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From Hapless Victims of Desire to Responsibly Choosing Citizens

The Emancipation of Consumers in Low Countries' Consumer Credit Regulation

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Legal history can help to date shifts in social attitudes, because it shows how, when, and often also why norms changed. We demonstrate this by examining when consumer credit became widely accepted in the Netherlands and Belgium, because general access to credit may serve as a good indicator of the advent of a consumer society. That shift in attitudes happened in both countries during the 1960s, when legislators came to accept that credit is part and parcel of modern life for everybody. The consequent equality of consumers before the law then became more and more fragmented in European regulation, sacrificed to its leading principle, the idea that well-informed consumers choose rationally and are therefore responsibly for their choices.

Van ongelukkige slachtoffers van verlangen naar de verantwoordelijke keuze van de burgers. De emancipatie van Nederlandse en Vlaamse consumenten in de wetgeving inzake consumentenkrediet

Rechtsgeschiedenis kan helpen om verschuivingen in maatschappelijke opvattingen te dateren, omdat daaruit blijkt hoe, wanneer en vaak ook waarom normering veranderde. We demonstreren dit door te onderzoeken wanneer consumentenkrediet in Nederland en België gemeengoed werd, omdat de algemene bereikbaarheid daarvan goed kan gelden als het begin van de consumptiemaatschappij. Die kentering deed zich in beide landen tijdens de jaren 1960 voor, toen de wetgever vaststelde dat krediet bij ieders moderne levenspatroon hoorde. Die gelijkheid van consumenten voor de wet raakte

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vervolgens in Europese regelgeving steeds meer versplinterd door de consequenties van het informatieparadigma, de idee dat goed geïnformeerde consumenten rationeel kiezen en dus voor de gevolgen van hun keuzes verantwoordelijk zijn.

Introduction

Changes in social attitudes are often very hard to pinpoint in time. We know the before and the after well enough to label the before as different from the after, but we can rarely identify a precise moment in which before became after. Take the consumer society. At what moment in time had attitudes towards modern consumption patterns changed sufficiently for us to identify their general acceptance? Legal history can help here. Regulations, the law, and jurisprudence mirror society and thus change with it. That means we can track shifts in how societies see particular issues by examining proposed legislation, case law and jurisprudence, and particularly lawyers' debates about those issues. Of course one cannot always pin down whether shifting legal opinions lead society or the other way around, but at least those shifts enable us to date changing attitudes a little better.

Consumer credit regulation offers a good case in point. Historians have interpreted the rise of consumer credit use during the 1960s as marking the advent of a consumer society in the Netherlands, for instance, without really probing the timing or significance of this phenomenon.[2] Economists examined the evolution of consumer credit, but omitted to ask what made attitudes change.[3] By contrast, tackling the subject from a legal history perspective enables us to do just that, because it was a tightly regulated issue. Moreover, from that perspective we can trace changing attitudes better than, say, data about purchasing power or sales of consumer durables can do, because, unlike such figures, debates about regulation yield arguments about what ought to be permitted or not, and why. Doing that requires harnessing what legal historians do, i.e. interpreting the evolution of the law from the perspective of history, to the concerns of the social and economic historian, that is to say, tracing how and why attitudes in society change, with the risk of pleasing neither discipline.

We decided to take the risk and undertake to compare Belgium with the Netherlands in the expectation that, starting from a similar legal basis and ending up under the same regulatory EU umbrella, attitudes to credit would

1 The authors are much obliged to Nick Huls for his welcome comments on earlier versions of this paper. We have gratefully used material collected in 2011 by Arne Mombers, Clara olde Heuvel, and Hanneke Palm, then still law students at Utrecht University. Seminars at Paris Nanterre University, the IISH Amsterdam and Frankfurt generated much appreciated comments.

2 K. Schuyt and E. Taverne, *1950, welvaart in zwart-wit, de Nederlandse wederopbouw in 12 beelden* (The Hague 2000) 276.

3 D.S. Dotinga, *Consumptief krediet in Nederland* (Deventer 1983).

closely resemble each other and follow similar trajectories of change. We find three marked developments. First, seen from a legal perspective consumer credit users emancipated. Until the Second World War they counted as potential victims of desire, ineptitude, and ignorance. However, new legislation introduced during the 1960s treated all citizens as alike and perfectly capable of judging for themselves if credit would be bad for them. Henceforth credit was seen as part and parcel of modern consumption patterns, which we take as the full acceptance of the consumer society in all its ramifications.

Second, the increasing complexity of modern financial products gradually eroded the equality of all citizens before the law, as one exception after another had to be made from the underlying general assumption that all consumers could judge for themselves. Third, despite the common legal point of departure and the shared European regulation, attitudes towards consumer protection continue to show subtle differences between the two countries. Belgian legislators nursed a distinct suspicion against the free market as a source of mischief and they continue to do so, resulting in a range of protective measures for consumers. By contrast, their Dutch counterparts have always shown a greater trust in the market and individual responsibility as safeguards against mishaps, which minimized intervention.

We proceed chronologically and reach back to the early nineteenth century to show how the two countries, despite a common legal point of departure and shared social prejudices about the dangers of consumer credit, diverged from each other when it came to protection. During the 1960s and 1970s attitudes changed in both countries, effectively rendering consumers equal before the law. European regulation adopted that same principle, but added an important new one: the Information Paradigm, the idea that consumers choose responsibly if properly informed. Even so the consumers' equality before the law did not last since one exception after another had to be made. Moreover, as it became clear that consumers couldn't be expected to digest all kinds of information, the paradigm adopted turned effectively into a paradox.

Points of departure: freedom of contracting versus consumer protection

Initially consumers were not seen to need protection, with regard to credit or anything else. The Low Countries inherited equality before the law as constitutional principle from the Enlightenment and translated this during codification into a formal rule of contractual freedom.[4] People are free in their

4 Enshrined in the 1804 *Code Civil* for the southern Netherlands, and the 1809 civil code in the Kingdom of the Netherlands. Following the incorporation of the northern Netherlands into the French Empire in 1811 the *Code Civil* came into force until the Kingdom of the Netherlands obtained its own *Burgerlijk Wetboek* (Civil Code) in 1838, meanwhile been replaced by a new Civil Code. Its section about money and credit, relevant for our argument here, became law in 1992. About

transactions, in choosing a counterparty, and in setting conditions.[5] The French *Code civil* framers considered this formal contracting freedom as fundamental for both individual and general welfare: freedom of contract would boost the economy, because every deal enriched contracting parties.[6] Credit transactions formed no exception.[7] If parties agreed an excessive interest rate, that was up to them, so borrowers had to fulfill loan contracts until expiry.

Even so the law made an exception for pawnbroking and did this already under the French occupation (1795-1813), that is, long before the 'social issue' debate during the second half of the nineteenth century pilloried widespread malpractice. As the root of evils like usury and social depravation, pawnshops were subjected to a licensing system which amounted to a formal ban.[8] However, the system foundered on the government's dithering. It clung to the ban while omitting to provide the necessary alternatives to pawnshops. Consequently they simply remained in business, with license or without.[9] In 1826 the Dutch government attempted to solve this problem by instructing the municipal loan banks to curb usury.[10] This failed to work as well, because the pawnshops

the early codification in the Netherlands see: J.H.A. Lokin, J.M. Milo and C.H. van Rhee, ed., *Tweehonderd Jaren Codificatie* (Groningen 2010). For Belgium: D. Heirbaut and G. Martyn, ed., *Napoleons nalatenschap, tweehonderd jaar Burgerlijk Wetboek in België* (Mechelen,2005).

