is the fact that the European Commission’s choice for full harmonization is based on the belief that only full harmonization can guarantee the smooth functioning of the internal market and stimulate cross border consumer credits. More specifically, the Commission argues that only in case of full harmonization 1) consumers are ensured they will receive the same level of protection as would have been the case in concluding an agreement in their own country (see consideration 9 CCD) and 2) creditors no longer need to fear/dread that additional protection measures incorporated in the consumer’s national law may apply (Wilhelmsson, 2004). It is clear that these arguments are not very convincing if one takes into account that many aspects of consumer credit law are not governed by the CCD (Gourio, 2008) and therefore not harmonized at all (Van Lysebettens, 2008). In conclusion, the CCD has – at least in Belgium - reduced the level of consumer protection though it will not stimulate cross-border consumer credits (Hoornaert, 2010). Not much of a success story.

2. Scope of application of the Belgian Consumer Credit Act

Before discussing the information requirements incorporated in the Belgian CCA it is worth taking a brief look at the scope of application of the CCA.

¹ In this case the Court decided that the prohibition to demand payment within the withdrawal period (in case of a distance contract) is incompatible with the Treaty if this prohibition is interpreted as a prohibition to ask the consumer’s credit card number as a guarantee.

First, it is interesting to mention that (certain) provisions of the Belgian CCA apply to credit agreements that are excluded from the scope of application of the CCD. Although the CCD is based on the principle of full harmonization, this does not mean that the Belgian CCA is incompatible with the CCD. Indeed, the CCD determines that Member States can maintain or introduce national legislation corresponding to the provisions of the Directive or certain of its provisions on credit agreements falling outside the scope of the Directive (consideration 10) (Gourio, 2008; Raymond, 2008; Rott, 2009). For instance, the CCD determines that it is not applicable to credit agreements involving a total amount less than 200 euro or more than 75.000 euro, nor is it applicable to credit agreements where the credit has to be repaid within one month. Nevertheless the Belgian legislator has chosen to apply certain provisions of the CCA to these types of credit agreements. The solution chosen by the Belgian legislator is rather complicated since the provisions that need to be applied differ from one type of credit to another (De Muynck, 2011).

For those credit agreements that are partly excluded from the CCD (e.g. credit agreements where the credit must be reimbursed within three months), the solution is somewhat different. For those credit agreements Member States are not allowed to apply other CCD-provisions than the ones applicable according to the CCD itself. Therefore, besides the provisions that need to be applied according to the CCD, Member States can only apply provisions relating to areas falling outside the scope of the harmonized field of law (Rott, 2009). For example, next to the provisions indicated in the CCD, the Belgian legislator has chosen to apply the provisions on unfair contract terms (e.g. penalty clauses) to this type of credit agreements. Since these rules are not harmonized by the CCD, the Belgian legislator was free to do so.

The definitions of “creditor” and “credit intermediary” as used in the Belgian CCA (art. 1.2 and 1.3) are slightly different from the definitions in the Directive. More specifically, the person who concludes a credit agreement with the consumer but *immediately assigns his rights to another creditor that is mentioned in the credit agreement*, is not considered a creditor but a credit intermediary. We believe that this definition, which specifically aims to reduce information requirements on behalf of car sellers – car sellers often conclude credit agreements with consumers but immediately assign their rights to another creditor - is not compatible with the Directive (De Muynck, 2011; Terryn and Vannerom, 2009). Moreover, there is a risk that those car sellers, provided that they immediately assign their rights, are able to argue that they are credit intermediaries acting in an ancillary capacity. This would imply that they are not held to meet the information requirements laid down in article 5 CCD or article 11 CCA (art. 7 CCD and art. 11^{ter} CCA). In this situation it is left to the final creditor to provide the consumer with the mandatory information and adequate explanations. Obviously one can hardly understand how a creditor, not being present at the conclusion of the agreement can be better placed than the car seller to provide such explanations (De Muynck and Steennot, 2011).

