The European Legal Forum
Forum iuris communis Europae

Rott, Peter

Maximum Harmonisation and Mutual Recognition versus Consumer Protection:

The Example of Linked Credit Agreements in EC Consumer Credit Law

The European Legal Forum (E) 2/3-2006, 61 - 68

The European Legal Forum

Forum iuris communis Europae

2/3-2006
pp. I-61 - I-136
6th Year March/June 2006

Section I

EUROPEAN CONSUMER PROTECTION LAW

Maximum Harmonisation and Mutual Recognition versus Consumer Protection:

The Example of Linked Credit Agreements in EC Consumer Credit Law

Prof. Dr. Peter Rott [*]

A. Introduction

EC consumer contract law, including private international law, has come under the pressure of the internal market. In recent activities at EC level, we can see a clear tendency to replace the principle of minimum harmonisation by a maximum harmonisation approach. First examples were the EC-Commerce Directive 2000/31/EC and Directive 2002/65/EC on the distance marketing of financial services, and the next target of the Commission is consumer credit law. Due to considerable resistance by the Member States to a total harmonisation at EC level of consumer credit law, the Commission has recently proposed to supplement the maximum harmonisation approach for a part of the Directive by a mutual recognition approach for other parts where no agreement between the Member States can be achieved. This article discusses the consequences that the combination of these two approaches would have on the particular issue of the treatment of so-called linked credit agreements.

The purchase of consumer goods or services is frequently financed by a third party that is more or less closely linked with the trader. This tripartite relationship in which the consumer is confronted with two contracting partners has replaced a bilateral relationship in which the seller gave the purchaser a loan; and it has created problems ever since.[1] What happens to the sales contract if the connected credit is invalid or withdrawn or terminated by the consumer? And what happens to the consumer credit contract if the sales contract is invalid, or if the purchased good is defective? Under what circumstances is the connection between the two contracts close enough to evoke legal consequences?

Long before the EC adopted the first Consumer Credit Directive, national courts and legislators have sought to protect the purchaser from an artificial splitting up of an economically connected situation.[2] The idea was taken up by the current Consumer Credit Directive 87/102/EEC (B.) and can also be traced in other consumer law Directives (C.). The proposal for a new Consumer Credit Directive has also included a provision on linked credit agreements (D.) but primarily aims at harmonising the national consumer credit laws and at facilitating cross-border lending through the principles of maximum harmonisation and of mutual recognition (E.). One good example to illustrate the consequences on national law of linked credit contracts is German consumer law (F.). This article concludes that the new rules will severely impact on consumer protection in tri-partite relationships at least in some Member States.

B. Linked Contracts under Directive 87/102/EEC

Directive 87/102/EEC takes into account linked contracts in its Article 11. At the time, the concept was new for some of the Member States,[3] and Directives had to be adopted unanimously. This may be the reason why the rules are rather weak. The tripartite relationship was considered in two ways: Article 11(1) concerns the consumer-supplier relationship, and Article 11(2) deals with the relationship between the consumer and the creditor.

[*] *Junior Professor for Private Law with a focus on European Private Law, University of Bremen (DE).*

[1] On the history of credit financed sale in Germany, see *W. Dürbeck*, Der Einwendungsdurchgriff nach § 9 Absatz 3 Verbraucherkreditgesetz (VVF, Munich, 1994), at 5 *et seqq*.

[2] German courts first applied the good faith clause of Para. 242 German Civil Code. See, for example, BGH (DE), BGHZ 37, 94, at 99 *et seqq*.

[3] See *N. Reich & H.-W. Micklitz*, Europäisches Verbraucherrecht, 4th ed. (Nomos, Baden-Baden, 2003), at 747.

I. The consumer-supplier relationship

Article 11(1) aims at preventing that the consumer's legal position vis-à-vis the trader is affected by the existence of a credit agreement in cases where the goods or services are not supplied or are otherwise not in conformity with the contract for their supply. This seems obvious and has never led to any debate.

II. The consumer-creditor relationship

Article 11(2) considers to what extent the consumer can pursue remedies against the creditor of a linked contract where goods or services covered by the credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract for their supply. This issue had been subject to controversial debate during the legislative process.[4] Consumer advocates had favoured a solution under which the trader and the creditor would have been made jointly and severally liable for any breach of the contract on the supply of goods or services.[5] This idea did not reach the consensus of the Member States. In contrast, Article 11(2) now merely requires the subsidiary liability of the creditor under narrow conditions.[6]

Four issues must be distinguished: (1) the scope of application, i.e. the definition of a linked credit agreement, (2) the rights that a consumer can exercise in case of a linked credit agreement, (3) whether or not the consumer has to take measures against the trader first, and if so, what measures, and (4) formalities and procedural aspects.