5 A.S. Hartkamp & C.H. Sieburgh, *Mr. C. Assers handleiding tot de beoefening van het Nederlands Burgerlijk Recht 6: Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht,* (Deventer 2014); O.O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party. A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Munich 2007) 10-11; L. Cornelis, *Algemene theorie van de verbintenis* (Antwerp 2000) 19; M. De Potter De Ten Broeck, 'De gekwalificeerde benadeling aanvaard, maar wat met de grondslag?' (footnote under Cass. 9 November 2012), *Tijdschrift voor Belgisch Burgerlijk Recht* 26 (2013) 131-140, ibidem 135; S. Stijns, *Verbintenissenrecht. Boek 1: de bronnen van verbintenissen* (Brugge 2005) 37-38; W. Van Gerven and S. Covemaeker, *Verbintenissenrecht* (Louvain 2001) 47-49; A. Van Oevelen, *Algemeen verbintenissenrecht* (Antwerp 2010) 72.

6 K.-O. Knops, 'Verbraucherschutz und Kreditrecht', *Verbraucher und Recht* 12 (1998) 107-117, ibidem 109; Stijns, *Verbintenissenrecht* 37; A. Van Oevelen, *Algemeen verbintenissenrecht* (Antwerp 2010) 70-71.

7 Cf. Burgerlijk Wetboek 1809, articles 1021. 1636, and 1648 ff.; C. Sieburgh, 'Western Law of Contract', in: M. Bussani and F. Werro, ed., *European Private Law: a Handbook* (Bern 2009) 172; E. Terryn, *Bedenktijden in het consumentenrecht. Het herroepingsrecht als instrument van consumentenbescherming* (Antwerp 2008) 44.

8 The Act of 16 Pluviose, An XII (6 February 1804), applicable in the Netherlands since 1810. For a history of pawnbroking see H.A.J. Maassen, *Tussen commercieel en sociaal krediet, de ontwikkeling van de Bank van Lening in Nederland van Lombard tot Gemeentelijke Kredietbank 1240-1940* (Hilversum 1994). Unfortunately P.E.L.J. Soetaert, *De Bergen van Barmhartigheid in de Spaanse, de Oostenrijkse en de Franse Nederlanden (1618-1795)* (Brussels Gemeentekrediet, 1986) does not discuss the post-1795 period.

9 C. olde Heuvel, 'Strafrechtelijke handhaving van pandbelening, *Nederlandsch Juristenblad* 88 (2013) 795.

10 The Dutch gazette *Staatsblad* 31 October 1826, no. 132.

typically supplied small loans of a few guilders, which the loan banks could not or would not handle for reasons of cost and space.[11] Repeated attempts to bridle pawnbroking with new legislation foundered in Parliament until it finally passed the Pawnshop Act of 1910.[12] This Act acknowledged usury and the rising number of pawnshops as social evils, however without accepting them as sufficient reasons for making an exception on the principle of contractual freedom.[13] In reply to parliamentary questions the government professed itself unwilling to confront a deeprooted and accepted phenomenon like pawn credit and put its hope for eliminating it on education to teach people how to achieve economic self-sufficiency.[14] Therefore the Act did not do much more than an overhaul of the license system for pawnshops plus new regulations for their keeping of records; their customers did not get any form of protection.

Towards the end of the nineteenth century a different form of ambivalence, one determined by class prejudices, surfaced in reactions to new forms of consumer credit. When purchasing household furniture or clothing upper strata of society received credit a matter of course, others mostly bought on tick for victuals like bread and milk or at cafés, with social control mechanisms ensuring reasonable conditions and regular repayment all around. However, hire-purchase and installment schemes brought durable consumer goods within reach of people on low incomes, raising fears that they would use these facilities to live beyond their means and social status. These new credit forms also remained impervious to the usual mechanisms of social control, while getting a dubious reputation because the seller-creditor's power over buyer-borrowers was seen as conducive to one-sided conditions and usury.[15]

Belgian legislators tackled these credit forms from the perspective of usury, defined in the 1865 Act concerning money lending as a misdemeanour, both for professional lending and for consumer credit.[16] As the law put it,

11 Maassen, *Tussen commercieel en sociaal krediet*, 193.

12 Dutch *Staatsblad* 1910, 321.

13 Government memo (Memorie van Toelichting or MvT) accompanying the draft Pawnshop Act, Handelingen Tweede Kamer (hereafter HTK) 1908-1909, item no. 277-3, p. 6. About the attempts to outlaw usury in Belgium C. Del Marmol, *La répression de l'usure* (Courtrai 1943). Other forms of consumer exploitation discussed by C. Biquet-Mathieu, *Le sort des intérêts dans le droit du crédit. Actualité ou désuétude du Code civil?* (Liège 1998).

14 Government reply to questions (Memorie van Antwoord or MvA), HTK 1909-1910, item no. 53-2.

15 N. Huls, *Consumentenkrediet. Sociaal-juridische beschouwingen, in het bijzonder met betrekking tot huurkoop van roerend goed* (Deventer 1981); R. Cooter, 'The confluence of justice and efficiency in the economic analysis of law', in: F. Parisi and C.K. Roweley (eds.), *The Origins of Law and Economics. Essays by the Founding Fathers* (Cheltenham 2005) 229; C. Canaris, 'Wandlungen des Schuldvertragsrechts, Tendenzen zu seiner "Materialisierung"', *Archiv für die civilistische Praxis* 185 (2000) 273-363, ibidem 277; Cornelis, *Algemene theorie*, 21-24; H. Jacquemin, 'Le formalisme de protection de la partie faible au rapport contractuel', *Annales de droit de Louvain* 70 (2010) 3-42, ibidem 14; E. Swaenepoel, *Toetsing van het contractueel evenwicht* (Antwerp 2011) 27-29; Van Oevelen, *Algemeen verbintenissenrecht*, 78-79.

16 The Belgian gazette *Staatsblad*, 7 May 1865.

lenders committed usury when they misused a borrower's needs, weaknesses, passions, or ignorance to obtain, on behalf of themselves or others, an interest rate exceeding the normal rate and the cover for the loan's risk.[17] Therefore this concept of usury consisted of two elements, a subjective and an objective one. On the one hand the creditor must knowingly misuse a borrower's weaknesses, for instance by exploiting a penurious situation to negotiate a higher interest rate. On the other hand the interest charged may not exceed the going market rate plus, depending on the case, a surcharge covering a borrower's insolvency risk. A poorer borrower thus needs to pay more interest than financially sound ones, because the lender runs a higher risk of non-payment.[18] One potential source of usury, compound interest or 'anatocism', was given particular attention. When in arrears borrowers had to pay not just interest over unpaid installments, but also over unpaid interests due, which could lead to a rapidly spiralling debt.[19] For that reason Belgium bound compound interest to tight regulation. Only interest due over actual sums borrowed could be subject to new interest charges, and then under very strict conditions, that is to say in fulfilment of a court order or a special transaction, if and when that order or transaction concern interests due for a minimum of one whole year.[20]