The definition of consumer in the Belgian CCA at first sight resembles the definition in the Directive. In the preparatory works however, it is emphasized that a physical person is considered a consumer if he obtains credit for *mainly* private objectives. In other words, the mere fact that the credit agreement is concluded to finance a good or service that will partly be used for professional goals does not exclude the application of the Belgian CCA. In the Gruber case (with regard to the Brussels I Regulation) the European Court of Justice decided that a person can only be regarded as a consumer if the professional purpose is so limited as to be negligible in the overall context of the supply (C.J. 20 January 2005, case 464/01, *Gruber v. Bay Wa AG*, <http://www.curia.eu.int>). If this definition is to be transposed into the definition of consumer in the consumer credit Directive (in that sense: Loos, 2005; Howells, 2005; van der Hertten, 2009. Contra: Terryn & Vannerom, 2009), the concept of a consumer



in the Belgian CCA is broader than the one incorporated in the Directive. However, this does not mean that the Belgian CCA is incompatible with the European Directive. Indeed, the principle of full harmonization does not prevent member states to apply the rules incorporated in the Directive to persons that are not protected by the Directive (Raymond, 2008; Rott, 2009), the only requirement being that such additional protection is compatible with the European Treaty (free trade of goods and services) (De Muynck & Steennot, 2011).

3. Pre-contractual obligations on behalf of the creditor and credit intermediary

Three articles of the Belgian Consumer Credit Act are of major importance in determining the creditors and credit intermediary's pre-contractual obligations. Article 11 CCA creates the obligation to provide certain information and an adequate explanations. Article 10 CCA requires the creditor to obtain information from the consumer with regard to his financial situation. Article 15 CCA is the key provision of the Belgian CCA and contains the obligations for the creditor on the one hand to choose the type of credit agreement that is most appropriate for the consumer and on the other hand to only grant credit if he can reasonably believe that the consumer will be able to reimburse the credit. It is clear that the fulfillment of the obligations incorporated in article 15 CCA is only possible if the creditor or credit intermediary has also fulfilled its information obligation incorporated in article 10 CCA.

3.1 Obligation to provide information and adequate explanations

Article 11 §1 CCA transposes article 5 CCD and first of all requires the creditor or credit intermediary to provide certain information (enumerated in the Act) using the Standard European Consumer Credit Information form (SECCI). As laid down by the Directive, the information is principally to be provided on paper or on a durable medium in good time before the consumer is bound by an offer or credit agreement (see e.g. Rott, 2009).

Belgian scholars have argued about the meaning of the obligation to provide information in good time before the consumer is bound. Does such an obligation require the credit agreement to be concluded in two steps - the first step being the provision of the information and the second one the conclusion of the agreement - and that a substantial amount of time passes between these two phases? More specifically, if a consumer goes to a store and wants to buy a television on credit, is it possible to give the consumer the necessary information and immediately afterwards conclude the credit agreement or is it required to ask the consumer to come back the day after in order to conclude the credit agreement? Answering this question, one must take into account this requirements' objective being to enable the consumer to compare offers of several creditors and to allow consumers to make an informed decision (Terryn & Vannerom, 2009). If the consumer has the possibility to reflect on the information and then, being well informed, decides to conclude the credit agreement immediately, we do not see why there would be a problem (De Muynck & Steennot, 2011).

The obligation to provide adequate explanations as laid down in article 5.6 CCD is literally trasposed in article 11 §4 CCA. More specifically, the creditor must, where appropriate, explain the pre-contractual information to be provided, as well as the essential characteristics of the products proposed and the specific impact they may have on the consumer (including the consequences of default in payment by the consumer). This duty implies that the creditor will have to advise on alternative credit products which he usually offers (Rott, 2009). This information requirement clearly serves another goal than the one incorporated in article 11 §1 CCA (art. 5.1 CCD), i.e. enabling the consumer to assess



whether the proposed credit agreement is adapted to his needs and to his financial situation. As we will illustrate later, it seems that the Belgian legislator was not convinced that (even well-informed) consumers are able to take this decision since in article 15.1 CCA the legislator imposes the creditor or the credit intermediary to choose the most appropriate type of credit (*infra*).

