

Case Volksbank România: Limits of the full harmonization approach of the Consumer Credit Directive

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I. Introduction

European Directives in the field of consumer protection can be based on minimum harmonization or on full (i.e. maximum) harmonization. In the case of minimum harmonization, Member States retain the possibility to preserve and even introduce measures which offer additional protection to consumers. In the case of full harmonization, they are not allowed to do so for matters falling within the harmonized field of the law¹. Whereas the 1986 Consumer Credit Directive² was based on the principle of minimum harmonization (art. 15)³, the 2008 Consumer Credit Directive⁴ (CCD) is based on the principle of full harmonization, or - as many say - *targeted* full harmonization⁵. *Targeted* full harmonization is not to be considered a different harmonization technique. The notion of *targeted* full harmonization is used to illustrate that the CCD *only* harmonizes certain aspects or core areas of consumer credit law (art. 22). Other aspects are left to the Member States. The shift from minimum to full harmonization characterizes consumer law in the 21st century. Recent Directives on consumer protection, such as the 2005 Unfair Commercial Practices Directive⁶ and the 2011 Consumer Rights Directive⁷, have all been based on full harmonization.

¹ Mak, V. (2009). Review of the Consumer Acquis: Towards Full Harmonization?. *European Review of Private Law* Volume 17 (Issue 1), p. 58-59; Twigg-Flesner, C. (2007). No sense of purpose or direction? The modernization of European Consumer Law. *European Review of Contract Law* Volume 3 (Issue 2), p. 204.

² Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 12 February 1987, 42/48.

³ Rott, P. (2009). Consumer Credit. In Micklitz, Reich & Rott (eds.), *Understanding EU Consumer Law*, Antwerp, Intersentia, p. 182.

⁴ 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, OJ L 22 May 2008, 133/66.

⁵ De Muyck, M. (2011). *Consumentenkrediet: de wet van 13 juni 2010 gewikt en gewogen*. Cahier RABG. Brussels. Larcier, p. 7; Grundmann, S. & Hollering, J. (2008). EC Financial Services and Contract Law – Developments 2005-2007. *European Review of Contract Law* Volume 4 (Issue 1), p. 49; Terryn, E. & Vannerom, J. (2009). De implicaties van de nieuwe Richtlijn consumentenkrediet voor het Belgisch recht. In *Recht in beweging* (pp. 19-49), Antwerpen. Maklu, p. 22 ff.

⁶ Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 11 June 2005, 149/22.

⁷ Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and the Council, OJ L 22 December 2011, 304/64.

In its judgment of 12 July 2012⁸, the European Court of Justice acknowledges the limits of (targeted) full harmonization. More specifically, it states that the full harmonization approach, used in the CCD, 1) does not retain Member States from applying the rules that are incorporated in the CCD to credit agreements not falling under the scope of the CCD and 2) does not prevent Member States from offering additional protection with regard to matters not specifically covered by the harmonization. However, additional protection measures, even if they aren't contrary to the CCD, need to be compatible with the principles of free movement, incorporated in the Treaty on the Functioning of the European Union (TFEU).

II. Minimum, full and targeted full harmonization

a. Minimum harmonization and the fragmentation of the law

In the case of minimum harmonization, European Directives only determine the minimum level of protection that must be offered to consumers. As mentioned earlier, Member States, when implementing the Directives, retain the possibility to maintain and even introduce measures which offer additional protection to consumers⁹. Since in the past, many Member States have actually used the possibility to offer consumers additional protection¹⁰, minimum harmonization often implies that different rules apply in the Member States. This has also been the case for consumer credit legislation. The main conclusion from a study of the European Commission on the implementation of the 1986 Directive was that many Member States had made considerable use of the minimum clause and strengthened consumer protection by going beyond the directive during the transposition process¹¹. Therefore, consumer credit legislation in the Member States was quite different (so-called fragmentation of the law).

The European Commission considers the fragmentation of the law an obstacle to the realization of the internal market. More specifically, the Commission argues that disparities between the laws of the Member States increase compliance costs to traders wishing to engage in the cross-border sale of goods or provision of services. They also undermine consumer confidence in the internal market¹². That is why, according to the Commission, the minimum harmonization approach has to be abandoned and replaced by full harmonization, for instance with regard to consumer credit legislation.