Though curbing the usury associated with the new forms of consumer credit formed an equally powerful public concern in the Netherlands, the government failed to design effective legislation covering them, for two reasons.[21] First, for technical legal reasons hire-purchase and installment credit fitted badly in the commercial law system and lawyers debating the issue showed themselves better at raising objections than at finding practical solutions. Second, lawyers clung to the hallowed principle of contracting freedom and would not consider making an exception for usury, let alone consumer credit.[22] The lengthy debates highlight the deep social prejudices underlying them: in the Netherlands, as no doubt in Belgium, too, the

17 Burgerlijk Wetboek, article 1097ter.

18 D. Caplovitz, *The Poor Pay More, Consumer Practices of Low-Income Families* (New York 1967).

19 Belgian Supreme Court, cassation 29 January 1990, *Pasicrisie belge* 1990, I, 626; idem, cassation 28 November 1985, *Pasicrisie belge* 1986, I, 391; idem, cassation 7 September 1978, *Pasicrisie belge* 1979, I, 17; Biquet-Mathieu, *Le sort des* intérêts, 123-124; C. Van Hulle with contributions by M. Dutordoir, K. Smedts, K. De Cock, H. Drijkoningen, T. Lievens and A. Vanderlinden, *Bank- en financiewezen*, I (Louvain 2010) 26-28; M.E. Storme, 'Vragen rond rente', *Tijdschrift van de Vrederechters* (1997) 196-203, ibidem 203.

20 Burgerlijk Wetboek article 1154.

21 Huls, *Consumentenkrediet* 15-16; C.J.H. Jansen, 'De Geldschieterswet van 28 januari 1932', *Nederlands Tijdschrift voor Burgerlijk Recht* 26 (2015) 4-5. Cf. B. van Dam, NVVK, *75 jaar toonaangevend en springlevend* (The Hague 2008) for an overview.

22 See notably C. Del Marmol, 'La clause de réserve de propriété dans les ventes de meubles et la protection du vendeur', *Annales de droit commercial et industriel, français, étranger et international* 48 (1939) 177-219; more recently, M.E. Storme, 'Eigendomsvoorbehoud en samenloop buiten faillissement. Hof van Cassatie leidt aan fantoompijn', *Rechtskundig Weekblad* 80 (2011-2012) 254-266.

constitutional principle of equality before the law mirrored a society in which class distinctions were taken for granted, as was class-bound behaviour. Hire-purchase and installment credit were considered dangerous as means to seduce people on low incomes to live above their status on credit. Instead, people should first learn how to manage money properly, and learn to save before taking credit.[23] Lawyers did criticize unfair clauses in hire-purchase and installment contracts. The lawyer and liberal MP P.H. de Kanter pilloried them in parliament as early as 1891, while the following year two academic dissertations about installment purchases were published.[24] One of them advocated binding legislation and notably a ban on sellers formally keeping ownership of goods sold, because, as the author put it, the state ought to protect its citizens, especially the propertyless, against self-inflicted damages incurred through inexperience or weakness.[25] However, in 1902 the Supreme Court rejected that view.[26]

Four years later the Dutch Law Society (*Nederlandsche Juristen Vereeniging* or NJV) discussed the need for legislation covering installment plans. Both keynote lectures noted the near absence in the Netherlands, unlike Germany, Austria, Britain, and the US, of jurisprudence, data on the prevalence of consumer credit, and of academic debate.[27] In the debate following the lectures some of the society's members pleaded emphatically for a total ban, but an overwhelming majority held fast to the principle of contractual freedom and the individual citizen's obligation to be on their guard in any transactions.[28] The NJV felt no immediate need for legislation, let alone a ban. A small majority considered a change in the law desirable, but only as part of a more general commercial law overhaul designed to give consumers various guarantees: fairer clauses covering shortfalls, clear rules for extensions,

23 Discussed at length by the leader of the Catholic party RKSP, the lawyer L.G. Kortenhorst, HTK, 1928-1929, 612 and following, as well as by Frida Katz of the CHU fraction, referring to a Danish Act of 8 May 1917: idem, 665.

24 See HTK, 1891-1892, sessions of 24 November, 4 and 9 December 1891. De Kanter MP utters serious criticism, which the minister counters with the simple *iura vigilantibus scripta* – the law protects the watchful (p. 351). This Roman law principle can be found in an opinion from the second century AD and formulated by the lawyer Scaevola. Almost four centuries later it found its way into the Emperor Justinianus's legal texts: Digests 42.8.24. See J.E. Spruit, R. Feenstra and F.B.J. Wubbe, *Corpus Iuris Civilis. Tekst en vertaling* V (The Hague 2000). The two dissertations were M.A.H.L. van Lier, *Afbetalingscontracten* (Utrecht 1892) and H.L. Hemsing, *Het afbetalingscontract* (Dordrecht 1892).

25 Van Lier, *Afbetalingscontracten*, 70.

26 Supreme Court 7 February 1902, *Weekblad van het Recht* 7720.

27 The keynotes were given by Paul Scholten and A.A.H. Struycken (*Handelingen* NJV 1906 I, 84-198).

28 *Handelingen* NJV 1906 II, 17 ff. J.A. Levy pleaded passionately for a ban. However, he was 'second to none in voicing displeasure', J.H.A. Lokin and C.J.H. Jansen, *Tussen droom en daad, de Nederlandse Juristen-Vereniging 1870-1995* (Zwolle 1995) 90 and could not convince the 80-5 majority; idem, 80.

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The last quarter of the nineteenth century saw a rapid spread of new consumer credit forms like buying on installments: an advertisement in the newspaper Haagsche Courant, 5 May 1884, offering 'all kinds of goods' on installment.
National Library of the Netherlands, The Hague.

and a statutory duty to repay installments not due.[29] That overhaul never happened, but a court ruling in 1931 fulfilled some of these desiderata by stating that a hire-purchaser in arrears had to return the property concerned, in order to be freed from paying the remaining installments.[30]

Meanwhile five MPs had tabled draft legislation to combat usury.[31] Referring to recent reports about malpractices in the so-called people's credit business, these initiators wanted binding contractual rules and state supervision of the institutions concerned. Their proposal led to Parliament passing the 1932 Credit Providers Act (*Geldschieterswet*), which at last curtailed the hallowed freedom of contracting. Pawn creditors were put under government supervision through a licensing system and the imposition of mandatory transparent conditions with maximum rates. A standing commission made sure the rules were applied.[32] That same year another government commission reported on legislating installment plans. The report avoided moralizing, denied the existence of malpractices and claimed that installment purchases and hire-purchase boosted retail sales. However, the commission did identify some points of friction, including a declining willingness to meet payment deadlines and expensive legal procedures, and its proposed remedies made a half-hearted step towards consumer protection. Hire-purchase and installment plans, though market-determined, did require legislation in order to protect consumers against their own ineptitude. That would have to be achieved by imposing statutory duties to provide information on buyers and sellers, by state supervision on door-to-door selling, and by certain statutory contract clauses.[33] These proposals were on the one hand realized in article 1576 BW (Civic Code), and on the other in the Installment Providers Act which imposed a license system to tackle usury and door-to-door selling.[34] Contrary to the 1932 *Geldschieterswet*, this license

29 *Handelingen* NJV 1906 I, 136-137. Keynote deliverer Struycken refused to go that far. He considered Dutch law, in contrast to German and Austrian law, as hardly social in intent, but felt that there had to be very strong arguments for changing such a key principle as the autonomy of contracting parties. However, Struycken did concede to having no idea about the importance of installment credit and associated malpractices, and therefore no proper answer to the Dutch law society's questions: *Handelingen* NJV 1906 I, 196-197. Van Lier had prepared the ground by defining the conditions for reservation of ownership: Van Lier, *Afbetalingscontracten*, 19.