3.2 Obligation to assess creditworthiness of the consumer

Article 10 CCA transposes article 8 CCD, which obliges the creditor to assess the consumer's creditworthiness. More specifically, it determines that the creditor or credit intermediary must obtain information from the consumer with regard to his financial situation and his capability to reimburse the credit. The consumer must provide the creditor or credit intermediary with correct and full answers. Article 15.2 CCA is also relevant here as it obliges the creditor amongst other things to consult a central database containing information on previously concluded credit agreements falling within the scope of application of the CCA or the Belgian Act on Mortgage Credit (the so-called Database for Consumer Credits). The relation between these two rules can be summarized as follows: the creditor is in any case obliged to consult the Database for Consumer Credits (Civil Court Namur 8 October 2007, *Jurisprudence de Liège, Mons et Bruxelles* 2008, 73, Civil Court Antwerp 16 January 2004, *Nieuw Juridisch Weekblad* 2004, 1065), though consultation of the database is not sufficient to assess the consumer's creditworthiness. Additional information needs to be obtained (Juge de Paix Courtrai 17 October 2007, *Annuaire Juridique du Crédit* 2007, 68).

The question arises whether this interpretation can be maintained taking into account the new CCD. Article 8.1 CCD determines that the creditor must assess the consumer's creditworthiness on the basis of sufficient information and *where necessary*, on the basis of a consultation of the relevant database. The use of the words "where necessary" indicate that an obligation to consult the Database for Consumer Credit in all cases is not possible (Rott, 2009). However, one must take into account that article 8.1 CCS also states that Member States whose legislation already required creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database could retain this requirement. It can therefore be concluded that the Belgian absolute obligation to consult the Database for Consumer Credit seems compatible with the Directive (Rott, 2009).

It is accepted by the courts that it is up to the creditor or the credit intermediary to take the initiative to obtain the necessary information from the consumer (e.g. Rb. Oudenaarde 4 December 2002, *Annuaire Juridique du Crédit* 2002, 104; Juge de Paix Courtrai 31 October 2006, *Annuaire Juridique du Crédit* 2006, 23; Juge de Paix Saint-Nicolas 4 December 2001, *Algemeen Juridisch Tijdschrift* 2001-2002, 1030; De Boeck, 1996; De Muynck, 2011). The consumer does not have to provide information at his own initiative, as far as the information is not directly related to the questions asked by the creditor or the credit intermediary. For example, if a creditor is - or should be - aware of the fact that the consumer is divorced (e.g. because the consumer concludes the credit agreement with his bank which has been previously notified about the divorce), it is up to the creditor to ask whether the consumer has to pay alimony (Juge de Paix Arendonk 29 September 2009, to be published in *Revue des Juges de Paix* 2011). Or, if the bank is aware of the fact that the consumer does not own a house, it is up to the creditor to obtain information on the rent the consumer must pay (Juge de Paix Courtrai 26 September 2000, *Annuaire Juridique du Crédit* 2000, 73).

The consumer for his part must provide correct and complete information, i.e. answer questions in good faith (Civil Court Bruges 31 January 2003, *Revue des Juges de Paix* 2003, 224; Civil Court Antwerp 16 January 2004, *Annuaire Juridique du Crédit* 2004, 55; De

Muynck, 2011). For example, if a consumer is asked about his income and he knows that his employment ends in the near future because he has been dismissed, he cannot satisfy the requirement to answer questions completely by solely mentioning his income. He is also obliged to inform the creditor or the credit intermediary on his dismissal (De Muynck, 2011).

Although it is left to the consumer to provide correct information, it has been decided that the consumer and creditor are jointly liable if the creditor knew or should have known that the information was incorrect (Civil Court Antwerp 16 January 2004, *Annuaire Juridique du Cr dit* 2004, 55). For example, even if the consumer mentions he does not have any obligations resulting from previously concluded credit agreements, the creditor will be jointly liable if the consultation of the Database for Consumer Credits shows – or would have shown – that the consumer previously has concluded several credit agreements which still need to be reimbursed (Steennot, 2009; De Muynck, 2011. See also: Juge de Paix Saint-Nicolas 8 February 1999, *Revue des Juges de Paix* 2002, 105²). Also, a creditor is jointly liable if he does not verify the correctness of the consumer's answers with regard to his income, this because of the fact that such verification can be easily done by asking the consumer for his latest remuneration slip (Juge de Paix Ghent 6 January 2005, *Rechtspraak Antwerpen, Brussel, Gent* 2005, 345).