⁸ C.J. 12 July 2012, Case C-602/10, *SC Volksbank România SA v. Autoritatea Națională pentru Protecția Consumatorilor – Comisariatul Județean pentru Protecția Consumatorilor Călărași (CJPC)*, <http://curia.europa.eu>

⁹ Mak, V. (2009). Ibidem, p. 58-59; Twigg-Flesner, C. (2007). Ibidem, p. 204.

¹⁰ See with regard to several EU-Directives (not including the 1986 Consumer Credit Directive): Schülthe-Nolke, H. (2008). EC Consumer Law Compendium. University of Bielefeld, http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf, 44 ff.

¹¹ European Commission, Report on the operation of Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, COM (1995) 117 Final.

¹² See: Recital 4 and 9 CCD and Recital 6 Consumer Rights Directive. See also: Smits, J. (2010). Full Harmonization of Consumer Law? A Critique on the Draft Directive on Consumer Rights. *European Review of Private Law* Volume 18 (Issue 1), p. 6-7, who is quite skeptical about these arguments.

b. Full harmonization and targeted full harmonization

In the view of the European Commission, full harmonization considerably increases legal certainty for both consumers and traders. 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 Directive¹³. Therefore, in the case of full harmonization, Member States do not have the possibility to incorporate or even preserve additional protection measures into their national legislation¹⁴. As 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”. Since the CCD only harmonizes some core areas of consumer credit legislation (*targeted* full harmonization), only for those matters harmonized by the CCD, the same rules will apply in different Member States. Moreover, even within the harmonized field of law, the Member States are sometimes given the possibility to incorporate additional rules. For example, article 5.6 CCD - which relates to the obligation to provide adequate explanation to the consumer - determines that Member States can adapt the manner by which and the extent to which assistance is given to the consumer, as well as by whom it 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. Such options also imply that differences between the law of the Member States will remain.

(Targeted) full harmonization implies that Member States who, when implementing the 1986 Directive in the past, enacted legislation offering more protection to consumers than incorporated in the 2008 CCD and falling within the harmonized field of the CCD, had to reduce the level of consumer protection. 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 some Member States. However, one must not forget that the European legislator’s primary objective is to create an internal market (of consumer credit).

However, many scholars are quite skeptical about the European legislator’s arguments¹⁵. With Tonner and Fangerow we agree that consumer protection should not be victimized on the altar of alleged needs of internal market policy¹⁶. Moreover, there are many other factors, which are more

¹³ C.J. 23 April 2009, case C-261/07, *VTB-VAB v. Total Belgium*, <http://curia.europa.eu>; Gourio (2008). La Directive européenne du 23 avril 2008 concernant les contrats de crédit aux consommateurs. La Semaine Juridique Entreprises et Affaires (Issue 36), p. 15-16; Twigg-Flesner, C. and Metcalfe, D. (2009). The proposed Consumer Rights Directive – less haste, more thought? *European Review of Consumer Law* Volume 5 (Issue 3), p.371.

¹⁴ Loos, M. (2008). Herziening van het consumentenrecht: een teleurstellend richtlijnvoorstel. *Tijdschrift voor Consumentenrecht* (Issue 5), p. 173; Mak, V. (2009). *Ibidem*, p. 58.

¹⁵ Howells, G. and Schulze, R. (2009). Overview of the proposed Consumer Rights Directive. In *Modernizing and Harmonizing Consumer Contract Law*, European Law Publishers, p. 8; Rott, P. and Terryn, E. (2009). The proposal for a Directive on Consumer Rights: No single set of Rules. *Zeitschrift für Europäisches Privatrecht* Volume 17 (Issue 3), p. 460-462; Smits, J. (2010). *Ibidem*, p. 8; Twigg-Flesner, C. and Metcalfe, D. (2009). The proposed Consumer Rights Directive – less haste, more thought? *European Review of Consumer Law* Volume 5 (Issue 3), p.372; van Boom, W. (2009). The Draft Directive on Consumer Rights: Choices Made and Arguments Used. *Journal of Contemporary Research* Volume 5 (Issue 3), p. 461; Wilhelmsson, T. (2004). The Abuse of the “Confident Consumer” as a justification for EC Consumer Law. *Journal of Consumer Policy* Volume 27, p. 317 ff.

