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Protection of Consumers in Consumer-Credit Contracts:

Expectations and Reality in Estonia^{*1}

1. Introduction

Consumer protection in credit agreements has become an increasingly acute legal and social problem during the recent economic crisis. This crisis was at least partly rooted in the lending boom, during which credit was extremely easily obtainable even for non-creditworthy borrowers. Since 2008, we have been experiencing the sobering effects of the recession, in Estonia just as much as in other countries, and it has very often been the consumer who faces the bitter consequences of over-indebtedness.

This article discusses the development and experiences of Estonian consumer-credit law over the last 10 years—i.e., since the codification of the new Estonian law of obligations. The paper is based on the assumption that the analysis of consumer-protection issues in consumer credit cannot be limited solely to the provisions of substantive law: while in Estonia the contractual aspects of credit transactions are regulated by the Law of Obligations Act^{*2} (LOA), including the norms implementing the new EU Consumer Credit Directive^{*3} (CCD), the enforcement of the claims arising from consumer-credit contracts are to a great extent set forth in or affected by other legal acts, most importantly in the General Part of the Civil Code Act^{*4} (GPCCA) and the Civil Procedure Code.^{*5} The Consumer Protection Act^{*6}, in turn, regulates the public-law requirements of offering of credit services and the supervision thereof. The article shows that it is not possible to achieve effective protection of consumers in credit relationships by substantive-law regulation alone. On the contrary: in reality, it is very much dependent on aspects of procedural law.

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² Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 11.6.2013, 3 (in Estonian).

³ 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 133/66, 22.5.2008.

⁴ Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; RT I, 6.12.2010, 12 (in Estonian).

⁵ Tsiviilkohtumenetluse seadustik. – RT I 2002, 35, 216; RT I, 22.3.2013, 16 (in Estonian).

⁶ Tarbijakaitseseadus. – RT I 2004, 13, 86; RT I 2010, 77, 590 (in Estonian).

2. The problem of the decade: usurious electronic consumer credit

2.1. Usurious lending practices in Estonia and the response from the legislator and the Supreme Court

The most acute consumer-protection problems in consumer credit have largely been related to the usurious practices involved in electronic consumer credit. Using small-scale electronic consumer loans—that is, unsecured instant loans obtainable via text message (so-called SMS loans) or via the Internet—has become extremely popular in Estonia in the last 7–8 years. Such loans are widely offered—partly by the same companies⁷—also in other Baltic and Nordic countries. On one hand, such kind of electronic consumer credit is a modern and highly innovative credit product: new technical possibilities make it extremely easy to obtain credit. On the other hand, the usurious and irresponsible lending practices of electronic-credit providers have created new tensions and substantial socio-economic problems, including over-indebtedness of consumers, in Estonia just as much as in other Nordic-Baltic societies. To a great extent, those problems stem from the usurious nature of the loans, as an extremely high annual percentage rate of charge (APRC) is charged on them: for example, if the user takes out credit of 100 euros for one month, the average APRC might be slightly over 600%. It has not been rare in Estonia for the APRC of an electronic consumer loan to exceed 1,000%.⁸ The information obligations of the creditor and the right of withdrawal of the consumer set forth in the European consumer-protection directives have proved to be ineffective against usurious lending practices in Estonia.⁹

So far, different methods of combating those problems have been applied in other European countries (administrative methods, interest- or APRC-rate caps, unconscionability doctrine, etc.) with ongoing legal discussion of whether more efficient methods should be employed.¹⁰ The Estonian legislator, for example, has tried to solve those problems by setting relative APRC-rate caps in combination with the unconscionability doctrine. In 2009, the Estonian Parliament passed a legislative amendment changing the notion of a transaction violating ‘good morals’ as characterised in §86 of the GPCCA. With this amendment the legislator attempted to set forth a rule that usurious credit contracts can be considered to be against good morals and thus void under §86 (1) of the GPCCA. According to the new §86 (2) of the GPCCA, a transaction is deemed contrary to good morals if, *inter alia*, a party knew or had to have known that the other party entered into the transaction because of urgent needs, dependence, or inexperience of the other person, or similar circumstances, and if 1) the transaction was carried out on terms grossly unfair for the other party or 2) an imbalance exists between the value of the mutual obligations of the parties that is deemed contrary to good morals. To ease the consumer’s burden of proof, the second sentence of §86 (3) of the GPCCA stipulates that in cases of consumer-credit contracts it is assumed that the value of the parties’ mutual obligations is disproportionate and contrary to good morals if, *inter alia*, at the time of issuing of the loan the APRC payable by the consumer is more than three times the average APRC charged on consumer credit by credit institutions as determined from the latest statistics prepared by the Estonian Central Bank.