Finally, the question arises who bears the burden of proof. Is the consumer held to prove that not all relevant information has been asked for (which would require that the consumer delivers proof of a negative fact), or is it up to the creditor to prove that the relevant information has been asked for? The Belgian Supreme Court has decided that the burden of proof is in principle imposed on the consumer, but the creditor must collaborate at the level of proof (Cass. 10 December 2004, *Nieuw Juridisch Weekblad* 2005, 951). In practice, this implies that the creditor must be able to provide a document (in writing or electronically) which shows that the relevant information has been asked for (Juge de Paix Courtrai 31 October 2006, *Annuaire Juridique du Cr dit* 2006, 23), especially if the circumstances allow to presume that the necessary information was not obtained (de Patoul, 2005).

3.3 Obligation to provide assistance

Article 15.1 CCA obliges the creditor or the creditor intermediary to choose, amongst the credit agreements he usually offers or for which he usually mediates, the type of credit agreement that is most appropriate for the consumer, taking into account the consumer's financial situation and the purpose of the credit agreement. It is clear that this obligation does not oblige the creditor to advise the consumer to go to another creditor if the latter offers a type of credit which is more appropriate (e.g. cheaper) than the types of credit the creditor himself offers (Juge de Paix Courtrai 29 June 2004, *Annuaire Juridique du Cr dit* 2004, 55). It is up to the consumer to shop around (Juge de Paix Ghent 23 June 2000, *Annuaire Juridique du Cr dit* 2000, 64; Lettany, 1991). But if, amongst the credit agreements offered by the creditor, there is not an appropriate one, the creditor will have to refuse to conclude the credit agreement (Biquet-Mathieu, 2008). It is up to the consumer to prove that the creditor or credit intermediary did not meet this obligation (Dambre, 1993).

As far as credit intermediaries are concerned, one has to make a distinction between credit agents and credit brokers. Credit agents act exclusively for one creditor (art. 62 CCA), which implies they can only choose the most appropriate type of credit amongst the agreements offered by that creditor. Credit brokers are entitled to act on behalf of different

² In this case the creditor should have been aware of the existing credit agreements because the new credit agreement was concluded to reimburse two existing credit agreements.

creditors (art. 62 CCA). This implies that they have to choose the most appropriate credit agreement amongst the credit agreements offered by all the creditors for whom they intermediate. Therefore, the obligation to find the most appropriate type of credit is more elaborate for credit intermediaries not acting as a credit agent (Steennot, 2004).

Which type of credit is most appropriate must be determined taking into account the financial situation of the consumer and the purpose of the credit. The mere fact that the financial situation of the consumer *at the time of conclusion of the contract* necessitates a certain type of credit is not sufficient, if this type of credit is not appropriate taking into account the purpose of the credit. More specifically, a creditor was held liable because he granted an overdraft facility to a consumer who wanted to obtain credit in order to be able to buy a car. The creditor believed that an overdraft was most appropriate given the financial situation of the consumer who had declared that he would not be able to start reimbursing the capital within the first few years. Nevertheless, it was decided that in this situation an overdraft was not the most appropriate type of credit agreement. Notwithstanding, overdraft facilities are particularly useful if the consumer does not know in advance the exact amount of the credit needed (Juge de Paix Grâce-Hollogne 5 June 2007, *Jurisprudence de Liège, Mons et Bruxelles* 2008, 107). , a loan is more appropriate than an overdraft facility in case the consumer wants to obtain credit to buy a car, especially because the overdraft facility is more expensive than the loan.