¹⁶ Tonner, K. and Fangerow, K. (2010). Directive 2101/83/EU on Consumer Rights: a new approach to European Consumer Law?. *Zeitschrift für Europäisches Unternehmers- und Verbraucherrecht*. Volume 1 (Issue 2), p. 77 (with regard to the Consumer Rights Directive).

likely to deter consumers and professionals from cross-border trade, such as language barriers, lack of trust in unknown businesses, and unease over the prospect of resolving disputes across borders. Full harmonization will not solve these problems. Moreover, in the case of the CCD, the harmonization being limited to some core areas and several options being given to the Member States, creditors will still be confronted with problems resulting from the fragmentation of the law¹⁷.

III. The impact of full harmonization is limited to the harmonized field of law

a. Full harmonization does not prohibit applying the CCD provisions to contracts falling outside its scope

Article 22 CCD clearly determines that the prohibition to maintain or enact rules diverging from those incorporated in the CCD, only applies in so far as harmonization has taken place. First, this means, as the Court of Justice acknowledges in its judgment of 12 July 2012, that Member States retain the possibility to apply all or certain principles laid down in the CCD to credit agreements that do not fall under the material scope of the CCD (Recital 10 CCD)¹⁸. For example, Member States can apply the provisions incorporated in the CCD to credit agreements concerning the grant of credit secured by immovable property, to credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building, to credit agreements involving amounts less than 200 euro or more than 75.000 euro, or to credit agreements in the form of an overdraft facility where the credit has to be repaid within one month (art. 2.2 CCD).

It is important to emphasize that for credit agreements that are partly excluded from the CCD (e.g. credit agreements where the credit must be reimbursed within three months, credit is the form of an overrunning, art. 2.3 and 2.4 CCD), the solution is different. For those credit agreements Member States are not allowed to apply other CCD-provisions than the ones applicable according to the CCD itself (Recital 11 CCD)¹⁹. However, Member States retain the possibility with regard to partly excluded credit agreements to apply provisions relating to aspects falling outside the harmonized field of law.

Further, it is clear that the CCD does not prohibit Member States to determine that all or certain provisions incorporated in the CCD apply to persons that cannot be regarded as a consumer in the meaning of the CCD²⁰. This finding is especially interesting, because of the restrictive definition of a consumer under the CCD, defining a consumer as a natural person who, in transactions covered by the CCD, is acting for purposes which are outside his trade, business or profession. In the past, this definition, which is also used in many other Directives, has always been interpreted in a restrictive

¹⁷ Gourio, A. (2008). *Ibidem*, p.16; Hoornaert, Y. (2010). *Wet op het Consumentenkrediet (WCK): andermaal hervormd*. *Revu du Droit Bancaire et Financier* Volume 74 (Issue 6), p. 400; Van Lysebettens, J. (2008). *Richtlijn 2008/48/EEG inzake kredietovereenkomsten voor consumenten en tot intrekking van Richtlijn 87/102/EEG: kredietovereenkomsten voor consumenten of consumentenkredieten versterkt door sommige kredietgevers?*. *Revue du Droit Bancaire et Financier* Volume 72 (Issue 5), 332.

¹⁸ Gourio, A. (2008). *Ibidem*, p. 15; Raymond, G. (2008) *Premières approches sur la directive n° 2008/48/CE*. *La semaine juridique édition générale* (Issue 48), p. 34-35.

¹⁹ Gourio, A. (2008). *Ibidem*, p. 15; Rott, P. (2009). *Ibidem*, p. 191.