1. The scope of application

Article 11(2) has a very narrow scope of application, and not all its requirements are entirely clear.[7] The most important restrictions are Article 11(2) lit. b and e. According to lit. b, the provision only relates to cases in which the creditor and the supplier of the goods or services have a pre-existing agreement under which credit is made available *exclusively* by that creditor to customers of that supplier for the acquisition of goods or services from that supplier. Thus, the consumer is not protected in cases where a trader co-operates with several creditors.[8] Obviously, this opens the door for circumvention strategies that cannot be countered by making use of Article 14(2) of the Directive. Moreover, this criterion does not reflect the consumer's interest: From the point of view of the consumer, it is merely important that the trader and the creditor form an economic unit.[9] And finally, the criterion of exclusivity is difficult to prove for the consumer; although, in the light of ECJ case-law on the burden of proof,[10] one may require the trader to prove that he does not co-operate solely with the creditor in question. Sales contracts that are paid for with a credit card are not covered by Article 11(2).[11]

2. The rights of the consumer

The "rights" that the consumer can exercise against the creditor are not specified in Article 11(2). Possible solutions include: the right to evoke objections from the linked contract in order to reject further payment, or the right to claim reimbursement of payments already made under the credit contract, or even the right to claim damages for breach of contract or even tort law stemming from the trader's conduct? The first proposal by the Commission had actually opted for a broad concept that had included all these types of damages[12] but met considerable resistance from a number of Member States that argued against imposing a no-fault liability on the creditor. Therefore, Article 11(2) sentence 2 now leaves it to the Member States to determine to what extent these remedies shall be exercisable.

3. Subsidiary liability

Under Article 11(2) lit. e, the consumer must first pursue his remedies against the supplier and fail to obtain the satisfaction to which he is entitled, before he can exercise his rights against the creditor. What this exactly means is subject to some controversies. Whilst some authors argue that the consumer must initiate insolvency proceedings against the trader,[13] others suggest that "simple" court proceedings or even extra-judicial measures suffice.[14] Others argue that Article 11(2) sentence 2 of Directive 87/102/EEC leaves it to the Member States to regulate on details, this being a consequence of disagreement between the Member States at the time when the Directive was adopted.[15] The ECJ has not had the opportunity yet to clarify the law.[16]

4. Formalities and procedural aspects

With a view to formalities and procedural aspects, Article 11(2) makes no requirements. Article 11(2) sentence 2 leaves it to the Member States to determine under what conditions the consumer's rights shall be exercisable.

---

4 For details, see *A. Hüttebräuker*, Die Entstehung der EG-Richtlinien über den Verbraucherkredit (Diss. Bonn, 2000), at 142 *et seqq*.

5 See *P. Latham*, Dispositions communautaires relatives au crédit à la consommation: la directive 87/102/CEE du 22 décembre 1986, Revue du Marché Commun (RMC) 1988, 219, at 224.

6 For critical comments see *G. Howells & T. Wilhelmsson*, EC Consumer Law (Ashgate, Dartmouth, 1997), at 208 *et seq*.

7 See *I. Klauer*, Die Europäisierung des Privatrechts (Nomos, Baden-Baden, 1998), at 120.

8 See *Reich & Micklitz* (*supra* note 3), at 748.

9 See *S. Grundmann*, Europäisches Schuldvertragsrecht (de Gruyter, Berlin, 1999), at 676.

10 See, for example, ECJ 17 October 1989 – 109/88 – *Handels- og Kontorfunktionærernes Forbund I Danmark* v *Dansk Arbeitsgiverforening for Danfoss*, [1989] ECR 3199, para. 13.

11 Against *Howells & Wilhelmsson* (*supra* note 6), at 209; *Reich & Micklitz* (*supra* note 3), at 749 *et seq*. Only the UK and Greece have extended the scope of their national rules to credit card financed sales, see COM(95) 117 final, at 69.

12 See *Hüttebräuker* (*supra* note 4), at 143.

13 See, for example, *F. J. Scholz*, Schwerpunkte der EG-Verbraucherkreditrichtlinie – unter Berücksichtigung des geltenden deutschen Rechts, Monatsschrift des Deutschen Rechts (MDR) 1988, 730, at 734; *Hüttebräuker* (*supra* note 4), at 147.

14 See *Reich & Micklitz* (*supra* note 3), at 749.

15 See *Grundmann* (*supra* note 9), at 676.

16 The question of the Juzgado de Primera Instancia n. 10 de Seville that was answered by ECJ 7 March 1996 – C-192/94 – *El Corte Inglés SA* v *Cristina Blázquez Rivero*, [1996] ECR I-1281, merely related to the horizontal direct effect of this provision although the case also raised important questions on the prerequisites of Article 11(2).

III. Evaluation

The responsible member of staff of the Commission, Patrick Latham, had expressed his disappointment with Article 11 as soon as in 1988, and he had hoped that the Member States would introduce more protective rules voluntarily;[17] which most Member States did not do.[18] In 2002, the Commission has given an implicit evaluation of Article 11(2) of Directive 87/102/EEC, by stating in its first proposal for a new Consumer Credit Directive that a "number of Member States simply transposed Article 11 and created legislation that was ineffective", whereas other Member States have gone (far) beyond the requirements of that Directive.[19] In practice, Article 11 at least did not do any harm since Member States were allowed, under the minimum harmonisation clause of Article 15 of the Directive, to adopt or maintain more stringent consumer protection measures.[20] However, the provision on linked contracts, as many other parts of the Directive, has certainly not harmonised the laws of the Member States to a great extent,[21] and it does not ensure a high level of consumer protection either.[22]