The question arises whether article 15.1 CCA, imposing the obligation to choose the most appropriate credit upon the creditor or the credit intermediary, is compatible with the Directive. Given the fact that the Directive is based on the principle of full harmonization, this can be doubted (Terry & Vannerom, 2009, De Muynck, 2011). The Directive does only contain an obligation to provide adequate explanations, aimed at enabling the consumer to assess whether the proposed credit agreement is adapted to his needs and to his financial situation. According to the Directive it is up to the consumer to decide which credit agreement is most appropriate, and not up to the creditor or credit intermediary (Rott, 2009). Although article 5.6 CCD allows Member States to adapt the manner by which and the extent to which such assistance is given - which means that they can oblige the creditor or credit intermediary to assist the consumer by choosing the most appropriate type of credit -, this possibility is limited to the particular circumstances of the situation in which the credit agreement is offered, the person to whom it is offered or the type of credit that is offered. Therefore, Member States can only determine that the creditor must choose the most appropriate credit agreement in case of particular circumstances, in case of the provision of credit to vulnerable consumers (Rott, 2009) or for specific types of credit agreements. For example, it can be argued that this provision enables Member States to introduce specific rules on centralization of credit agreements (De Muynck, 2011).

3.4 Prohibition to provide credit in case of lack of creditworthiness

Article 15.2 CCA determines that the creditor can only conclude a credit agreement if he reasonably believes that the consumer will be able to reimburse the credit. This implies that it is up to the creditor to decide whether or not the credit agreement can be signed (e.g. Civil Court Oudenaarde 4 December 2002, *Annuaire Juridique du Crédit* 2002, 104; Juge de Paix Ghent 6 January 2005, *Rechtspraak Antwerpen, Brussel, Gent* 2005, 345; Juge de Paix Courtrai 31 oktober 2006, *Annuaire Juridique du Crédit* 2006, 23). It is clearly not sufficient to warn the consumer that his financial situation does not allow him to obtain further credit.

The decision to grant credit must exclusively be based on the financial situation of the consumer himself, known to the creditor on the basis of the consultation of the Database for

Consumer Credit and the information obtained from the consumer (through the credit intermediary). The fact that securities guarantee the reimbursement of the credit is not relevant (Juge de Paix Liège 25 July 2007, *Annuaire Juridique du Crédit* 2007, 65; Juge de Paix Courtrai 31 October 2006, *Annuaire Juridique du Crédit* 2006, 23; Blommaert, 2006). Therefore, if the reimbursement of the credit is guaranteed by a surety, the creditor cannot take into account the income of this surety in order to assess the consumer's capability to reimburse the credit. In practice, creditors often try to convince a person, who from an economical point of view acts as a surety, to sign the credit agreement as a second borrower (e.g. Juge de Paix Dendermonde - Hamme 16 November 2006, *Annuaire Juridique du Crédit* 2006, 79 where the consumer's girlfriend, who was not cohabiting with the consumer, signed the agreement as a co-debtor). Such practice aims on one hand to avoid that the specific rules which aim at protecting sureties (art. 34-36 CCA) apply and on other hand to allow the creditor to take into account the income of this person. It has been argued that if the judge concludes that a person economically acts as a surety – which is the case when it is clear that the second debtor does not have any personal interest in the credit – the judge can decide to treat the second borrower as a surety instead of a co-debtor (Biquet-Mathieu, 2006). This implies the income of this person cannot be taken into account, which will most often imply that the credit agreement could not be concluded (violation of art. 15.2 CCA).