30 Supreme Court, 26 March 1931, *Nederlandsche Jurisprudentie* (hereafter NJ) 1931, 669.

31 HTK, 1928-1929, item no. 395.

32 Cf. Jansen, 'Geldschieterswet'; Huls, *Consumentenkrediet* 57-58; W. Schoonderbeek, *De geldschieterswet* (Arnhem 1957).

33 Committee Report 'Verslag van de Commissie inzake de wettelijke regeling van de afbetalingsovereenkomst' (The Hague 1932).

34 Cf. the BW (Civil Code) articles 7A:1576 and 1576 a-g about installment plans and art.7:A:1576h-x about hire-purchase. An installment plan is a sale and purchase contract in which parties agree that the sale price will be paid in installments, two or more of which are due after the buyer has received the product in question. Hire-purchase is a variation on the above involving the reservation of ownership.

system never worked since the government failed to enact the supervision of installment providers.[35]

Thus from a similar legal point of departure the two countries reacted very differently to hire-purchase and installment plans. Whereas Belgium sacrificed contracting freedom to consumer protection early, it took the Netherlands some seventy years before doing the same.

Curtailing creditors

After the Second World War both countries showed a curious phenomenon. Rising incomes boosted the use of consumer credit, but social prejudices against it remained virtually unchanged. Immediately after the war the Dutch government, fearing that post-war scarcities would combine with strong pent-up demand to create serious bottlenecks, introduced consumer credit restrictions. In 1946 all pawnshop licenses were cancelled and the issuing of new ones halted, rendering the *Pandhuiswet* an empty shell, because existing pawnshops were allowed to remain in business.[36] That same year the government also created a scheme for people wanting to buy 'indispensable consumer durables'. The scheme entailed a system of tightly regulated, non-profit loans in the form of vouchers with which people could buy goods like shoes, clothes and certain household goods at designated shops. The system's provisions for rescheduling payments in case of arrears were remarkably lenient.[37]

Intended as provisional, these measures triggered a debate about overhauling the existing legislation concerning pawnshops and installment plans. Some authors noted that consumer credit rose without a rise in abuse.[38] At the same time an official report on installment plans clung to

35 Already in 1942 an article *Nederlandsch Juristen Blad* signalled the lack of supervision: Huls, *Consumentenkrediet* 69.

36 The Act of 28 October 1946, which ratified a decree issued jointly by the secretaries-general heading the ministries of the Interior and Justice in 1942. Prior to the parliamentary debate pawnshops are characterized as 'the least desirable institutions responding to the credit needs of the poorer population', Annex Tweede Kamer 1946, no. 25. The empty shell was only filled by the Pawn Lending Act 2014. See for a penal law perspective on this issue Olde Heuvel, 'Strafrechtelijke handhaving', and for a private law perspective A. Salomons, 'Goederenrechtelijke aspecten van pandbelening', *Weekblad voor Privaatrecht, Notarisambt en Registratie* 6986 (2013) 653-655.

37 HTK 1945-1946, item no. 182-3. Between 1948 and 1961 the Act against price pushing and goods hoarding (Dutch *Staatsblad* 1939, 634) imposed maximum rates on installment plans, in effect handicapping proper pricing: Huls, *Consumentenkrediet* 73. The postwar developments analyzed by Van Dam, NVVK 35-66.

38 Schoonderbeek, *Geldschieterswet* 305-306.

received opinion about trusting the market while reiterating the pre-war prejudices. The supply of credit to people with little means ought to be left to the free market, hemmed in only by regulations to curb excesses and protect economically weak social groups against their inexperience and thoughtlessness.[39] The debate resulted in the 1961 Installment Plans Act (Wet op het afbetalingsstelsel), which retained the licensing system while giving a better definition of installment plans and imposing a statutory duty on sellers to check the creditworthiness of purchasers.[40] Three years later the high street banks set up the Bureau for Credit Registration (*Bureau Krediet Registratie* or BKR) as a central repository of transactions enabling the mandatory checks. Affiliated lenders agreed to obtain prior information on all borrowers of sums between 250 and 100,000 guilders, to register all transactions, and in all respects to act 'in a way as behoves good sellers on installment and lenders on installment'.[41] This form of self-regulation is a form of 'soft law' that counts as an effective means of regulating producer-consumer relations.[42]

Belgian legislators showed similar attitudes. In 1955 a government reply to parliamentary comments on a draft installment purchases law acknowledged the increasing popularity of this credit type, but underlined at the same time that it enabled 'people on low incomes to buy goods which they could not buy cash without saving first'. That was exactly where, according to the government, a social danger lurked. The combination of long payment terms, low payments, and the immediate enjoyment of the coveted product could easily lead buyers to overestimate their ability to pay and, worse, to turn a blind eye to the hidden high interest rates. The power of modern advertising increased that danger still further, by fuelling desire 'ambiguously and indeed fraudulently'. The reply added particular economic objections to an unbridled expansion of installment purchasing, such as exaggerating business fluctuations, stimulating consumption over investment, and inflation.[43] The proposed law central, public register for installment plans remained a good intention for the moment.

39 This was the Lichtenauer committee in its *Rapport omtrent het afbetalingswezen* (The Hague 1954); Huls, *Consumentenkrediet*, 77.

40 Dutch *Staatsblad* 1961, no. 218. The Burgerlijk Wetboek's section concerning installment credit was left unchanged, but the new law introduced a different, broader definition of installment plans which was also made to cover hire-purchase. The law targeted only commercially operating installment financiers.

41 Art. 40. Huls, *Consumentenkrediet*, 81.

42 E.H. Hondius,'Non-Legislative Means of Consumer Protection, The Dutch Perspective', *Journal of Consumer Policy* 7 (1984) 137-156.

43 Transactions of the Belgian Senate 1954-1955, no. 211. Addressing the Chamber of Representatives, the Minister for Economic Affairs Jean Rey underlined that installment plans were widely used by the working class, which needs protection against certain excesses, Transactions of the Chamber of Representatives 1956-1957, 20 June 1957, no. 716.

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Since 1964 the *Bureau Krediet Registratie* (BKR) records all consumer crediet in the Netherlands. Photo: www.bkr.nl.

Towards the end of the 1960s opinions in the Low Countries changed, however. Prodded by the commission supervising the 1932 *Geldschieterswet*'s license system, the Dutch government submitted a proposal to replace that Act.[44] The proposal's title, Consumer Credit Act, eloquently summed up the changed conceptions which the government's accompanying motivation spelt out.[45] Consumer credit was no longer regarded as a dubious excess to be bridled through the firm supervision of creditors, but presented as a normal aspect of modern society in need of guidelines. In a remarkable conceptual turnaround, the government even labelled consumer credit saving in hindsight. No wonder that the proposal targeted a group much bigger than the socially weak and the usurers parasiting on them. The draft law was meant for all ordinary citizens and included regulations for all new kinds of credit offered by the high street banks.[46] Promulgated in 1972, the act retained the regulatory principles which the 1932 *Geldschieterswet* had shown to work, i.e. the prevention of creditor malpractices through a licensing system, transparent conditions with maximum rates, and government supervision.[47]

Thus the 1972 Consumer Credit Act (*Wet op het consumptief geldkrediet*) marked a clear break with the past in four respects. First, the old social prejudices had disappeared. Consumer credit was no longer seen as a threat to particular social classes, but accepted as a normal part of modern living for everybody, a facility enabling citizens to consume. Second, this conceptual switch translated into the government dropping the close focus on protecting the weak, in effect recognizing the equality of all consumers before the law. In other words, the Act accepted all citizens as classless consumers differentiated primarily by income level and spending patterns. Third, the normative idea that people should first learn to save had disappeared. Fourth, the principle

44 Unfortunately the Commission's publicly available records stop in the 1930s. The commission's long-term chairman and one of the initiators of the 1932 law, G. van den Bergh, left his papers to the International Institute for Social History, Amsterdam. Boxes 8 and 9 cover his activity as chairman, but only up to 1962.