C. Linked Contracts in EC Consumer Law outside the Consumer Credit Directive

EC legislation on linked contracts is relatively scarce. The Time-sharing Directive 94/47/EC, and the Distant Selling Directives 97/7/EC and 2002/65/EC (merely) consider the consequences for linked credit contracts of the withdrawal of the financed contract. Under all three Directives, a credit agreement that covers the price of goods or services fully or partly shall be cancelled, without any penalty, if the consumer exercises his right to withdrawal with regard to the distance selling or time-sharing contract.[23]

The Doorstep Selling Directive 85/577/EEC does not mention linked contracts. Two German doorstep cases were recently decided by the European Court of Justice (ECJ).[24] In these cases, German consumers were persuaded, in their private homes, to purchase property and to take up bank loans in order to finance the purchase. Subsequently, they cancelled the doorstep credit agreement. The Landgericht (District Court) Bochum and the Oberlandesgericht (Higher Regional Court) Bremen tried to persuade the ECJ in the cases of *Schulte* and *Crailsheimer Volksbank* that the two contracts, i.e. the credit contract and the contract on the sale of property, had to be treated as linked contracts, and that the cancellation of the credit contract therefore led to the cancellation of the sales contract. Consequently, the consumer would be released from repaying the credit, he could claim his part payment back, and he would merely have to hand over the (frequently overprices) property in return. Although the ECJ recognised that in the individual cases the two contracts were linked, it declined to extend the withdrawal of the credit contracts to the financed sale contracts.

In conclusion, the EC has continued, after the initial provision of Article 11(2) of Directive 87/102/EEC, to introduce rules that take account of the economic unit between a credit agreement and a contract for the sale of goods or the provision of services. However, consistent and comprehensive rules are still missing. National laws have gone further. For example, Germany has created a comprehensive rule that extends the withdrawal of any financed contract to the linked credit agreement.[25]

D. Linked Contracts in the Commission's Proposal on a New Consumer Credit Directive

With its proposal for a new Consumer Credit Directive of September 2002,[26] as amended in September 2004[27] and again in October 2005,[28] the Commission has taken up on the issue of linked contracts again. After a courageous initiative towards the more protective system of joint and several liability, the Commission has in its latest proposal partly retreated towards the old system of Directive 87/102/EEC. Article 14 of this proposal drops the old and unnecessary Article 11(1) of Directive 87/102/EEC, maintains Article 11(2) and introduces a new rule on the consequences of the withdrawal of the financed contract.

1. Withdrawal of the financed contract

Article 14(1) of the latest proposal deals with the effect that the withdrawal of the financed contract has on the linked credit contract. Where the consumer has exercised a right of withdrawal concerning a contract for the supply of goods or

---

17 *Latham* (*supra* note 5), at 224.

18 See COM(95) 117 final, at 68.

19 COM(2002) 443 final, at 22. See also *C. Ritz*, Harmonisierungsprobleme bei der Umsetzung der EG-Richtlinie 87/102 über den Verbraucherkredit (Lang, Frankfurt, 1996), *S. Herrmann*, Der Verbraucherkreditvertrag (VVF, München, 1996), and *U. Blaurock*, Verbraucherkredit und Verbraucherleitbild in der Europäschen Union, Juristenzeitung (JZ) 1999, 801 *et seqq*., all of them on Germany, France and the UK; *D. Henrich*, Die Umsetzung der Richtlinie 87/102/EWG zur Harmonisierung des Verbraucherkredits in Deutschland und Italien, in: *C.-W. Canaris & A. Zaccaria* (eds), Die Umsetzung zivilrechtlicher Richtlinien der Europäischen Gemeinschaft in Italien und Deutschland (Duncker & Humblot, Berlin, 2002), 25 *et seqq*., on Germany and Italy.

20 See also *Klauer* (*supra* note 7), at 120.

21 See, for example, *Blaurock* (*supra* note 19), at 808.

22 See also *M. Wolf*, Störungen des Binnenmarkts durch das Verbraucherkreditgesetz, in: *F. Kübler et al.* (eds), Festschrift für Theodor Heinsius (de Gruyter, Berlin & New York, 1991), 967, at 970.

23 Article 7(1) of Directive 94/47/EC; Article 6(4) of Directive 97/7/EC; Article 6(7) of Directive 2002/65/EC.

24 ECJ 25 October 2005 – C-350/03 – *Elisabeth Schulte and Wolfgang Schulte* v *Deutsche Bausparkasse Badenia AG*; and ECJ 25 October 2005 – C-229/04 – *Crailsheimer Volksbank eG* v *Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche and Joachim Nitschke*, [2005] ECR I-9215 and I-9273 = [2005] EuLF I-235 and I-241. See also the case notes by *N. Reich & U. Rörig*, Die Urteile des EuGH in den Rechtssachen C-350/03 (*Schulte*) und C-229/04 (*Crailsheimer Volksbank eG*), Verbraucher und Recht (VuR) 2005, 452 *et seqq*., and *P. Rott*, Risikohaftung der Banken für "Schrottimmobilien": Anmerkung zu EuGH, Rs. C-350/03 – *Schulte* und C-229/04 – *Crailsheimer Volksbank*, Zeitschrift für Gemeinschaftsprivatrecht (GPR) 2006, 24 *et seqq*.; *id*., Linked contracts and doorstep selling: Case note on ECJ, judgments of 25 October 2005, cases C-350/03 – *Schulte* and C-229/04 – *Crailsheimer Volksbank*, to be published in Yearbook of Consumer Law 2006, 403 *et seqq*.