It is up to the consumer to prove that the creditor, on the basis of the information he disposed, at the time of conclusion of the credit agreement could not reasonably believe that the consumer would be able to reimburse the credit. The mere fact that the consumer was not able to reimburse the credit is obviously not sufficient since this can be due to circumstances which occur after the conclusion of the credit agreement (e.g. the consumer gets divorced, has an accident, becomes unemployed,...). More specifically, the consumer must prove that the creditor did not act as a normal, reasonable creditor, placed in the same circumstances (e.g. Civil Court Dendermonde 10 February 1998, *Revue des Juges de Paix* 2000, 128; Juge de Paix Ghent 6 January 2005, *Rechtspraak Antwerpen, Brussel, Gent* 2005, 345). Cases in which the consumer succeeded in delivering this proof include: 1) a case in which the consumer earned 1400 euro a month, but half the amount had to be spend to pay the rent and reimburse the credit (Juge de Paix Louvain 23 June 2005, *Annuaire Juridique du Crédit* 2005, 30), 2) a case in which a family consisting of 4 persons only retained 642, 82 euro after paying the rent, fixed costs (e.g. electricity, insurances) and reimbursing the credit (Juge de Paix Courtrai 4 October 2005, *Annuaire Juridique du Crédit* 2005, 39), 3) a case where 40% of the income of the consumer was generated by child allowances and 52 % of the income was needed to reimburse the installments (Juge de Paix Liège 25 July 2007, *Annuaire Juridique du Crédit* 2007, 65). Interesting is also that the mere fact that only 33% of the income is spend to reimburse the credit, does not prove that the creditor could grant the credit (Juge de Paix Courtrai, 31 October 2006, *Annuaire Juridique du Crédit* 2006, 23). Indeed, if the income is low and the consumer also has to pay rent, there is not enough left to lead a normal life.

Not only creditors must assess the consumer's creditworthiness, credit intermediaries are equally obliged to do so. More specifically, credit intermediaries have to take into account article 64 §1 CCA, which determines that they cannot transmit a credit proposal to the creditor on behalf of the consumer if they believe, on the basis of the information obtained from the consumer, that the consumer will clearly not be able to reimburse the amount borrowed.

The CCD only requires creditors to assess the consumer's creditworthiness and does not oblige the creditor to refuse credit if, at the time of conclusion of the credit agreement, one could reasonably believe that the consumer would not be able to reimburse the credit. Therefore, the question arises whether this requirement is compatible with the European

Directive. This question has been largely debated in Belgium. Most authors believe that article 15.2 CCA is incompatible with the Directive since it imposes an additional duty on the creditor (Terryyn & Vannerom, 2009; van der Hertten, 2009).

In our view, article 15.2 CCA is compatible with the Directive because article 15.2 CCA does not fall within the harmonized field of the Directive (Steennot, 2011). One can clearly see the difference with the obligation to assist the consumer (art. 5.6 CCD). Article 5.6 CCD states that adequate explanations must be given in order to place the *consumer* in a position enabling *him* to assess whether the proposed credit agreement is adapted to his needs and to his financial situation. Therefore, article 5.6 CCD explicitly determines who must decide which credit agreement is most suitable. Article 8 CCD on other hand does not determine whether it is up to the consumer or the creditor to decide. Therefore, this question is not harmonized. Rott seems to share this view as he states that “the Directive does not state the legal consequences of the consumer’s lack of creditworthiness” (Rott, 2009).

It is clear that the obligation to assess the consumer’s creditworthiness would be completely useless if no consequences at all were attached to the finding that the consumer’s financial situation does not allow for further credit (Rott, 2009). However, the question arises: which consequences? Most authors argue that the creditor must warn the consumer about the difficulties he will experience in reimbursing the credit (Rott, 2009). If not, the creditor should be held liable. However, once the consumer has been warned it is up to him to decide whether or not to conclude the credit agreement (Grundmann & Hollering, 2008).

All of this shows that, compared to the CCD, the Belgian CCA imposes an additional obligation on the creditor. In this context it is worth mentioning that even in the absence of specific legislation Belgian jurisprudence has concluded that creditors can only provide credit to consumers whose financial situation allows for further credit. More specifically, we are aware of 2 cases where the application of the prohibition to conclude a credit agreement with consumers, not being creditworthy, was extended to mortgage credits (although the Act on Mortgage Credits does not contain specific rules with regard to the obligation to assess the consumer’s creditworthiness). Where one court applied article 15.2 CCA by analogy to a mortgage credit (Commercial Court Brussels 15 January 2008, *Revue du Droit de la Consommation* 2008 (issue 80), 90), another court based its decision upon civil law principles (art. 1382 Civil Code) (Juge de Paix Zottegem 25 May 2000, *Annuaire Juridique du Cr dit* 2000, 133). It was argued that a creditor who grants credit to a consumer who will clearly not be able to reimburse the credit, does not act as a normal, reasonable creditor and has to compensate the damages the consumer suffered. As we will illustrate later on, the application of the CCA and civil law principles lead to another sanction (*infra*).