The applicability of this unconscionability doctrine to electronic instant consumer loans was clarified in Supreme Court case 3-2-1-49-11. To hold the credit contract void under §86 of the GPCCA—so the Supreme Court stated—one must determine, first, whether there is a gross imbalance between the values of the mutual obligations of the parties and, second, whether the consumer concluded the contract due to his urgent needs, dependence, or inexperience.¹¹ Most importantly, the Supreme Court stressed that it is the

⁷ Such as Bigbank, Folkia, or Ferratum.

⁸ See, for example, the APRC figures for electronic small-scale credit company SMSLaen at <https://www.smslaen.ee/?mod=ModLaenTables&menuID=56&lang=est>.

⁹ For further information, see K. Saare, K. Sein, M.A. Simovart. Protection of consumer rights in SMS loan agreements. – *European Review of Private Law* 2010 (18)/1, pp. 129–142.

¹⁰ The most recent thorough comparative study of interest-rate restrictions in Europe was published in 2010. See U. Reifner, S. Clerc-Renaud, M. Knobloch. Study on interest rate restrictions in the EU: Final Report. Available at http://ec.europa.eu/internal_market/finservices-retail/docs/credit/irr_report_en.pdf (most recently accessed on 21.10.2013). However, since then, legislative changes or amendment proposals have been made in several Member States (e.g., Finland and Lithuania).

¹¹ CCSCr 17.6.2011, 3-2-1-49-11, para. 8. Available at <http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-49-11> (most recently accessed on 10.4.2013) (in Estonian).

consumer who has to plead and prove the existence of that second element; however, the standard of proof may be lower in those cases wherein the disproportion of the parties' obligations is extreme.^{*12}

2.2. The effectiveness of the unconscionability doctrine against usurious practices

The purpose of introducing the unconscionability doctrine in combination with relative interest-rate caps in §86 of the GPCCA was to 'reduce the social problems related to the fast development of instant consumer credit market'; it was admitted that the current legal rules were not able to solve those problems in accordance with social needs and the society's sense of justice.^{*13} As the new rules of §86 of the GPCCA have been in force for four years already, the first conclusions can be drawn on whether the amendments have reached this goal or, instead, there is a need for stricter consumer-protection mechanisms.

As is described above, the Estonian Supreme Court took the position that merely establishing that the APRC of a particular consumer-credit contract is in excess of three times the average APRC (i.e., establishing the existence of a disproportion of the parties' obligations) is not, in itself, enough for assumption of the existence of the subjective component and, as a result, for one to consider the credit transaction to be against good morals and thus void. Moreover, it is necessary that the consumer additionally plead and prove that he concluded the credit contract as a result of urgent needs or inexperience. This means that in reality the norm providing for the voidness of a usurious credit contract cannot be applied *ex officio* by the court, particularly if the consumer is not present for the proceedings (in the case of default judgement), as is often the case in Estonia.^{*14} This is probably one of the most important reasons for which the unconscionability doctrine has proved to be ineffective against the usurious practices.^{*15} There are practically no cases wherein the voidness of a usurious credit contract has been established by the court and in which the consumer has been able to prove his urgent needs or inexperience.^{*16}

There are also other procedural and, in addition, psychological reasons for which the problems of usurious consumer credit continue to exist in Estonia. First, the creditors often assert their claims against consumers not in ordinary court proceedings but, rather—as their first resort—by using debt-collection agencies. After receiving the payment reminder from the collection agency, consumers are often ready to pay voluntarily, as they are afraid of the creditor reporting their default to the credit-information registry^{*17} and thereby bringing about their stigmatisation for the whole credit market.

Secondly, the creditors apply the order-for-payment procedure in hopes that the consumers will not lodge a statement of opposition. Namely, if the debtor does not file a timely statement of opposition to the claim, the court issues a payment order in accordance with §489 of the Estonian Civil Procedure Code. Such a payment order can be enforced without any other formalities. Therefore, in the order-of-payment procedure, if the consumer does not lodge an objection—as is often the case in Estonia—the validity of the claim is not examined by the court at all. It is unfortunate that there is no such restriction in Estonian civil-procedure law as in Germany, where §688 (2), No. 1 of the German Civil Procedure Code does not allow the order-for-payment procedure to be used in cases of consumer-credit claims if the APRC of the credit

¹² SCCCd 3-2-1-49-11, para. 9.

¹³ Tsviiliseadustiku üldosa seaduse ja võlaõigusseaduse muutmise seaduse eelnõu seletuskiri ['Explanatory Notes to the Act Amending the General Part of Civil Code Act and Law of Obligations Act']. Available at <http://www.riigikogu.ee/?page=eel nou&op=ems2&emshelp=true&eid=420369&u=20130411155159> (most recently accessed on 10.4.2013) (in Estonian).