25 Para. 358(1)1 of the German Civil Code.

26 COM(2002) 443 final, OJ 2002, C 331, at 200.

27 COM(2004) 747 final.

28 COM(2005) 483 final.

services by a trader, he shall no longer be bound by a "linked credit agreement". This new rule was first proposed by the European Parliament.[29]

Which rights of withdrawal qualify is not specified any further. Under Directives 94/47/EC, 97/7/EC and 2002/65/EC, a linked credit agreement shares the fate of the withdrawn contract on the sale of goods or the provision of services anyway. Article 14(1) of the proposal would however improve the consumer's situation under the Doorstep Selling Directive 85/577/EEC where no such rule exists yet.[30] Moreover, the open wording of Article 14(1) would seem to apply to rights of withdrawal stemming exclusively from national law as well.

The crucial issue is of course the notion of "linked credit agreement". Under Article 3 lit. l of the latest proposal, "linked credit agreement" means a credit agreement where (i) the credit in question serves exclusively to finance an agreement concerning the supply of goods or the provision of a service and (ii) those two agreements form from an objective point of view a commercial unit; a commercial unit is involved where the supplier or service provider himself finances the credit for the consumer or, if it is financed by a third party, if the creditor uses the services of the supplier or service provider in connection with the conclusion, or preparation, of the credit agreement, or if the credit agreement makes reference to the specific goods or services to be financed with the credit. This definition is far broader than the one used by Article 11(2) of Directive 87/102/EEC. Its structure was proposed by the European Parliament.[31] However, in contrast to the Parliament's proposal, the definition requires that the credit serves *exclusively* to finance the other contract, and it also specifies the term "commercial unit" in an exhaustive way.

The legal consequence is not entirely clear. Under Article 14(1), the consumer shall not be bound by linked credit agreement. He may, however, wish to uphold the credit agreement. For example, he may have obtained a very cheap credit that was meant to promote the sale of a certain product, for example, a 0% loan. The wording of Article 14(1) appears to suggest that the linked credit agreement is not necessarily void but that the creditor may remain bound to his agreement.

2. Withdrawal of the credit contract

The European Parliament has also proposed to make the financed contract dependent from the credit agreement.[32] This idea was explicitly rejected by the Commission.[33] Thus, under the new Directive a consumer who has purchased a good that was financed by a third party will be able to cancel the credit contract but retain the purchased good. This may be useful if the consumer finds a cheaper credit than the one that was linked to the purchase. In contrast, it will be impossible to avoid the whole financed contract if the latter does not include a right to withdrawal itself; which implies that the consumer will have to find another creditor in order to substitute the credit contract that was originally linked to the purchase contract.

3. Remedies against the creditor of a linked credit agreement

Article 14(2) takes up the old Article 11(2) of Directive 87/102/EEC with identical wording. The narrow requirements that have made the old rule hardly ever relevant are maintained. Notably, the relatively broad new notion of "linked credit agreements" is not transferred into Article 14(2). Instead, the provision upholds the precondition of exclusivity that the Commission had proposed to drop, in an earlier document.[34] Furthermore, Article 14(2) maintains the old uncertainty connected with its second sentence according to which the Member States shall determine to what extent and under what conditions these remedies shall be exercisable.

4. No impact on rules on joint and several liability

According to Article 14(3), the new rules shall be without prejudice to national rules under which the creditor and the supplier of a linked transaction are jointly and severally liable. This rule replaces Article 19(2) of the first proposal with which the Commission had intended to introduce joint and several liability in cases where the supplier has acted as an intermediary for the creditor,[35] a rule that is known from English law[36] but that is far more stringent than the law of most other Member States. Article 14(3) reflects a compromise that allows the UK to maintain its strict legislation.

E. Maximum Harmonisation, Mutual Recognition and Private International Law

I. Introduction

The Commission is convinced that the current non-existence of a European consumer credit market finds its ground in the diversity of the Member States' consumer credit laws.[37] It therefore wishes the new Consumer Credit Directive to become a maximum harmonisation Directive that disallows more stringent national legislation;[38] an objective that has been heavily criticised by lawyers, and in particular consumer advocates, from Member States that provide for a higher level of

[29] See Article 16(1) of the position of the European Parliament of 20/4/2004, Doc. P5_TC1-COD(2002)0222.

[30] See *supra*, C.

[31] See Article 2 lit. n of the position of the European Parliament of 20 April 2004, *supra* note 31.

[32] See Article 16(2) of the position of the European Parliament of 20 April 2004, *supra* note 31: "Where the consumer has withdrawn his acceptance of a consumer credit agreement, he shall no longer be bound by his acceptance of any agreement on the supply of goods or provision of another service linked to that consumer credit agreement".

[33] See COM(2004) 747 final, at 5.

[34] See COM(95) 117 final, at 69.

[35] See also COM(2002) 443 final, at 22.

[36] Sec. 75 of the Consumer Credit Act 1974.