²⁰ Rott, P. (2009). *Ibidem*, p. 190.

way²¹. In the Gruber case²², the Court of Justice determined that a person who concludes a contract intended for purposes which are in part within and in part outside his trade or profession cannot be considered a consumer, unless the trade or professional purpose *is so limited as to be negligible* in the overall context of the supply, *the fact that the private element is predominant being irrelevant in that respect*. Although this decision relates to the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters²³, many scholars argued that this interpretation could also be used with regard to the notion of a consumer, used in consumer protection Directives²⁴. Although the same definition is incorporated in the 2011 Consumer Rights Directive (CRD), the analyses under the CRD is different. Recital 17 of the CRD states that in the case of dual purposes contracts, a person must be considered a consumer if the trade purpose is *so limited as not be predominant in the overall context of the contract*. Therefore, although defined in the same way as in previous Directives (including the CCD), the notion of a consumer must probably be interpreted differently, including natural persons acting for primarily private purposes. Whether this new approach, that is in line with the Draft Common Frame of Reference²⁵ (DCFR) (Book I-1:105), can also be used with regard to previous Directives, such as the CCD, is not certain. But, taking into account the fact that article 22 CCD does not prohibit Member States from protecting other persons than consumers in the meaning of the CCD, it is beyond any doubt possible for Member States to apply the provisions of the CCD to persons acting for preponderantly private purposes. The only question that remains, is whether they have to do so.

- b. Full harmonization does not prohibit additional obligations relating to matters not specifically covered by the CCD

Since the CCD only harmonizes certain core areas with regard to consumer credit law, the Member States can, even with regard to credit agreements falling under the scope of the CCD, impose obligations that are not provided for in the CCD. However, this is only possible if these additional obligations do not fall within the field of law harmonized by the CCD. More specifically, as the Court

²¹ C.J. 22 November 2001, Case C-541/99 and 542/99, *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl*, Jur. 2001, I-9049; C.J. 14 March 1991, Case C-89/91, *Patrice Di Pinto*, Jur. 1991, I-1189, where the Court of Justice decided that a trader concluding an advertising contract concerning the sale of his business is not to be regarded as a consumer.

²² C.J. 20 January 2005, Case C- 464/01, *Johann Gruber v Bay Wa AG*, Jur. 2005, I-439.

²³ The Brussels Convention of 1968 has been replaced by the Regulation 44/2001 of the Council 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). The definition of a consumer has remained the same.

²⁴ Howells, G. (2005). The scope of European consumer law. *European Review of Contract Law* Volume 1 (Issue 3), p. 360-361; Loos, M. (2005). Het begrip "consument" in het Europese en Nederlandse privaatrecht. *Weekblad voor privaatrecht, Notariaat en Registratie* Volume 6638, p. 771-772; Straetmans, G. (2009). *Het Europese consumentenacquis: genese en toekomstblik*. In *Het EG-Consumentenacquis: nu en straks*. Antwerpen. Intersentia, p. 25.

²⁵ Principles, definitions and model rules of European Private Law, available at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf. See also: Loos, M. (2008). Review of the European Consumer Acquis. Working Paper Series Centre for the Study of European Contract Law. [Http://ssrn.com:abstract=1123850](http://ssrn.com:abstract=1123850); Tonner, K. and Fangerow, K. (2012), *Ibidem*, 72-73.

of Justice states, Member States must only abstain from imposing other obligations than the ones incorporated in the CCD *with regard to matters specifically covered by the harmonization*²⁶.

Matters harmonized by the CCD include the information to be incorporated in advertising which indicates an interest rate or any figures relating to the cost of the credit, pre-contractual information, the obligation to assess the consumer's creditworthiness, information to be included in credit agreements, the right of withdrawal, linked credit agreements, early repayment, the assignment of rights and the calculation of the annual percentage rate of charge. Areas which have for example not been harmonized include: the information to be incorporated in advertising not mentioning the interest rate or any figure relating to the cost of the credit agreement, usury laws, the consequences of late or non-performance by the consumer (e.g. penalties in case of late or non-performance, rescission of the contract) and remedies in case the creditor violates its obligations under the CCD. Further, one must understand that even with regard to the areas harmonized by the Directive, not all questions have been dealt with. Therefore, these are left to the Member States. For example, although the right of withdrawal has been harmonized (art. 14 CCD), Member States retain the possibility to maintain or introduce national provisions on the cancellation of a contract for the sale of goods or provision of services if the consumer exercises his right of withdrawal (Recital 9 CCD).