¹⁴ See, for further details, I. Ulst. *Balancing the Rights of Consumers and Service Providers in Electronic Retail Lending in Estonia*. Tartu: Tartu Ülikooli Kirjastus 2011, p. 75.

¹⁵ It is interesting to note that exactly the same tendency has been observed in a country as far away as Australia; see J. Tuffin. Responsible lending laws: Essential development or overreaction. – *QUT Law & Justice Journal* 2009 (9)/2, pp. 289, 291.

¹⁶ M. Vutt. Tehingu heade kommete vastasus TSÜS § 86 alusel ['Transactions Contrary to Good Morals under Section 86 of GPCCA'], pp. 6–18, 25–26. Available at http://www.riigikohus.ee/vfs/1352/TehinguHeadeKometeVastasus_MargitVutt.pdf (most recently accessed on 3.4.2013) (in Estonian). There is, however, a recent judgement of Tallinn District Court (No. 2-11-60438) in which the court held asserting claims arising from a consumer-credit contract with an APRC of 441% to be incompatible with the principle of good faith. Here the court explicitly did not apply the unconscionability doctrine of Section 86 of the GPCCA and instead stated that enforcing contracts with an excessive APRC runs counter to the principle of good faith.

¹⁷ There is no state-owned official credit information registry in Estonia. Credit information registries are run by private companies, the biggest being Krediidinfo AS.

contract exceeds the average market interest by 12%.^{*18} Thus it is that the interests of consumers are not protected in the order-for-payment procedure.^{*19}

The norms banning usurious contracts have further been avoided through the use of abstract acknowledgements of debt: when a consumer defaults, the creditor offers him an abstract acknowledgement of debt to sign (or sometimes manipulates him into so doing), according to which the consumer acknowledges that he owes the creditor a certain sum of money. This acknowledgement of debt contains no details about how much of that sum is the capital of the debt and how much the interest, penalty interest, or other costs. Those acknowledgements of debt are then enforced either in order-for-payment procedure or in ordinary proceedings, making it impossible or at least very difficult for judges to determine whether the underlying contract is void in consequence of the excessive APRC rate.

It is also the Estonian reality that most debtors in cases of usurious consumer loans are persons who are not ready to assert their rights in the courts or who do not possess the financial means necessary for this. Moreover, consumer-credit norms are often highly complicated, and consumers, as a rule, are not able to resort to them^{*20}, at least not without professional legal aid. All in all, I share the view of the Estonian Consumer Protection Board that the unconscionability doctrine and the relative APRC restrictions in §86 of the GPCCA have not fulfilled their purpose of effectively limiting the usurious practices of electronic consumer-loan providers.^{*21}

2.3. A plea for introducing APRC restrictions in Estonia

In order to put an end to usurious lending in Estonia, the author suggests introducing APRC restrictions, at least for consumer credit. This would seem to be the only way of effectively protecting consumers against such practices: when one turns an eye to neighbouring countries facing the same kinds of problems, it seems that other, less restrictive measures have not been a success. For example, the Finnish legislator has only very recently implemented an important legal reform related to instant credit in order to reduce consumer-debt problems caused by such credits.^{*22} Amendments to the Finnish Consumer Protection Act, introducing interest-rate caps of 50% plus legal interest for small-scale consumer-credit contracts (i.e., credit under 2,000 euros) in its Article 17a, were approved in the Finnish Parliament in February 2013.^{*23} This is a development that, in my opinion, should be very carefully monitored. Finland, along with other Nordic countries, has traditionally opposed interest-rate restrictions, differing in this respect from such Member States as Germany, France, Belgium, Italy, or Poland, where interest-rate caps in one or another form have existed already for a long time. The Finnish legislator has thus far opted instead to use administrative methods restricting the 'opening hours' of instant-credit providers in order to prevent impulsive borrowing in the late evening and during the night. Obviously, those administrative methods have not proved to be effective, for Finland has now deemed it necessary to set the maximum interest rate as low as 52%.

Quite similarly, in Lithuania, an absolute APRC cap of 200% has been introduced since the beginning of 2011.^{*24} In other words, our close neighbours who have been facing exactly the same problems of usurious electronic lending as we are in Estonia have seen no other way of solving them except to introduce

¹⁸ K. Saare, K. Sein, M.A Simovart. Laenusaja õiguste kaitse SMS-laenu lepingute puhul ['Protection of consumers in SMS loan agreements']. – *Juridica* 2010/1, p. 49 (in Estonian); M. Vutt. Maksekäsu kiirmenetluse kohtupraktika probleeme ['Problems of order-for-payment procedure'], p. 6. Available at http://www.riigikohus.ee/vfs/1140/Maksek2suKiirmenetus_MargitVutt.pdf (most recently accessed on 3.4.2013) (in Estonian).