[37] See COM(2002) 443 final, at 3 *et seqq*. For critical comments on this view that has never been proven or undermined by empirical evidence, see for example, *A. Danco*, Die Novellierung der Verbraucherkreditrichtlinie, Wertpapier-Mitteilungen (WM) 2003, 853, at 859; *M. Hoffmann*, Der Diskussionsstand zur Reform der Verbraucherkreditrichtlinie, Zeitschrift für Bank- und Kapitalmarktsrecht (BKR) 2004, 308, at 310. Doubts have already been expressed when Directive 87/102/EEC was adopted, see *Scholz* (*supra* note 13), at 731.

[38] See, for example, COM(2005) 483 final, at 2 *et seq*.

consumer protection.[39] Since a strict maximum harmonisation approach also met the resistance of the European Parliament and the Member States, the Commission now proposes a combination of maximum harmonisation and mutual recognition, whereby Article 21(1) deals with maximum harmonisation, and Article 21(2) with mutual recognition.

II. The concepts of maximum harmonisation and mutual recognition

Article 21(1) of the latest proposal expresses the aim of maximum harmonisation by prohibiting other provisions than those laid down by the Directive "insofar as this Directive contains harmonised provisions". The Commission explains that issues that are not addressed by the Directive remain in the competence of the Member States.[40] The most important example is probably usury where the policies of the Member States differ greatly. However, the scope of Article 21(1) is not entirely clear.[41]

The concept of mutual recognition reflects that the proposal gives leeway to national implementation, mainly due to existing heterogeneity as regards national markets or national legislation. The Commission states the examples of national rules on early repayment or overrunning. However, it also wishes to ensure that the degree of flexibility provided for national implementation within the limits of the Directive does not contribute to raise additional barriers to the single market in consumer credit.[42] The concept of mutual recognition is laid down in Article 21(2) of the proposal:

> "When implementing and applying Article 5(1), (2) and (5), Article 13, Article 14(1) and (2), Articles 15, 17, 19 and 20, and without prejudice to necessary and proportionate measures which Member States may take on grounds of public policy, Member States shall not restrict the activities of creditors established in another Member State and operating within their territory in accordance with this Directive either through freedom of establishment or free provision of services."

What this really means becomes apparent from the Commission's explanations. The principle of mutual recognition does not only apply to the admission, or supervision, of creditors as service providers but predominantly impacts on consumer protection in private international law. Under the current regime of Article 5 of the Rome Convention on the Law Applicable to Contractual Obligations,[43] the choice of a law by the parties to the contract may not deprive a consumer of the protection of the mandatory provisions of the law of the country of the consumer's habitual residence, and in the absence of a choice of law, a consumer contract is governed by the law of the country of the consumer's habitual residence. Whilst the situation of isolated credit contracts is still subject to controversial debate,[44] linked credit agreements clearly come under Article 5 of the Rome Convention. Thus, the so-called "passive" consumer who was in some way approached by the creditor in his home country[45] may not lose the protection afforded to him by the mandatory consumer protection laws of his home country, and the consumer credit laws of the Member States are usually mandatory.[46]

With a view to the principle of mutual recognition, the Commission states:

> "In the area of contract law, this could lead to another result than foreseen by Article 5 of the Rome Convention. In an Article 5 situation, which would lead to the application of the law of the country where the consumer has his habitual residence, this latter law may establish standards that, in relation to the equivalent standards applicable in an incoming creditor's home country, restrict that creditors activity, for instance by being higher (or different) than his home country standards. In that case, if areas mentioned in the mutual recognition clause are concerned, the host Member State has to ensure that the said standards would not apply to the contract. Either the law chosen by the parties, or, in the absence of such a choice, the requirements of the creditor's home country law would continue to apply."

Thus, the principle of mutual recognition would turn the rules of private international law on their head. Article 21(2) of the Commission's latest proposal for a new Consumer Credit Directive deprives the consumer of the protection that private international law has offered until now.[47] And, to make bad things worse, the creditor is not even obliged to inform the consumer about this situation.[48] Public policy reasons that might allow Member States not to accept the rules of another Member State on linked credit agreements are difficult to see.

Remarkably, the DG Internal Market makes here an isolated attempt to change the rules on private international law in the specific field of consumer credit contracts, whilst the DG Justice, Freedom and Security has tabled a proposal for a Regulation on the law applicable to contractual obligations (Rome I)[49] and its modernisation that is meant to modernise

---

39 For an account with a view to guarantees contracts under the first and second proposal, see *P. Rott*, Consumer Guarantees in the Future Consumer Credit Directive: Mandatory Ban on Consumer Protection?, European Review of Private Law 2005, 383 *et seqq*.

40 COM(2005) 483 final, at 7.

41 For a more detailed analysis of the distinction between issues within and without the scope of application of a Directive, see *P. Rott*, Minimum harmonisation for the completion of the internal market? – The example of Directive 1999/44/EC, Common Market Law Review 40 (2003), 1107, at 1115 f.; *id.* (*supra* note 39), at 399 *et seqq*.

42 COM(2005) 483 final, at 7 *et seq*.

43 Consolidated version in OJ 1998, C 27, at 34.

44 See, for example, *K. Felke*, Internationale Konsumentenkredite: Sonderanknüpfung des VerbrKrG über Art. 34 EGBGB?, Recht der Internationalen Wirtschaft (RIW) 2001, 30, at 31, with further references.