In its decision of 12 July 2012, the Court of Justice had to decide whether a Member State can enact legislation with regard to the type of charges that a creditor may levy in connection with consumer credit agreements. More specifically, Romanian consumer credit legislation contains an exhaustive list of bank charges that can be levied by the creditor upon the consumer. According to the Court of Justice, such provision is not contrary to the CCD, since it does not fall within the matters specifically harmonized by the CCD. Whereas the CCD harmonizes the obligations relating to the information that creditors must provide for (including information on bank charges), it does not contain substantive rules relating to the type of charges that a creditor may levy upon the consumer with regard to credit agreements. Therefore, additional obligations with regard to the type of charges creditors can levy upon consumers, can be imposed on the creditor, at least if compatible with the principles of free movement.

c. It is not always easy to determine the harmonized field of law

In some cases, it might be harder to determine whether a certain provision in national law specifically relates to matters falling within the harmonized field. This can be illustrated by providing an example from Belgian Consumer Credit legislation.

Article 8 CCD 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 Belgian Consumer Credit Act (CCA) not only contains a similar provision in article 10 CCA, it also determines that the creditor may only conclude a credit agreement if he reasonably believes that the consumer will be able to reimburse the credit (art. 15.2 CCA). In other words, it is up to the creditor to decide whether or not the credit agreement can be signed.

²⁶ Rott, P. (2009). *Ibidem*, p. 191.

Most Belgian scholars believe that article 15.2 CCA is incompatible with the CCD since it imposes an additional duty on the creditor²⁷. First, the question arises whether article 15.2 CCA really creates an additional obligation. Isn't it possible to argue that a creditor who finds out that the consumer will probably not be able to reimburse the credit has to refuse to grant credit? Can one not say that such rule is implicitly included in the CCD? Certainly not everyone will agree on this. More specifically, most scholars could argue that the CCD only (implicitly) requires the creditor to warn the consumer about the difficulties he will experience in reimbursing the credit²⁸.

But even if one accepts that article 15.2 CCA creates an additional obligation, article 15.2 CCA is not necessarily incompatible with the Directive. More specifically, article 15.2 CCA doesn't create any problems if one accepts that such additional obligation does not fall within the harmonized field of law, i.e. that it does not relate to matters *specifically* covered by the harmonization. In order to determine whether the obligations arising from the assessment of the consumer's creditworthiness are harmonized, it is interesting to have a closer look at article 5.6 CCD which relates to 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 (the consumer). Article 8 CCD on the other hand does not determine whether it is up to the consumer or the creditor to decide whether the credit agreement can be concluded. It only states that the creditor must assess the consumer's creditworthiness. Therefore, one could argue that this question is not harmonized by the CCD and article 15.2 CCA is compatible with the CCD²⁹. In the end, it will be up to the Court of Justice to decide whether or not this obligation relates to a matter *specifically* covered by the CCD.

The CCD is not the only Directive where the determination of the harmonized field of law has led to discussions. For example, the Court of Justice was asked to decide whether Member States could still prohibit combined offers to consumers, taking into account that the 2005 Unfair Commercial Practices Directive is based upon full harmonization. According to the Court of Justice, combined offers constitute commercial practices, which means that they cannot be prohibited as such (since they are not prohibited in the Directives' black lists of *per se* forbidden commercial practices). Combined offers can only be considered unfair if they constitute an unfair commercial practice in the meaning of the Directive³⁰.

In other cases, it was left to the national courts to decide whether a certain provision falls within the harmonized field of law. At stake was the Belgian prohibition to announce price reductions during pre-sales periods (a certain period preceding the sales). The Court decided that if such prohibition amongst others aims at protecting consumers, it is contrary to the Directive on Unfair Commercial Practices. On the contrary, if such prohibitions does not aim at protecting consumers and only wants

²⁷ Terryn & Vannerom (2009). *Ibidem*, p. 34-37; Van Der Hertem, F. (2009). De omzetting in het Belgisch recht van de nieuwe Europese richtlijn inzake consumentenkrediet. In *Liber Amicorum Achilles Cuypers* (pp. 275-304), Gent, Larcier, p. 294.

²⁸ Grundmann, S. & Hollering, J. (2008). *Ibidem*, p. 50; Rott, P. (2009). *Ibidem*, p. 199.

²⁹ 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, P. (2009). *Ibidem*, p. 199.

