



# The legal framework in Belgium

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# Introduction

**I.Setting the scene = why do we need 'consumer (credit) law'?**

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# Setting the scene

- **Consumer Law**
  - **Consumer = market participant**
  - **Definition:**
    - *Sensu lato*: to safeguard each market participant's freedom of behavior, to afford each market participant the possibility to freely conclude contracts
    - *Sensu stricto*: rules applicable to B2C transactions
  - **Open market economy with free competition and (formal) freedom of contract**
  - **Also need for compensatory rules (cf. consumer's weaker position)**
    1. Duties to inform (substantive freedom of contract)
    2. Right of withdrawal (substantive freedom of contract)
    3. Substantive contractual justice

# Setting the scene (II)

- **Formal contractual freedom**
  - contractual freedom & competition law
- **Substantive contractual freedom**
  - (pre-)contr. information duties
  - Cooling-off periods
- **Formal contractual justice: 'Quid pro Quo'**
- **Substantive contractual justice**
  - Abuse of rights
  - Unfair terms (judicial review)
  - Usury prohibition, IRR

# Setting the scene (III)

- **Consumer**

- **Scope of application *ratione personae*: "any natural person who is acting for purposes which are outside his trade, business, craft or profession"** (art. 2, a) Directive 2005/29/EC; art. 3, a) Directive 2008/48/EC; etc.)
- **criterion (I): natural person**
- **criterion (II): objective – goal**

- **Quid SME's?**

- ≠ 'consumer'
- Expanding the level of protection
  - Unfair B2B-commercial practices

# Setting the scene (IV)

- **Consumer image: "an average consumer who is reasonably well-informed and reasonably observant and circumspect"**

(§ 37 ECJ C-210/96, *Gut Springenheide*)

- Internal market – unfair B2C commercial practices  
→ INFO
- substantive measures – 'distance selling'  
→ WEAKER POSITION

# Setting the scene (V)

- **Financial capability:**

- Knowledge
- Attitude
- Behaviour



- **Why do we need consumer protection?**

- Lack of bargaining power
- Level of knowledge



- **Preferred solution:** ↗ consumer's knowledge = inform the consumer



# Setting the scene (VI)

- **Expanding consumer protection**
- **Multilayered consumer image**
- **➤ Substantive protection in contract law**

also B2B:

- ➔ **Belgium:**
  - ➔ **B2B Unfair Commercial Practices;**
  - ➔ **SME Consumer Credit law**

# Consequence = Multilayered legal system



GENERAL  
CONTRACT  
LAW

GENERAL  
CREDIT LAW

GENERAL  
CONSUMENT  
CONTRACT  
LAW

CONSUMER  
CREDIT LAW

B2C-  
MORTGAGE  
CREDIT LAW

# Quid 'Consumer Credit'?

- **Consumer Credit Law *sensu lato***
  - scope of application: Directive 2008/48/EC + Directive 2014/17/EU
- **Consumer Credit Law *sensu stricto***
  - Directive 2008/48/EC (*see next slides*)

# Code of Economic Law

- Step-by-step
- General Principle: codification of existing rules
- Overview
  - Book I.: *'Definitions'*
    - Art. I.1 CEL: general definitions (a.o. 'consumer');
    - Art. I.9 CEL: definitions relating to Book VII.
  - Book VI.: *'Market practices & consumer protection'*
    - Unfair contract terms, unfair commercial practices; prohibition on Joint Offers
  - Book VII.: *'Payment- and credit services'*
    - Paymentservices & Basic Banking Services
    - Consumer Credit s.s. (1 April 2015);
    - Mortgage Credit (1 April 2015);
  - Book XV.: *'Prudential Supervision'*
  - Book XVI.: *'FOS'*
- *De lege ferenda*: transposition Directive 2014/17/EU
  - before 21 March 2016

Access to the market – 1 July 2015

# The Belgian Legal Framework

- Burden of Proof
- Rules on Responsible Lending
- Prohibition on Joint Offers
- Substantive Measures
- Revision of contract?

# Burden of Proof

Art. VII.2, § 4, al 2 CEL:

*"Onverminderd de bepalingen van artikelen VII.54 zijn elk van de **bedingen en voorwaarden** of de combinaties van bedingen en voorwaarden verboden en nietig van rechtswege voor zover die ertoe strekken de **bewijslast** voor de naleving van **alle of een deel van de in dit boek bedoelde verplichtingen** die rusten op de betalingsdienstaanbieder, de kredietgever of de kredietbemiddelaar, op de betalingsdienstgebruiker of de consument te leggen. Het komt aan de kredietgever toe **het bewijs** te leveren dat hij heeft voldaan aan de verplichtingen **inzake kredietwaardigheidsbeoordeling**, bedoeld in de artikelen VII.69, VII.75 en VII.77, van de consument en desgevallend van de steller van een persoonlijke zekerheid"*

# Burden of Proof (II)

## 1) General Principle

- Burden of Proof lies with claimant
- CCA: burden of proof lies with consumer, however the creditor could be asked to cooperate (cf. Cass. 10 December 2004)

## 2) Book VII. CEL

- ➔ Burden of Proof lies with Creditor / Credit Intermediary
  - ➔ rules on responsible lending
  - ➔ prohibition of Joint Offers
- ➔ + Unfair contract term
  - ➔ *ipso iure* void

# Responsible Lending

- Advertising
- (Pre)contractual Information
- Advice
- Prohibition to enter into a credit agreement



# Responsible Lending (II)

## Advertising

- Art. VII.64, § 2 CEL: warning has to be included in each advertising

*"Watch out, borrowing money also costs money"*

# Prohibition on doorstep-selling (art. VII.67 CEL)

Doorstep-selling?