45 Transactions Second Chamber 1968-1969, item no. 9952.

46 Huls, *Consumentenkrediet*, 85. Transactions Second Chamber 1969-1970, item no. 9952-5 Provisional Report, p. 1. Second Chamber Papers 1968-1969, no. 9952-3 Government Motivation, 11. Transactions Second Chamber 1968-1969, item no. 9952-3 Government Motivation, 21. One of the new practices was targeted by the law concerning door-to-door selling, published in the Dutch *Staatsblad* 1973, 438. That law amended the law concerning installment plans and also introduced a novelty in Dutch law, a fixed reflection term. Buyers can cancel the transaction within eight days and without having to give a reason for doing so. Thereby the reflection term protects buyers against acting in haste: Government Motivation, Second Chamber 1970-1971, item no. 11106-3; Government Motivation. Second Chamber 1968-1969, item no. 9952-3, 11.

47 Dutch *Staatsblad* 1972, no. 399.

of contractual freedom was sacrificed to the need for consumer protection.[48] This watershed coincided with changing behaviour. Between 1960 and 1970 rising disposable income boosted the amount of consumer credit supplied from the equivalent of 65 million euro to 814 million.[49] Even so two-thirds of respondents people interviewed for market research purposes during the second half of the 1960s expressed themselves against installment purchasing.[50]

Similar changes in attitude and behaviour occurred in Belgium. Early signs were visible by 1964, when government proposals to bring personal loans under the same regime as installment purchases avoided all qualifications about the likely target group, as did the subsequent parliamentary debate on the proposals.[51] In 1977 the government submitted a consumer credit law to parliament which acknowledged the equality of all users by simply referring to consumers.[52] Sent back to the drawing board by parliament, the government unveiled a new proposal in 1987, its motivation showing a full emancipation of consumer credit. The fast growth of amounts supplied and the absence of serious problems demonstrated that consumer credit's negative connotations had disappeared; it had now become a key function of the consumer society which rendered goods accessible to a wide public. Borrowers fulfilled their obligations generally quite well, despite signs of rising excess debt cases. The law was designed to reduce their number, in part through mandatory registration of transactions at the central debt administration bureau which had finally been set up two years earlier, in 1985. That institute did not belong to the private sector, as in the Netherlands, but formed a department of the *Nationale Bank van België*, the central bank.[53] The Belgian Consumer Credit Act

48 Historical introductions to consumer law traditionally use a speech by US President John F. Kennedy from 1962 to pinpoint the origins of consumentism: 'Consumers by definition includes us all.' See for instance the contribution by Gerhard Rijken, 'Ontstaan en positie van het consumentenrecht', in: E.H. Hondius and G. Rijken, *Handboek Consumentenrecht* (Zutphen 2015) 19-30.

49 CBS Statline http://statline.cbs.nl/Statweb/publication/?DM=SLNL&PA=37758&D1=109-118&D2=22,27,32,37,42,63-74&HDR=T&STB=G1&VW=T. (4 August 2016). A good summary of the factors driving the rising demand for credit in N. Huls, *Vergeef ons vaker onze schulden, naar een schone lei 2.0* (The Hague 2016) 27-29.

50 A. Pais, *Consumer credit in The Netherlands* (Rotterdam 1975), 155 and idem, 'Op de pof', *De Economist* 117 (1969) 1-23, ibidem 2, 6-7 DOI:10.1007/BF01726047.

51 Transactions Belgian Senate 1963-1964, nos. 217 and 342; Transactions Chamber of Representatives, no. 921-2.

52 Transactions Chamber of Representatives 1976-1977, no. 1102-1.

53 Transactions Belgian Senate 1987-1988, no. 638-1. The Act's contents discussed amply by J. Van Den Bergh, *Koop (afbetalingsovereenkomsten)* (Brussels 1960); A. De Caluwe, *Les ventes, les prêts et les prêts personnels à tempérament, les obligations de brasserie* (Brussels 1965); J. Van Den Bergh and A. De Caluwe, *Afbetalingsovereenkomsten, financieringshuur, brouwerijovereenkomsten* (Ghent 1975).

(Wet van 12 juni 1991 op het consumentenkrediet) reached the statute book in 1991.

European regulation: the Information Paradigm

Consumers' equality before the law had hardly been achieved or it began to be restricted again by European regulation.[54] In 1975 the European Council adopted the so-called Information Paradigm as the first general principle of consumer protection, the idea that consumers, if given correct and complete information, will take rational and proper decisions.[55]

54 See J. Vannerom, *Consumentenbescherming bij de uitvoering en herziening van kredietovereenkomsten* (Antwerp 2015) 86-99.

55 Van Dyck adopts this definition for the protection of investors, see idem, *De geharmoniseerde prospectusplicht. Kritische analyse van de geharmoniseerde prospectusplicht in de Prospectusrichtlijn 2003/71/EG en haar omzettingswetten in België, Nederland, Frankrijk, het Verenigd Koninkrijk en Duitsland*, (Bruges 2010) 44. The latest guidelines contain numerous mandatory information and/or advice duties for suppliers of goods or services: see for instance Guideline 2008/122/EC of the European Parliament and the Council of 14 January 2009 about the protection of consumers facing certain aspects of transactions concerning the parttime use, holiday products of long duration, selling on and exchange, *Gazette* L 3 February 2009, issue 33, 10-30; Guideline 2008/48/EC; Guideline 87/102/EEC; COM (2011) 142 def. [Proposal for a Guideline of the European Parliament and the Council concerning home finance transactions]. Cf. also S. Grundmann and Y.M. Atamer, 'European Contract Law and Banking Contracts after the Financial Crisis: Challenges for Contracting and Market Transactions', in: S. Grundmann and Y.M. Atamer (eds.), *Financial Services, Financial Crisis and General European Contract Law. Failure and Challenges of Contracting* (Alphen a/d Rijn 2011) 3-31, ibidem 16 and 20-21; E. Poillot, *Droit européen de la consommation et uniformisation du droit des contrats* (Paris 2006) 94; I. Ramsay, 'Regulation of consumer credit', in: G. Howells, I. Ramsay, T. Wilhelmsson and D. Kraft (eds.), *Handbook of research on international consumer law* (Cheltenham 2010) 366-405, ibidem 385; N. Reich, 'Economic law, consumer interests and EU integration', in: H.-W. Micklitz, N. Reich and P. Rott (eds.), *Understanding EU Consumer Law* (Antwerp 2009)1-60, ibidem 21-22; R. Steennot, 'Sanctionering van inbreuken op het consumentenrecht: de zoektocht naar een rechtvaardige oplossing', in: F. Evers and P. Lefranc, ed., *Kiezen tussen recht en rechtvaardigheid* (Bruges 2009) 145-155, ibidem 146; G. Straetmans, 'Some thoughts on the future European consumer acquis', *European Business Law Review* 20 (2009) 423-442, ibidem 428-429; T. Van Dyck and V. Colaert, 'Reclameregulering als vorm van consumentenbescherming', in: C. Bruyneel, J.P. Buyle, M. Delierneux, J.F. Romain and E. Van Den Haute (eds.), *Liber Amicorum A. Bruyneel* (Brussels 2008) 33-72, ibidem 35-36; T. Wilhelmsson, G. Howells and H.-W. Micklitz, 'European Consumer Law', in: M. Bussani and F. Werro (eds.), *European Private Law: a Handbook* (Bern 2009) 245-291, ibidem 261. For an overview of the historical development of the information paradigm in finance law see Van Dyck, *Geharmoniseerde prospectusplicht*, 44-56.