The Belgian CCA and the jurisprudence with regard to mortgage credit seem to assume that some consumers need to be protected from themselves. Does it make any sense to hold the creditor liable if a consumer who has been informed about the difficulties he will experience in repaying nevertheless decides to conclude the credit agreement? Should the creditor be liable for the risk the consumer takes? Well, all depends on the objective one wants to achieve by this rule. If the main objective is to avoid over-indebtedness, this rule seems useful, if not necessary. Indeed, one has to take into account that consumers experiencing financial difficulties are not very rational, often believe that reimbursing will become easier in the future or even that reimbursing is something to worry about tomorrow (Block-Lieb & Janger, 2006). All that matters to consumers already experiencing over-indebtedness is to get the extra cash immediately! These consumers, which are the most vulnerable, can only be protected if the creditor himself must refuse to conclude the credit agreement. The Draft Directive on Mortgage Credit (Proposal for a Directive on credit agreements relation residential property) seems to acknowledge this where it prohibits creditors to provide credit if the assessment of the consumer’s creditworthiness results in a



negative prospect for his ability to repay the credit over the lifetime of the credit agreement (art. 14.2)

3.5 Centralization of existing credit agreements

Article 15 CCA plays an important role in case of centralization of existing credit agreements. Centralization of existing credit agreements occurs when a consumer has several credit agreements which are reimbursed with the amount granted by a new credit agreement. The amount of the new credit agreement may be equal to the amount of the capital which has to be reimbursed following the existing credit agreements (in some cases increased with the amount due for early repayment) or may even be higher in order to provide additional credit to the consumer. Centralization of credit agreements can be beneficial to consumers experiencing difficulties in reimbursing existing credit agreements, i.e. when it leads to a reduction of the amount of the installments to be paid by the consumer (Juge de Paix Saint-Nicolas 4 December 2001, *Annuaire Juridique du Crédit* 2001, 161). Such reduction can be the result of lower interest rates, as well as of a longer reimbursement period. However, in jurisprudence, we have seen many cases where centralization of existing loans did not lead to the reduction of the amount of the installments (e.g. Civil Court. Saint-Nicolas 17 April 2002, *Annuaire Juridique du Crédit* 2002, 133). If in such a situation the consumer already experienced difficulties in reimbursing the existing credit agreements the burden of proof is often reversed by judges. More specifically, they require that the creditor proves why the consumer, who was not able to pay correctly the monthly installments in the past, will be able to reimburse installments of the same amount in the future (Juge de Paix Courtrai 31 October 2006, *Annuaire Juridique du Crédit* 2006, 23) or why this credit agreement is the most appropriate one for the consumer (Juge de Paix Grâce-Hollogne 24 February 2004, *Annuaire Juridique du Crédit* 2004, 13). If the borrowed amount exceeds the amount to be reimbursed, creditors also have to be very cautious, since such a situation can be an indication for a negative spiral of debts (Juge de Paix Arendonk 12 October 2010, *Nieuw Juridisch Weekblad* 2011, 343).

3.6 Overdraft facilities

The obligation to provide adequate explanations has been specified by the Belgian legislator with regard to overdraft facilities offered outside the premises of the creditor and overdraft facilities offered at a distance. If the creditor who sells an overdraft facility at a distance or outside his premises also offers loans or credit sales, he or the credit intermediary will have to explain to the consumer the advantages and disadvantages of an overdraft facility in comparison with a loan or credit sale (e.g. with regard to the costs and the amortization of capital) (art. 11 §4 CCA). There is no doubt that this additional requirement is compatible with the European Directive, since article 5.6 CCD enables the Member States to adapt the manner by which and the extent to which such 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*.

With regard to the obligation to assess the consumer's creditworthiness, it is clear that the creditor must take into account the overdraft facility's limit, i.e. the full amount that can be obtained through the overdraft facility by the consumer to determine whether the consumer is sufficiently creditworthy. The creditor can only conclude the credit agreement if he can

reasonably believe that the consumer will be able to reimburse the complete amount of the overdraft facility within the period determined by the credit agreement.