1° Visiting the consumer at home, his official residence or at work, without a prior written request by the consumer

2° Approaching the consumer to make an appointment for a house-call

→ CCA: *'calling' the consumer*

→ Nowadays: *'approaching'*

3° Sending him a credit instrument, credit offer, payment instrument without his written prior request

4° Offering credit or approaching the consumer on public markets/places

5° Organising field trips

# Prohibitions on price-reductions

Art. VII.68 CEL stipulates:

*"Het is de verkoper van goederen of diensten verboden om prijsverminderingen te koppelen aan het opnemen van krediet, het gebruik van een kredietopening of van een hiermee verbonden kaart of betaalinstrument"*

→ Vendor of goods and services

→ E.g.: -10% on washing machine if the consumer buys the product on credit

# Precontractual Information Duties

- Precontractual Information = SECCI (Standard Information)
- Active investigation by the creditor
- Questionnaire
- Advice
- Creditworthiness Check
- Prohibition to enter into a credit agreement

# Active Investigation

- **Active investigation, but no detective**
  - art. VII.69, § 1. CEL
  - Consumer: has to answer + to be in good faith
- **Standard questionnaire**
  - creditor
  - cf. burden of proof
  - keep the document as long as the credit is not completely repaid

- **Providing the most adequate credit agreement**
  - not sending the consumer to other creditors
  - *per se* obligation of the creditor
  - not compliant with Directive 2008/48/EC

# Creditworthiness check



**Creditor (art. VII.77, § 1, al 1-2 CEL)**

- prior to signing the credit agreement
- of whom? The consumer and the guarantor
- checking the public database (=obligation of result)
  - each year

# Prohibition to enter into credit agreement

- Art. VII.77, § 1 CEL: prohibition to enter into a credit agreement  
→ obligation of means
- Art. VII.77, § 2, al 2 CEL: "Wanneer er in hoofde van een consument een wanbetaling(en) geregistreerd staat in de Centrale voor een totaal achterstallig bedrag van meer dan 1.000 euro in het kader van een consumentenkrediet die niet werd afgelost dan kan een kredietgever geen nieuwe kredietovereenkomst sluiten. In de andere gevallen van een **niet-afgeloste wanbetaling** kan een kredietgever slechts een nieuwe kredietovereenkomst sluiten mits een **bijzondere motivering** in het kredietdossier"  
  
→ absolute prohibition in case of default > 1.000 EUR → obligation of result!  
  
→ if default = of < 1.000 EUR: specific obligation to motify decision  
→ obligation of means



# Joint Offers

- **Prohibition on Joint Offers for financial services**

→ ECJ C-265/12, *Citroën Belux NV v. Federatie voor Verzekerings- en Financiële Tussenpersonen (FVF)*

- **Burden of Proof lies with the creditor/credit intermediary**

# Substantive Measures

*"The need to control moneylending transactions is as old as our civilisation and I know of no legal system that has not imposed such controls"*

(Lord Scott of Foscote, § 169 *Wilson v First County Trust Ltd (No 2)* )

- **Substantive justice in consumer credit law**
  - Zeroing Date
  - Usury prohibition
  - Compound interest
  - max. duration
  - IRR

# Zeroing Date

- **Term within which the credit must be repaid**
- ***ratio legis*: fighting over-indebtedness**

# Zeroing Date

- **Usury Prohibition**
  - obj.: 'normal market interest' & 'risk coverage'
  - subj.: abuse of weaknesses... (deliberate)
- **Abstract Interest Rate Caps**
  - abstract limits: market study?
  - quid risk coverage / *"The Poor pay More"*?
- **Multilayered Consumer Image**
- **Selective IRC**

# Revising a credit agreement?

*"But ships are but boards, sailors but men:  
there be land-rats and water-rats, water-thieves and land-thieves,  
I mean pirates,  
and then there is the peril of waters and rocks"*

(W. SHAKESPEARE, *The Merchant of Venice*)

**I. Judicial Powers**

**II. Based upon the parties?**

**III. Early repayment**

**IV. Imprevisión**

# Revising a credit agreement? (II)

## **"Force majeure"**

- *"practical impossibility"*
- permanent or temporary?
- *"Genera non pereunt"*

# Revising a credit agreement? (III)

## **"Imprevision"**

- *"pacta sunt servanda"*
  - monetary nominalism
- Imprevision
  - D: Störung der Geschäftsgrundlage
    - Äquivalenzprinzip:  
*"ein teurer Kredit dürfe somit auch teuer bleiben, während ein günstiger auch günstig bleiben müsse. Die Zinskonditionen dürfen nicht in ihrem Grundfuge verändert werden"*

# Final remarks: some thoughts for the future

- **Substantive measures: "yes, but..."**
- **General considerations:**
  1. Contractual Freedom: Justified Review
  2. Multilayered Legal System
  3. Be selective!
  4. *How to guide behavior?*



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