Consumers must therefore inform themselves before buying, but they will only be free to choose if they possess sufficient and correct information.[56] Conversely, sellers have mandatory information duties.[57] That information may concern either the legal position of the consumer, for instance their right to cancel within a fortnight, or practical data such as the price or the cost of goods or services.[58] Sellers must show themselves active in providing all relevant information, because they are often in a better position to obtain it.[59] Access to credit information bureaus enables lenders, for instance, to better estimate the possibilities for repayment than consumers can do.[60] The mandatory duty to inform can have considerable implications. It was ultimately raised to a fundamental consumer right.[61] The information paradigm does have a flipside, however. Consumers can only choose judiciously if properly informed, but then they are also responsible their decisions.[62] Careless or imprudent consumers must therefore expect firm treatment.[63]

56 J. Stuyck and G. Straetmans, *Financiële diensten en de consument. Bankdiensten – Consumentenkrediet – Hypothecair krediet – Verzekeringen – Handelspraktijken volgens het Belgisch en Europees recht* (Antwerp 1994) 31-32.

57 Consideration 3, Council Resolution dated 14 April 1975 outlining a first EEC programme for a policy concerning consumer protection and information, *Gazette* L 24 April 1975, 1; E. Poillot, *Droit européen,* 94. Council Resolution of 19 May 1981 outlining a second EEC programme for a policy concerning consumer protection and information, *Gazette* L 3 June 1981, 6.

58 Following article VII. 70 WER the creditor must also tell consumers about their right to cancel: Jacquemin, 'Le formalisme', 11-13.

59 Stuyck and Straetmans, *Financiële diensten*, 39.

60 Y.M. Atamer, 'Duty of Responsible Lending: Should the European Union Take Action?', in: Grundmann and Atamer, *Financial Services*, 179-202, ibidem 199.

61 Considerations 35 and 36 CoJ 178/84, Commission v. Federal Republic of Germany (*Reinheitsgebot*); consideration 19 CoJ C-238/89, *Pall Corp. v. P.J. Dahlhausen & Co.*; cf. also consideration 24 CoJ C-470/93, *Verein gegen Unwesen in Handel und Gewerbe* Köln eV. v. Mars GmbH; CoJ C-315/92, *Verband Sozialer Wettbewerb eV v. Clinique Laborataires SNC en Estée Lauder Cosmetics GmbH*; consideration 17 CoJ C-126/91, *Schutzverband gegen Unwesen in der Wirtschaft eV. v. Yves Rocher GmbH*; considerations 15-17 inclusive CoJ C-373/90, *Nissan*. Wilhelmsson, Howells and Micklitz, 'European Consumer Law' 270-271.

62 Cf. in this sense also O. Bar-Gill and E. Warren, 'Making Credit Safer', *University of Pennsylvania Law Review* 157 (2008) 101-201, ibidem 109, distinguishing between 'the rational uninformed consumer' and 'the imperfectly rational consumer'; C. Camerer, S. Issacharoff, G. Loewenstein, T. O'Donoghue and M. Rabin, 'Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"', *University of Pennsylvania Law* Review 152 (2003) 1211-1254, ibidem 1215; R. Posner, *Economic Analysis of Law* (New York 2003) 17-18. Van Dyck, *Geharmoniseerde prospectusplicht*, 493.

63 R. Incardona and C. Poncibò, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution', *Journal of consumer policy* 30 (2007) 21-38, ibidem 27.

These principles were enshrined in the first European consumer credit directive, issued in 1987 to harmonize the varying levels of consumer protection in member states.[64] To reduce the scope for legal shams, it dropped the customary terms of hire-purchase and installment credit and instead adopted a broad, functional definition of consumer credit derived from American conceptions and covering all forms in one go.[65] The guideline formulated minimum requirements for consumer protection, including statutory license systems for creditors, a written contract, mandatory information duties, limits to repossession rights, and a right for borrowers to early repayment.

Interpreting the directive, the European Court of Justice formulated two general principles. First, following the principle of the law serving the watchful, the Court defined a kind of Mr. and Mrs. Normal: an averagely informed, prudent, and watchful consumer.[66] Second, unlike people in business consumers deserve protection because they have a weaker position.[67] Sellers of products or services will often present consumers with non-negotiable standard contracts.[68] The character of relationships between sellers and buyers may also weaken the latter's position, for instance if it leads them to believe that a business representative, say their bank's client manager, will propose solutions which suits them, rather than the business, best.[69]

64 Considerations accompanying Guideline 87/102/EEC.

65 Second Chamber 1986-1987, item no. 19785-3, 68.

66 Consideration 27 Court of Justice (CoJ) C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*; consideration 36 CoJ C-303/97, *Verbraucherschutzverein eV v. Sektkellerei G.C. Kessler GmbH und Co*; consideration 31 CoJ C-210/96, *Gut Springenheide GmbH en Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt*.

67 CoJ C-240/98 until C-244/98, *Oceano Grupo Editorial SA v. Rocio Murciano Quintero*. In Consideration 25, the Court points out that the system of consumer protection embodied in the guideline departs from the idea that consumers find themselves in a weak position vis-a-vis sellers and possess less information than they. See also: Consideration 46 CoJ C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*; consideration 29 CoJ C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*; consideration 25 CoJ C-168/05, *Elias Maria Mostaza Claro v. Centro Movil Milenium*; J. Stuyck, 'Consumentenbescherming in tijden van economische crisis', *Jura Falconis* 45 (2009-2010) 323-333, ibidem 328.

68 Consideration 46 CoJ C-137/08, *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*; consideration 29 CoJ C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*; consideration 25 CoJ C-168/05, *Elias Maria Mostaza Claro v. Centro Movil Milenium*; J. Rinkes, 'De consument als zwakke partij', *Ars Aequi* 48 (2009) 380-387, ibidem 381-382; Swaenepoel, *Toetsing*, 24-25.

69 A. De Boeck, *Informatierechten en -plichten bij de totstandkoming en uitvoering van overeenkomsten: grondslagen, draagwijdte en sancties* (Antwerp 2000) 434-435; A. De Boeck, 'De informatieverplichting van de professioneel t.a.v. de consument', in: Y. Merchiers, ed., *Consumentenrecht* (Bruges 1998) 40; Swaenepoel, *Toetsing*, 698-699. Consumers' trust in their own banker remains high. Cf. for instance W. Sinn, D. Vater, D. Lubig and M. Kasch, *Was Bankkunden wirklich wollen* (Munich 2012) 11-12.