45 For details, see *Reich & Micklitz* (*supra* note 3), at 457 *et seqq*.

46 For critical comments on the overprotection of the German consumer, see *Ritz* (*supra* note 19), at 141 *et seq*.

47 For critical comments on the application of the principle of mutual recognition in consumer contract law, see *P. Rott*, Verbraucherschutz im Internationalen Verfahrens- und Privatrecht, in: *H.-W. Micklitz* (ed.), Verbraucherrecht in Deutschland – Stand und Perspektiven (Nomos, Baden-Baden, 2005), 355, at 378 *et seq*.

48 On the obligation to inform about the applicable law, see *Rott* (*supra* note 47), at 379 *et seq*. A recent provision that obliges the trader to inform the consumer on the law that is applicable to the contract is Article 3(1) no. 3 lit. e of Directive 2002/65/EC on the Distance Marketing of Financial Services. See *P. Rott*, Die Umsetzung der Richtlinie über den Fernabsatz von Finanzdienstleistungen im deutschen Recht, Betriebs-Berater 2005, 53, at 57.

49 COM(2005) 650 final.

the Rome Convention of 1980 and to harmonise and consolidate the rules on private international law within the EC and that opts, in its Article 5, for a strict application of the consumer home country principle in consumer contracts. They argue as follows:

> "There are two possible solutions (...) – full application of the law applicable to the professional or the law applicable to the consumer – only the latter would be truly compatible with the high level of protection for the consumer demanded by the Treaty. It also seems fair in economic terms: a consumer will make cross-border purchases only occasionally whereas most traders operating across borders will be able to spread the cost of learning about one or more legal systems over a large range of transactions."[50]

III. The classification of Article 14 of the Commission's proposal

The classification of Article 14 of the latest proposal is difficult. Article 21(2) on mutual recognition explicitly mentions Article 14(1) and (2). However, some elements of Article 14(1) and (2) might also qualify for maximum harmonisation under Article 21(1). Therefore, several elements of Article 14 might have to be distinguished.

1. Article 14(1)

As for Article 14(1), the consequences of the withdrawal of the linked contract for the credit agreement are regulated in a precise manner. It therefore qualifies for maximum harmonisation. At the same time, Article 21(2) on mutual recognition mentions Article 14(1), which implies that the Commission sees some leeway of the Member States in implementing Article 14(1). What kind of leeway this might be is entirely unclear. Admittedly, the rights of withdrawal that can be exercised appear to be subject to national law (unless, of course, they result from the implementation of another EC Directive, such as Directives 85/577/EEC, 94/47/EC, 97/7/EC or 2002/65/EC). However, Article 21(2) on consumer credit law cannot possibly be meant to impact on the private international law of rights of withdrawal in other fields of law.

2. Article 14(2)

With a view to Article 14(2), one may have to distinguish the four aspects of linked credit agreements mentioned above, i.e. the scope of application, the consumer's rights, the subsidiarity of the creditor's liability, and formalities and procedural aspects.

Article 14(2) sentence 2 of the proposal offers the Member States some discretion. It therefore comes under the principle of mutual recognition, which means that the creditor is merely bound to the extent and the conditions under which the consumer's remedies shall be exercisable as determined by his own Member State. This concerns the consumer's rights as well as formalities and procedural aspects.

In contrast, the rules laid down in Article 14(2) sentence 1 seem to qualify for maximum harmonisation. In this respect, it may be helpful to look at the case of *El Corte Inglés*. In his Opinion, A.G. Lenz said this:

> "As regards Article 11(2) (...) the Member States have no discretion as to whether the consumer is to be enabled to pursue remedies against the grantor of credit. Member States are intended to have a free rein only with regard to how this takes place or, in other words, with regard to the actual configuration from the technical legal point of view of the legal position (consumer claim, defence, etc). It appears from the context of the provisions of the directive that the basic grant of a legal position for the consumer is to be governed by Community law. (...) Consequently, the basic question of granting protective rights for consumers is not left to the discretion of the Member States. (...) The discretion afforded to the Member States by the second sentence of Article 11(2) with regard to what extent and under what conditions the remedies are to be exercisable is therefore limited."[51]

Although A.G. Lenz gave his Opinion in an entirely different context, namely on the issue of a potential direct effect of Article 11(2) of Directive 87/102/EEC, Article 14(2) s. 1 of the latest proposal is likely to be regarded as subject to a harmonised provision since it contains a number of clear and unequivocal rules as far as the definition, or description, of a linked credit agreement is concerned.

The fact that Article 14(3) allows Member States to uphold rules on joint and several liability does not affect this analysis since this provision does not necessarily allow for national provisions that are somewhere in between the proposed Article 14(2) and the creditor's and trader's joint and several liability. This may be best demonstrated by pointing at the Product Liability Directive 85/374/EEC. The Product Liability Directive has been judged by the ECJ to be a maximum harmonisation Directive.[52] In *Commission v. France*, the ECJ had to decide, amongst others, on provisions of French law that deviated from Article 7 lit. d and e of the Directive.[53] Although Article 15 of the Directive explicitly made a particular exception possible, the ECJ held that Member States could only use this particular exception but were not authorised to alter the conditions under which that exemption is applied.[54] The situation of Article 14 of the proposed Consumer Credit Directive appears to be equivalent: Article 14(3) allows for national rules on joint and several liability but apart from this exception Article 14 is a harmonised provision for linked transactions that cannot be derogated from in national implementation measures.