³⁰ C.J. 23 April 2009, Cases C-261/07 and C-299/07, *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV*, *Jur.* 2009, I-2949.

to ensure fair competition between traders, it does not fall within the harmonized field of law and therefore is not contrary to the Directive. According to the Court it is up to the national courts to decide whether such prohibition also contributes to consumer protection³¹.

Questions relating to the exact field of harmonization are typical for full harmonization Directives. In the case of a minimum harmonization the question is not important. Harmonized or not, Member States can impose additional obligations, as long as they do not restrict the free movement.

IV. Harmonization and the free movement of services

Whether additional protection measures are possible because a Directive is based upon minimum harmonization or additional protection measures are possible because they fall outside the scope of application or the harmonized field of a Directive, such measures must be compatible with the principles on the free movement laid down in TFEU³².

As in the past, granting a credit is considered a service in the meaning of article 56 TFEU³³. Therefore, the Court examines whether the Romanian provisions on bank charges are compatible with the freedom to provide services. The Court does not examine the compatibility of the Romanian legislation with the free movement of capital. It states that, in the case a national measure relates to both the freedom to provide services and the free movement of capital, the Court only examines the measure in relation to one of those two freedoms if it appears that one of them (in this case the free movement of capital) is entirely secondary in relation to the other and may be considered together with it. More specifically, if it were to be found that, by making consumer credit offered by companies which are established in other Member States less accessible for customers established in Romania, such provision has the effect of making recourse by such customers to those services less frequent and, therefore, of reducing cross-border financial flows relating to those services, that would be merely an unavoidable consequence of any restriction on the freedom to provide services. Therefore, the compatibility of the Romanian legislation only needs to be examined with regard to the freedom to provide services.

Determining whether the Romanian legislation, limiting the number of bank charges that can be included in consumer credit agreements, restricts the freedom to provide services, in the meaning of article 56 TFEU, the Court first repeats that the concept of restriction relates to measures by which exercise of the freedom to provide services is *prohibited, impede or rendered less attractive*³⁴. As in the *Italian Insurance Case*³⁵, the Court argues that national rules do not constitute a restriction in the meaning of article 56 TFEU solely by virtue of the fact that other Member States apply less strict, or

³¹ C.J. 15 December 2011, Case C-126/11, *INNO NV v Unie van Zelfstandige Ondernemers VZW (UNIZO) and Others*, <http://curia.europa.eu>.

³² Reich, N. (2009). *Economic Law, consumer interests and EU integration*. In *Understanding EU Consumer Law*. Oxford. Intersentia, p. 40.

³³ C.J. 3 October 2006, Case C-452/04, *Fidium Finanz AG, Jur.* 2006, I-09521.

³⁴ C.J. 5 October 2004, Case C-442/02, *Caixa-Bank France v. Ministère de l'Économie, des Finances et de l'Industrie, Jur.* 2004, I-8961; C.J. 28 April 2009, Case C-518/06, *Commission v. Italy, Jur.* 2009, I-3491; C.J. 29 March 2011, Case C-565/08, *Commission v. Italy*, <http://curia.europa.eu>.

³⁵ C.J. 28 April 2009, Case C-518/06, *Commission v. Italy, Jur.* 2009, I-3491. See also: Hatzopoulos, V. (2012). *Regulating Services in the European Union*. Oxford University Press, p. 118-119.

economically more favorable rules to providers of similar services established in their territory. However, the concept of restriction covers measures taken by a Member State, which, although applicable without distinction, affect access to the market for economic operators from other Member States (market access criterion).

In the *Italian Insurance* case³⁶, the Court of Justice argued that market access is affected when a trader is faced with a substantial interference to the freedom of contract leading him, in terms of organization and investment to significant additional costs or to rethink his business policy and strategy, thus changing the characteristics of the services offered³⁷. More specifically with regard to the Romanian legislation, containing an exhaustive list of bank charges that can be levied by the creditor upon the consumer, the Court states in its judgment of 12 July 2012 that this provision does not constitute an actual interference in credit institutions' freedom to contract. Although such provision may require creditors to amend certain clauses of agreements, it does not by itself result in an additional burden for credit institutions established in other Member States. It does not make it necessary for creditors to review their commercial policy and strategies in order to be able to gain access to the Romanian market. Therefore, according to the Court, it is not evident that such provision renders the access to the Romanian market less attractive, and in the event of access thereto, genuinely reduces the ability of the undertakings concerned to compete effectively, from the outset, against undertakings traditionally established in Romania. In those circumstances, the effect of the Romanian provision on trade in services is too uncertain and indirect to be regarded as liable to hinder intra-Community trade.