Information asymmetries between sellers and buyers also weaken the latter's negotiating position, because the former always possess more information.[70]

Becoming ever more particular

The first European directive and the subsequent Court decisions treated all consumers alike and aimed to provide minimum protection levels in member states. Soon those levels began to diverge more and more. Free to impose additional requirements, member states discovered consumer protection as a practical cover for all kind of protectionist policies, damaging the free circulation of goods and services, for instance the scope for crossborder credit flows.[71] Moreover, national courts retained the authority to apply the directive's guidelines to local circumstances, thereby rendering them increasingly particular. Finally, the mandatory information duties failed to bring about greater harmonization, but rather a creeping differentiation between consumers by country. The multitude of European languages, for instance, posed certain a-priori demands. French consumers cannot be expected to understand a loan contract in Italian, so national legislators may impose mandatory language requirements to protect consumers.[72] However, that requirement must be proportional to the consumer protection envisaged.[73] Member states may thus force foreign creditors to translate their loan contracts.[74]

In short, what counted as normal in one member state could not in fairness be called that in another one. This led to different gauges for normal consumer behaviour depending on circumstances, society, culture, and product or service.[75] At the same time Mr. and Mrs. Normal were increasingly differentiated following the recognition that their ability to choose responsibly depends on circumstances, and that circumstances often require extra consumer protection.[76] Consumers facing doorstep

70 CoJ C-168/05, *Elias Maria Mostaza Claro v. Centro Movil Milenium*.

71 RL 2008/48, L 133/66, overweging 4.

72 CoJ C-33/97, *Colim v. Bigg's Continent Noord* NV. Though this verdict concerned the freedom for goods, it appears applicable to services as well.

73 Consideration 19-20 CoJ C-154/89, *Commissie v. France (Tourist guides)*; Stuyck and Straetmans, *Financiële diensten*, 29-30.

74 Considerations 15 and 17 CoJ C-85/94, *Groupement des Producteurs, Importateurs et Agents Généraux d'Eaux Minérales Etrangères, VZW (Piageme) and others v. Peeters* NV; L. Gormley, 'The Consumer Acquis and the Internal Market', *European Business Law Review* 20 (2009) 409-422, ibidem 413.

75 Consideration 18 Guideline 2005/29/EG; CoJ C-220/98, *Estée Lauder Cosmetics*; Incardona and Poncibò, 'The average consumer', 22-26; E. Terryn, *Bedenktijden in het consumentenrecht. Het herroepingsrecht als instrument van consumentenbescherming* (Antwerp 2008) 38; Swaenepoel, *Toetsing*, 57-58.

76 Terryn, *Bedenktijden*, 41. Cf. also P. Bülow, '§ 497', in: P. Bülow and M. Artz, ed., *Verbraucherkreditrecht* (Munich 2011) 480.

salesmen, for instance, have a weaker position, the more so if they need certain things and sellers know this.[77] Somebody with a strong need for money will accept conditions sooner than a borrower without pressures of time or money.[78] Distance to sellers means buyers need extra protection, because as a rule they cannot really see, let alone test, the goods or services.[79]

Consumers may also become more vulnerable as a consequence of how they handle information. They do not always act with perfect rationality, they may possess sufficient information, yet fail to act accordingly, for instance because they underestimate the likelihood of loss of income through illness or job loss.[80] Finally a specific group of vulnerable consumers were recognized, i.e. people of whom it could be expected that their mental or physical handicap, their age, or their gullibility exposed them more than others to the risks of particular trade practices or products.[81] As it turned out it proved not always easy to delineate this target group from the average consumer.[82]

The divergence in protection levels between member states made the EU realize that consumer protection should be raised to a higher level all around. A new guideline, adopted in 2008, retained the functional definition of credit transactions of the previous one.[83] As a result the guideline's coverage was extended to wage claims, the partial transfer of future income for a lower amount than will be paid, and to new products

77 CoJ C-382/87, *Prosecution v. R. Buet and* SARL *Educational Business Services*; Stuyck and Straetmans, *Financiële diensten*, 31. Consideration 13 CoJ C-382/87, *Prosecution v. R. Buet and* SARL *Educational Business Services*. See also the articles 58-64 'Wet Marktpraktijken en consumentenbescherming' about consumer protection concerning transactions closed away from business premises.

78 Jacquemin, 'Le formalisme', 9-10 and 13-14, R. Steennot, 'De impact van het privaat financieel recht op de wilsautonomie, de contractvrijheid en het consensualisme', http://www.law.ugent.be/fli/wps/pdf/WP2010-15.pdf, 2010, 34.

79 Consideration 14 Guideline 97/7/EC of the European Parliament and the Council dated 20 May 1997 about consumer protection concerning transactions involving distances between buyers and sellers, *Gazette* L 4 June 1997, issue 144, 19-27.

80 Bar-Gill and Warren, 'Making Credit Safer', 112; D. De Meza, B. Irlenbusch and D. Reyniers, *Financial Capability: A Behavioural Economics Perspective*, http://www.fsa.gov.uk/pubs/consumer-research/crpr69.pdf, 2008, 20; D. M. Grether, A. Schwartz and L.L. Wilde, 'The Irrelevance of Information Overload: an Analysis of Search and Disclosure', *Southern California Law Review* 58 (1985-1986) 277-303, ibidem 277-278; Howells and Wilhelmsson, 'EC Consumer Law', 380-381.

81 Article 5 (3) Guideline 2005/29/EC. Critically on the determinability of vulnerable groups of consumers B.B. van Duivenvoorde, The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive, *Zeitschrift fur Europaisches Unternehmens- und Verbraucherrecht* 2 (2013) 69-79.

82 Incardona and Poncibò, 'The average consumer', 28-29.

83 RL 2008/48, L 133/66, consideration 9.

▲

Today consumer credit is accessible by mobile phone: a screenshot of an offer in July 2017. Photo: Johan Vannerom.

like flash loans.[84] However, the guideline makes no statements about mandatory licenses for lenders apart from the options mentioned in contract law, sanctions, and supervision.[85] Conversely, member states may apply the guideline to subjects formally not covered by it. Thus the Netherlands and Belgium have brought free loans and those above 75,000 euros and below 200 under the guideline.

The new guideline also testified to a changed conception of consumers. On the one hand lenders were put under fairly comprehensive mandatory rules of behaviour, including information duties both in publicity and prior to closing a transaction.[86] Transactions also needed to be entered on standard forms disclosing the lender's identity, and detailing the loan's terms and conditions such as particular form, duration, and cost, and the borrower's options to early repayment or cancellation. Lenders must thoroughly inform themselves about borrowers' creditworthiness and ensure that they do not overburden themselves with debt; if transactions appear irresponsible, lenders should not enter into them. Those mandatory duties run more or less parallel to the particular fiduciary duties which the courts, prompted by cases about complex financial products, imposed on their providers from the 1990s onwards.[87] However, when deciding relatively simple consumer credit transactions Dutch judges continued to hold consumers to their own responsibility, which should have kept them from overburdening themselves with debt.[88]

84 Exempted from the extended guideline, be it not from financial supervision, are mortgage loans, hire and lease, transactions concerning overdrafts to be repaid within a month, credit cards, loans without interest or other costs, and loans to be repaid within three months at marginal cost. The Belgian financial supervision authority AFM has specified those costs as 1 percent of the loan sum per year and no more than 50 euros in total. The Dutch AFM considers wage claims as offering a loan without license: verdict Court of Justice Arnhem 4 May 2012, ECLI:RBARN:2012:BW7949; Court of Justice Rotterdam 20 April 2012, ECLI:NL:RBROT:2012:BX3090; Court of Justice Breda 2 May 2012, ECLI:NL:RBBRE:2012:BW4484.