---

50 COM(2005) 650 final, at 6.

51 *A.G. Lenz*, Opinion of 7 December 1995 – C-192/94 – *El Corte Inglés SA* v *Cristina Blázquez Rivero*, [1996] ECR I-1281, para. 11 *et seqq*.

52 See ECJ 25 April 2002 – C-52/00 – *Commission* v *France*, [2002] ECR I-3827 = [2002] EuLF (E) 158, para. 24; and ECJ 25 April 2002 – C-154/00 *Commission* v *Greece*, [2002] ECR I-3879 = [2002] EuLF (E) 161, para. 20.

53 Under Article 7(d) of the Directive the producer is not liable if he proves that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or under Article 7(e) if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.

54 ECJ 25 April 2002 – C-52/00 – *Commission* v *France* (*supra* note 52), para. 47.

3. Article 14(3)

Under Article 14(3), Article 14(1) and (2) are without prejudice to any national rules according to which a creditor shall be jointly and severally liable for any claim the consumer may have against the supplier where the purchase of goods or services from the supplier has been financed by a credit agreement.

The scope of Article 14(3) covers two aspects. First, it allows Member States to opt for a system of joint and several liability in contrast to a system of subsidiary liability. Thus, it allows Member States to deviate from Article 14(2) lit. e. Second, it relates to "any claim" and therefore offers the opportunity to allow the consumer to claim damages from the creditor for any breach of the financed contract; an opportunity that is covered by Article 14(2) sentence 2 anyway.

In contrast, all the other preconditions of liability, and in particular the exclusivity requirement of Article 14(2) sentence 1 lit. b, would remain untouched. One may at least suspect that this is the interpretation that the ECJ might take on this clause.

4. The consequences for the financed contract of the withdrawal of the credit contract

The question as to whether or not the withdrawal of the credit contract also renders the linked purchase contract void, as proposed by the European Parliament, appears to remain completely under national competence since Article 14 does not regulate on this issue. The principle of mutual recognition does not apply either.

5. Credit cards

Credit card financed contracts continue not to come under the Consumer Credit Directive either so that neither the principle of maximum harmonisation nor the principle of mutual recognition will apply. Their treatment remains within the competence of the Member States.

6. Conclusion

Under Article 14 of the latest proposal for a new Consumer Credit Directive, the Member States will be prohibited to extend the scope of application of the creditor's liability, of any kind, for non-performance or bad performance of a connected sales contract, beyond Article 14(2) lit. b, which will make the rule rather inefficient in itself. In contrast, they will remain free to determine the rights that the consumer can exercise against the trader, the formalities and procedural aspects, and also, through Article 14(3), to opt for subsidiary liability or joint and several liability. In cross-border contracts, however, Member States will not be allowed to protect their "passive" consumers against a more restrictive system of the Member State where the creditor is located since this creditor will be protected by the principle of mutual recognition as enshrined in Article 21(2).

F. Consequences on German Law

The potential consequences on national rules of linked contracts shall be illustrated with a view to German consumer credit law. Germany has introduced one of the systems that the Commission has characterised, in its first proposal for a new Consumer Credit Directive, as an "independent system".[55] This means that Germany has neither simply adopted Article 11(2) of Directive 87/102/EEC nor does it follow a system of joint and several liability. Instead, Germany allows a consumer, in case of a linked credit agreement, to raise all the objections that he has against the trader against the creditor. In contrast to a system of joint and several liability, a consumer cannot claim reimbursement from the creditor for payments he has already made or for damages the trader is liable for.

Germany has adopted a far broader definition of a linked credit agreement.[56] Under Para. 358(3) BGB (German Civil Code), a contract for the sale of goods or services is linked to a consumer credit contract if the credit serves wholly or in part to finance the other contract and both contracts form an economic unit. An economic unit is to be assumed, in particular, if the trader himself finances the consumer's counter-performance or, in the event of a third person financing the sales contract, if the creditor uses the trader's services in preparing or concluding the consumer loan contract. According to the German courts, the consumer perspective is crucial: If the trader and the creditor present themselves as a unit, the two contracts are linked. The courts do not require a pre-existing agreement between the trader and the creditor but also apply Para. 358(3) BGB to factual co-operation.[57] A long-standing relationship between the trader and the creditor is not necessary either.[58] Furthermore, Para. 359 BGB does not require the consumer to take action against the trader first. Instead, he can raise objections from his relationship with the trader immediately against the creditor.

German law therefore represents a system that is not outside the scope of the Directive but that is far more stringent than Article 14(2) of the latest proposal[59] and that does not comply fully with Article 14(3) either. Thus, Germany would have to reduce the level of consumer protection quite drastically by narrowing down the definition of a linked agreement for both the purposes of Article 14(1) and (2)[60] and by making the creditor's liability merely subsidiary to the trader's liability. Alternatively, Germany would have to introduce a UK-type system of joint and several liability that is clearly more stringent than the current system and that has always been rejected by German lawyers.[61]

---

55 COM(2002) 443 final, at 22, fn. 23.

56 Although Germany, supported by the German banks, was one of the leading countries to block more protective legislation at EC level, see *Delbrück* (*supra* note 1), at 24 *et seqq*.; *U. Franz*, Der Einwendungsdurchgriff gemäß § 9 Absatz 3 Verbraucherkreditgesetz (Nomos, Baden-Baden, 1996), at 49 *et seq*.