Having a closer look at the reasoning of the Court, it becomes clear that the Court found it important that the Romanian legislation does not limit the amount of the charges or interest rates in general, but only limits the number of bank charges that can be included in the credit agreement. Therefore, it seems that a maximum annual percentage rate of charge (which for example exists in Belgium), would restrict the free provision of services. This is logical, since such rule has an impact on the commercial policy and strategy of a creditor and constitutes an actual interference in the institutions' freedom to contract.

However, even if additional protection rules restrict the freedom to provide services, they can still be compatible with the European Treaty³⁸. However, in such a situation, they need to be necessary to reach a legitimate public interest (e.g. consumer protection)³⁹. Also, additional protection measures must be proportionate. This implies that they must be suitable or appropriate in achieving their objectives and it may not be possible to protect the consumer in the same way by using measures which restrict the free movement of goods and services to a lesser extent⁴⁰.

³⁶ C.J. 28 April 2009, Case C-518/06, *Commission v. Italy*, *Jur.* 2009, I-3491.

³⁷ Hatzopoulos, V. (2012). *Ibidem*, p. 119.

³⁸ C.J. 28 April 2009, Case C-518/06, *Commission v. Italy*, *Jur.* 2009, I-3491. See also: Heremans, T. (2012). *Professional Services in the EU internal market*. Hart Publishing, p. 158 ff.

³⁹ C.J. 4 December 1986, Case 205/84, *Commission v. Germany*, *Jur.* 1986, I- 03755.

⁴⁰ C.J. 4 December 1986, Case 205/84, *Commission v. Germany*, *Jur.* 1986, I- 03755. See also on the criterion of proportionality: C.J. 5 October 2004, Case C-442/02, *Caixa-Bank France v. Ministère de l'Économie, des Finances et de l'Industrie*, *Jur.* 2004, I-8961; C.J. 16 December 2008, Case C-205/07, *Lodewijk Gysbrechts and Santurel Inter BVBA*, *Jur.* 2008, I-09947.

V. Private international law

As mentioned earlier, the use of the full harmonization approach in the CCD, being limited to some core areas, will not eliminate all differences in the Member States' consumer credit legislation.

Differences in the law of the Member States imply, that in the case of a cross-border consumer credit contract, one needs to determine whether the law of the consumer's habitual residence or the law of the creditor's habitual residence applies. Article 6 of the Rome I Regulation⁴¹ on the law applicable to contractual⁴² obligations contains a specific rule for consumer contracts. It determines that the law of the consumer's habitual residence applies if the parties did not chose the law applicable to the contract. If they did chose the law applicable to the contract (which is quite common in cross-border consumer agreements), the chosen law (most often the law of the trader's / creditor's habitual residence) cannot deprive the consumer of the protection which is offered to him according to the provisions in his own legal system from which the parties cannot derogate by agreement. Since provisions on consumer credit are always mandatory, this specific rule of private international law implies that the consumer will always be able to invoke the additional protection offered by his own legal system.

However, it is important to emphasize that this specific rule of private international law for consumer contracts only applies if the professional (creditor) pursues his commercial or professional activities in the country where the consumer has his habitual residence or by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities⁴³. With regard to the requirement of directing its activity to the consumer's country the European Court of Justice decided in the *Pammer* case⁴⁴ that a professional directs his activities to the consumer's country when, before the conclusion of any contract with the consumer, it is apparent from his website and his overall activity that he is envisaging doing business with consumers domiciled in the Member State of that consumer's domicile, in the sense that it is minded to conclude a contract with them. According to the Court of Justice the following matters, possibly in combination with one another, can for example indicate that the professional has such

⁴¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 4 July 2008, 177/6.

⁴² These rules will also apply to information requirements preceding the conclusion of a credit agreement. See: art. 12 of the Rome II Regulation (Regulation (EC) No 867/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ L 31 July 2007, 199/40) which determines that the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, is the law that applies to the contract or that would have been applicable to it had it been entered into.