3.7 Sanctions

In case the creditor or the credit intermediary does not fulfill the requirements incorporated in the articles 10, 11 or 15 CCA, the judge can decide that the consumer does not have to pay (part of the) interests due for late payment or can decide to reduce the consumer's obligations to the amount borrowed. In the latter case the consumer retains the benefit of reimbursing the amount borrowed in installments (art. 92 CCA). In practice, courts always apply the second sanction (e.g. Juge de Paix Ghent 6 January 2005, *Rechtspraak Antwerpen, Brussel, Gent* 2005, 345; Juge de Paix Courtrai 28 June 2005, *Annuaire Juridique du Crédit* 2005, 34; Juge de Paix Saint-Nicolas 22 October 2003, *Annuaire Juridique du Crédit* 2003, 29), which means that the consumer has obtained the credit for free. It is important to stress that the consumer can invoke this sanction towards the creditor, even if it was the credit intermediary who failed to meet the information requirements or obligation to provide assistance.

We would like to illustrate this sanction by providing an example. Suppose that a consumer has borrowed 12.000 euro which he has to reimburse within a period of 5 years. The borrowing rate is 6% which implies he has to pay 60 installments of 231.32 euro. If the judge, after the consumer has already paid 12 installments, decides that article 10, 11 or 15 CCA have been violated and consequently reduces the obligations of the consumer to the amount borrowed, the consumer will only have to pay 213 euro during 48 months.

$$12.000 \text{ (amount borrowed)} - 1775,84 \text{ (installments already paid (12 x 231.32))} = \\ 10224,16 : 48 \text{ (remaining duration of the credit agreement)} = 213 \text{ euro}$$

It is clear that the same result could not be reached by applying civil law principles. Although it would be possible to reduce the obligations of the consumer to the amount borrowed, civil law principles could not allow him to reimburse the reduced amount in installments. Therefore, this sanction benefits the consumer. This sanction is also different from the sanction of nullity, since, contrary to nullity, it does not oblige the consumer to reimburse the remaining capital immediately. We are aware of the fact that the application of this sanction is rather severe in case of a violation of article 15.2 CCA, especially if the consumer has been warned about the financial problems the extra credit would create (Grundmann & Hollering, 2008). However, if one really wants to avoid over-indebtedness, one needs a severe sanction, which dissuades creditors sufficiently.

When the consumer fails to provide complete and correct answers to the questions asked by the creditor or credit intermediary, the court can dissolve the credit agreement to the consumer's detriment (art. 95 CCA). This implies the consumer will have to reimburse the amount borrowed immediately. Moreover, he will have to compensate the damage suffered by the creditor. Article 27bis CCA imposes a cap to the amount of damages that can be claimed by the creditor. More specifically damage clauses are limited to 10% of the remaining capital up to 7500 euro. For the amount exceeding 7500 euro damage clauses are limited to 5%. In case of late payment, the creditor will also be able to ask for a supplementary interest of the borrowing rate + 10% of the borrowing rate calculated on the remaining capital (e.g. if the borrowing rate is 8%, the supplementary interest is maximum 8.8%).

In case of joint liability, it is sometimes decided that the obligations of the consumer are reduced to the amount borrowed, but in such a case the consumer can not enjoy the benefit



of paying in installments (Civil Court Antwerp 16 January 2004, *Nieuw Juridisch Weekblad* 2004, 1065).

Finally, it is interesting to mention that the credit intermediary who violates article 64 CCA will not be entitled to a commission from the creditor if the credit agreement has to be dissolved following the consumer's default (art. 99 CCA).

Conclusion

Article 15 of the Belgian CCA adds two important obligations to the CCD: 1) the obligation for the credit or credit intermediary to find the most appropriate type of credit and 2) the obligation only to provide credit if the creditor can reasonably believe that the consumer will be able to reimburse the credit. Whereas the second rule in our view, is compatible with the CCD (since it does not fall within the harmonized scope of the Directive), the first rule however is not as the Directive clearly determines it is up to the consumer to decide which credit is most appropriate.

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