57 See BGH (DE), Neue Juristische Wochenschrift (NJW) 2003, 2821.

58 See BGH (DE), NJW 1971, 2303.

59 See also *Scholz* (*supra* note 13), at 733; *Grundmann* (*supra* note 9), at 677. *Wolf* (*supra* note 22), at 974 *et seqq*., has even argued that this definition is in breach of the EC Treaty, free movement of services and free movement of capital because it deters foreign creditors from entering the German market.

60 See also *Danco* (*supra* note 37), at 860.

61 For critical comments on that option, see *Danco* (*supra* note 37), at 855 *et seq*.

G. Conclusion

The Commission's latest proposal on linked credit agreements is almost cynical. In Article 14(2) of this proposal, the Commission copies out Article 11(2) of Directive 87/102/EEC, a provision that it held itself to be dissatisfactory and insufficient right from the start and that it has evaluated to be ineffective in its 1995 report. The Commission then proposes to adopt a maximum harmonisation approach towards the preconditions of the subsidiary liability of the creditor, prohibiting the Member States to maintain or adopt legislation that is more protective than the ineffective provision of the Directive, with the exception for UK law as enshrined in Article 14(3). The Member States shall only retain their competences with regard to the extent of the consumer's rights under these narrow preconditions, and with regard to the formalities of their exercising. And even in this respect, the principle of mutual recognition of Article 21(2) shall deprive consumers from a more protective Member State of their national protection measures if the creditor is situated in a Member State with less protective rules. Ironically, the Commission claims to adhere to Article 95(3) EC, according to which the Commission, in its proposals envisaged in Article 95(1) concerning consumer protection, is to take as a base a high level of protection. If this latter requirement is taken serious, Article 14(2) of the proposal is in breach of primary EC law, and it is certainly not suited to increase consumer confidence in cross-border consumer credit contracts. At the very least, the principle of mutual recognition should be deleted from the proposal, and the regulation of consumer protection in private international law should be left to the experts in this field, and to an instrument that is specifically designed to deal with this admittedly complicated issue, which is the future Rome I Regulation.

LAW OF THE EUROPEAN ORGANISATIONS

ECJ 15 June 2006 – C-393/04 and C-41/05 – Air Liquide Industries Belgium SA v Ville de Seraing (C-393/04), Province de Liège (C-41/05)
Article 88(3) EC – State aid – Definition – Exemption from municipal and provincial taxes – Charges having equivalent effect – Internal taxation

1. The exemption from a municipal or provincial tax on motive force granted solely in respect of motors used in natural gas stations, to the exclusion of motors used for other industrial gases, may be regarded as State aid within the meaning of Article 87 EC. It is for the referring courts to establish whether the conditions relating to the existence of State aid are met.

2. The fact that a tax exemption, such as that at issue in the main proceedings, may be unlawful in the light of Community law on State aid does not affect the legality of the tax itself, so that undertakings liable to pay such a tax cannot rely before national courts on the argument that the exemption was unlawful, in order to avoid payment of the tax or to obtain reimbursement of it.

3. A tax on motive force, levied in particular on motors used for transporting industrial gas through very high pressure pipes, does not constitute a charge having equivalent effect within the meaning of Article 25 EC.

4. A tax on motive force, levied in particular on motors used for transporting industrial gas through very high pressure pipes, does not constitute discriminatory internal taxation for the purposes of Article 90 EC.

Facts: Air Liquide Industries Belgium SA ('Air Liquide') is an international group which specialises in the production and transport of industrial and medicinal gases and also provides associated services. In the context of its activities, Air Liquide undertakes inter alia *the transport of industrial gas from the various production facilities in Belgium, France and the Netherlands to its customers established in those three States. This transport is carried out, in the said States, using a network of very high pressure pipelines allowing, in particular, major consumers located in the steel- and chemical-producing areas to be supplied. To supply its network of pipelines, Air Liquide operates an industrial gas production unit in the territory of the ville de Seraing (BE), in the province de Liège (BE). That unit includes a gas compression station.*

On 28 June 2000, Air Liquide received from the municipality of Seraing a demand for payment by way of tax on motive force relating to its activities in 1999. On 20 April 2000 and 9 May 2001, the province de Liège sent Air Liquide demands for payment in respect of the 1999 tax year the 2000 tax year, by way of tax on motive force. Air Liquide applied to the respective authorities to have the demands withdrawn.

Since those applications were rejected, Air Liquide brought separate proceedings before the Court of First Instance, Liège (FR). In the context of these actions, it claimed that the tax on motive force was discriminatory, in particular in view of the fact that undertakings transporting natural gas benefited from an exemption, and that that tax was incompatible with the EC Treaty.

By judgment of 28 November 2002, the Court of First Instance, Liège, dismissed the first action as unfounded. Air Liquide appealed against that judgment to the Court of Appeal, Liège, which decided to stay the proceedings and to refer the matter to the Court of Justice for a preliminary ruling. With regard to the second proceedings, the Court of First Instance, Liège, decided to stay the proceedings and to refer the matter to the Court of Justice for a preliminary ruling. By order of 21 July 2005 of the President of the Second Chamber of the Court both cases were joined for the purposes of the oral procedure and the judgment.