85 About Guideline 2008/48 V. Heutger, 'Consumentenkrediet', in: A.S. Hartkamp, L. Keus, J. Kortmann and C. Sieburgh, *Europese Invloeden op het Nederlandse Privaatrecht* II (Deventer 2014)121-139; M. De Muynck and J.M. van Poelgeest, 'Het aanbieden van consumentenkrediet na Richtlijn 2008/48/EG: de Nederlandse en Belgische regelgeving aan elkaar getoetst', *Tijdschrift voor Consumentenrecht en handelspraktijken* 2012-2, 55-63.

86 Articles 7:59 and 60.

87 For the Netherlands, for instance verdict Supreme Court HR 23 May 1997, NJ 1998, 192 (Rabo/Everaars); HR 26 June 1998, NJ 1998, 660 (Van de Klundert/Rabo); HR 11 July 2003, NJ 2005, 103 (Van Zuylen/Rabo); HR 5 June 2009, NJ 2012, 182 (De Treek/Dexia). Cf. Huls, *Vergeef ons vaker* 24-25, 29-31.

88 Verdict Supreme Court HR 5 June 2009, NJ 2012, 182 (Den Treek/Dexia), r.o. 4.8.4.

From Paradigm to Paradox

Meanwhile national and international authorities woke up to the fact that mandatory information duties for financial service providers are not enough,[89] because a large percentage of consumers do not understand what the information provided.[90] If consumers are to assume their own responsibility, they need to become, in modern parlance, 'financially literate', which they seldom are. Consequently, the Information Paradigm leads to an Information Paradox: to be free to choose, consumers must be forced to absorb information that barely interests them. Consumers take little active interest in their financial affairs. A 2007 survey in Belgium showed that only 35 percent of those questioned had looked for information from two or more banks.[91] Apparently consumers consider the bother of getting all information to outweigh its use.[92] This highlights another consequence of the Information Paradigm mentioned above. Accepting that informing consumers is the best way of protecting them also means accepting that consumers are liable for the consequences of their choices.[93] Regulatory authorities are reluctant to accept that consequence. As a result initiatives for the financial education of consumers retain a certain degree of paternalism which partly defeats

89 See Vannerom, *Consumentenbescherming*, 111-113. As early as 2008, the Belgian financial market authority developed initiatives for training the financial abilities of consumers: L. Van Cauter, 'De FSMA en de bescherming van de financiële consument', *Bank- en Financiewezen* 75 (2011), 267-272. CBFA, *Verslag over het bevorderen van de financi*ële *kennis in België*, http://www.cbfa.be/nl/consultations/lop/pdf/2008-10_promotion.pdf [website no longer available], 2008, 30-39. For international initiatives see: EU, European Insurance and Occupational Pensions Authority, 'Report on Financial Literacy and Education. Initiatives by Competent Authorities'(2011), https://eiopa.europa.eu/, 38p; the OECD, 'Recommendation of the Concil on Good Practices on Financial Education and Awareness Relating to Credit'(2009), www.oecd.org; OECD, 'Recommendation on Principles and Good Practices for Financial Education and Awareness' (2005), http://www.oecd.org/finance/financial-education/35108560.pdf, 7p.; World Bank, 'Good Practices for Financial Consumer Protection'.

90 V. Mak, 'Een financieel geletterd consument telt voor twee, wat te doen met de anderen?', *Tijdschrift voor Consumentenrecht en Handelspraktijken* 7:3 (2012) 96-98; Heutger, 'Consumentenkrediet'; J.J.A. Braspenning in a critical note under the verdict of the Court of Justice Arnhem-Leeuwarden 2 September 2014, *Tijdschrift voor Consumentenrecht en handelspraktijken* 10:2 (2015) 82-89.

91 Cf. CBFA, *Verslag over het bevorderen van de financiële kennis in België*; cf. also De Meza, Irlenbusch and Reyniers, *Financial Capability* 10-20 and A. Atkinson, S. McKay, E. Kempson and S. Collard, *Levels of Financial Capability in the UK: Results of a Baseline Survey*, http://www.fsa.gov.uk/pubs/consumer-research/crpr47.pdf (2006).

92 G. Becker, 'The Economic Way of Looking at Behavior', in: F. Parisi and C.K. Roweley, ed., *The Origins of Law and Economics. Essays by the Founding Fathers* (Cheltenham 2005) 135-155, ibidem 141.

93 Van Dyck, *Geharmoniseerde prospectusplicht*, 93.

the purpose of campaigns to improve consumer protection. Therefore the search for alternative forms of consumer protection must be continued, if only because it is a fact that people find it difficult to improve their financial skills.[94]

Conclusion

Our comparison of changing attitudes towards credit and consumption in the Low Countries showed, first of all, a negative view, based on social prejudice, of consumer credit as a vice mainly affecting people on low incomes. At the same time the two countries developed, from a highly similar legal basis, different policies to tackle perceived ills. To combat usury, Belgium curtailed the *Code de Civil* and the *Code de Commerce*'s hallowed freedom of contracting. However, Dutch lawyers baulked at that and preferred to trust the market's ability to balance interests and eradicate injustices, until the *Geldschieterswet* in 1932 introduced a combination of mandatory standard contracts and government supervision of the sector. This difference between the two countries became more marked over time, Belgium showing a mistrust of the market and a tendency to intervene, the Netherlands relying more on the market and on soft law and the consumer's own responsibility to prevent mishaps.

During the 1960s general attitudes towards consumer credit changed in both countries. As rising disposable incomes boosted credit use, credit came to be seen as a normal part of modern life and modern consumption patterns for everyone. New legislation eliminated previous prejudices and rendered all consumers classless, equal before the law, a momentous shift in attitudes which in our view marks the general acceptance of modern consumption patterns in all their ramifications, i.e. the advent of the consumer society. However, that equality before the law did not last. European consumer protection legislation adopted the Information Paradigm, the principle that properly informed consumers make rational choices, in which case they are responsible for what they choose. Hardly had Mr. and Mrs. Normal been created or consumers were being subdivided into more and more categories

94 Van Dyck also pleads for alternative forms of consumer protection: T. Van Dyck, 'Antwoord op de open consultatie van de CBFA over het Verslag over het bevorderen van de financiële kennis in België', http://www.tomvandyck.com/Consultatiedocument%20CBFA%20-%20Financial%20Education%20%283%20January%202009%29.pdf [website no longer available], 2008, 5. See also R.A. Epstein, 'The Neoclassical Economics of Consumer Contracts', in: O. Bar-Gill and R.A. Epstein, *Consumer Contracts: Behavioral Economics vs. Neoclassical Economics. An exchange between Oren Bar-Gill and Richard A. Epstein*, http://ssrn.com/abstract=982527 (New York 2007) 1-19, ibidem 6-7.

deserving of protection because of their recognized inability to absorb sufficient information at the right moment. At the same time the increasing complexity of financial products hollowed out the mandatory information duties to the point of becoming useless, resulting in an information paradox: consumers can only be considered responsible if they could be brought to stomach a mass of indigestible information. Both governments have put their hopes on financial education to bring consumers to do just that, but the Information Paradigm has fragmented the mass of consumers, once all equal before the law, into numerous special interest groups deserving attention for one reason or another.

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