⁴³ See e.g.: Lopez-Tarruella Martinez, A. (2008). International consumer contracts in the new Rome I Regulation: how much does the regulation change?, *European Journal of Consumer Law* Volume 12 (Issue 3), 345-385; Francq, S. (2009). Le Règlement "Rome I" sur la loi applicable aux obligations contractuelles – De quelques changements...", *Journal du Droit International* Volume 136 (Issue 1), 62-65.

⁴⁴ C.J. 7 December 2010, cases C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller*, <http://curia.europa.eu>. This judgment concerns the Brussels I Regulation (jurisdiction), but the principles in it, without any doubt, apply to the Rome I Regulation, since the requirements to apply the specific rule for consumer contracts are the same. See on the Pammer case: Alvarez Armas, E. and Dechamps, M. (2011). Arrêt Pammer et Hotel Alpenhof: L'équilibre entre consommateurs et professionnels dans l'e-commerce, *European Journal of Consumer Law* (Issue 2), p.447-453; Posnow Wurm, M. (2011). La protection des consommateurs en droit international privé européen suite aux arrest Pammer – Hotel Alpenhof: la notion d' "activité dirigée". Tijdschrift@IPR.be. Volume 10 (Issue 1), 162-180.

intentions: the use of a language or a currency other than the language or currency generally used in the professional's Member State with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, use of a top-level domain name other than that of the professional's Member State and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether the evidence that the professional is envisaging doing business with consumers domiciled in the Member State of that consumer's domicile, in the sense that it is minded to conclude a contract with them exists.

If the specific application requirements of article 6 Rome I Regulation are not met, the chosen law (in practice the creditor's law) will apply (art. 3 Rome I). In the absence of any choice of law, the law of the creditor's habitual residence applies (art. 4 Rome I). However, the requirements to apply the specific rule of private international law for consumer contracts will often be met. Therefore, creditors offering consumer credit agreements in other Member States (e.g. over the Internet), will often have to take into account the consumer credit legislation of the Member State, in which the consumer has his habitual residence.

VI. Conclusions

Although the CCD is based upon the principle of full harmonization, differences in consumer credit legislation of the Member States will remain. First, the CCD does not prevent Member States to apply the provisions incorporated in the CCD to credit agreements or persons falling outside the scope of the CCD. Secondly, and more important, the CCD only harmonizes certain core areas of consumer credit legislation. As the Court of Justice acknowledges in its decision of 12 July 2012, Member States retain the possibility to impose upon creditors obligations which are not incorporated in the CCD, if these obligations do not relate to matters specifically covered by the harmonization. Therefore, determining the field of harmonization, although not always easy, is essential when examining whether national additional protection measures are compatible with the CCD.

The fact that differences in the law of the Member States remain, implies that rules of private international law need to be used to determine the law applicable to a cross-border contract. Taking into account article 6 of the Rome I-Regulation, as interpreted by the European Court of Justice, creditors will in many cases be subject to consumer credit legislation of the consumer's habitual residence. However, additional protection measures not relating to matters specifically covered by the harmonization, can only be opposed to creditors from other Member States when they are compatible with the freedom to provide services. Examining whether additional protection measures, applying in the same way to domestic creditors and creditors from other Member States are compatible with the freedom to provide services, one needs to determine whether they restrict the free provision of services, i.e. prohibit, impede or render less attractive the cross-border provision of services. In its judgment of 12 July 2012 the Court decides that a provision which does not limit the *amount* of charges, but only limits the *number* of charges that can be levied upon consumers does not create a restriction of the freedom to provide services. Even in the case additional protection measures restrict the freedom to provide services, they can still be considered compatible with the Treaty if they are necessary to protect consumers and proportionate.

Taking into account the fact that the CCD only harmonizes core areas of consumer credit legislation, that rules of private international law imply that creditors will often have to deal with the law of the Member State where the consumer has his habitual residence and the fact that additional protection measures will often be compatible with the freedom to provide services, it is unlikely that the CCD will contribute significantly to the increase of cross-border credit agreements. This finding makes it even more regrettable that some Member States had to reduce the existing level of consumer protection for those matters that are specifically covered by the CCD.