¹⁹ This is also stressed by V. Kõve. Tsiviilkohtumenetluse kiirendamise võimalused ja nendega seotud ohud ['Possibilities for expediting civil proceedings and dangers thereof']. – *Juridica* 2012/9, pp. 670–671 (in Estonian).

²⁰ *Ibid.*, p. 668.

²¹ *Tarbijakaitseameti aastaaruanne 2010* ['Yearbook of the Consumer Protection Board'], p. 55, Available at http://www.tarbijakaitseamet.ee/public/Aastaaruanne_2010.pdf (most recently accessed on 11.4.2013) (in Estonian).

²² Key reforms in collection and instant loan legislation. *Current Issues in Consumer Law* 2013/1. Available at <http://www.kuluttajavirasto.fi/en-GB/articles/current-issues-in-consumer-law-1-2013/key-reforms-in-collection-and-instant-loan-legislation> (most recently accessed on 3.4.2013).

²³ Laki kuluttajansuojalain 7 luvun muuttamisesta. Available at <http://www.finlex.fi/fi/laki/alkup/2013/20130207> (most recently accessed on 4.4.2013) (in Finnish). The act entered into force on 1.6.2013.

²⁴ Section 21 of the Law on Consumer Credits of the Republic of Lithuania (or *Lietuvos Respublikos vartojimo kredito įstatymas*). Available at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=413353&p_query=&p_tr2=2 (most recently accessed on 4.4.2013) (in Lithuanian).

some sort of interest or APRC caps. Therefore, in my opinion, the Estonian legislator should have second thoughts about the solution of the unconscionability doctrine implemented back in 2009 and seriously consider the possibility of setting APRC restrictions either in §86 of the GPCCA or in the chapter of the LOA on consumer-credit contracts.

It must be noted that the possibility of APRC restrictions has not been favoured by all Estonian authors. In the Estonian legal literature, even the Constitutional compliance of APRC restrictions has been cast into doubt with the assertion that ‘the APRC limit disproportionately restricts the constitutionally protected right of entrepreneurship freedom of service providers. In weighing the proportionality of the restriction, an important issue is the conflict between the principle of [the] social state and the fundamental right of entrepreneurship freedom’^{*25}²³. Instead of limiting the cost of credit, this author favours higher information, disclosure, and prudent-marketing requirements reconcilable with the idea of responsible borrowing.^{*26}

In essence, this is a classical argument against interest-rate caps: if in a free-market society we do not restrict by law the price of bread or cars, then how could we regulate how much a borrower should pay for the credit money? A classical counter-argument, of course, states that we cannot compare credit with other products, such as bread or cars: ‘Credit is different from other products and services offered to consumers in the sense that it will also affect their economic situation in the future.’^{*27} Indeed, if I waste all of my money today on a new car or expensive shoes, then I can have a fresh start tomorrow, but if I buy those things on credit, I will be financially bound for many years to come.

Thus the positive sides of APRC restrictions—if they are not set too low—do outweigh the negative effects: in my view, there seems to be no other possibility for effectively fighting the usurious lending practices that have been commonplace in Estonia for almost a decade. It is, of course, a question of legal policy how high the interest-rate cap should be set; in my view, a good starting point could be the threshold of thrice the average APRC charged on consumer credit by credit institutions that is currently set forth in §86 (3) of the GPCCA. Yet, should the Estonian legislator follow the Finnish and Lithuanian model and introduce APRC restrictions in domestic law, one must not forget the procedural aspects of the problem. To ensure that the APRC caps set forth in substantive law are not avoided by procedural means, it should further be specified in regulations that claims arising out of consumer-credit contracts exceeding the APRC ceiling may not be asserted via order-for-payment procedure.

3. The principle of responsible lending

The negative effects of irresponsible lending became obvious during the recent financial crisis, which in Estonia was preceded by a lending boom. One instrument intended to reduce the level of over-indebtedness or debt default of consumers on the European level was the introduction of the principle of responsible lending in Article 8 of the CCD.^{*28} The essence of the principle of responsible lending was, in my view, very pointedly described in a Tartu County Court decision stating that ‘bad’ borrowers are connected to ‘bad’ creditors and that ‘the creditor is not forced to give out credit’.^{*29} This really is the core idea of responsible lending: if creditors were paying more attention to consumers’ creditworthiness when making their credit decisions in the first place, there would be many fewer defaulting consumers.

²⁵ I. Ulst (see Note 14), p. 79. In my view, however, it is somewhat ambiguous to state that such interest-rate caps are in contradiction with the Estonian Constitution while similar or even more stringent caps in Germany, France, or other European countries are not considered to be unconstitutional in those countries.

²⁶ *Ibid.*, p. 81. Other authors, in contrast, are of the opinion that the regulation of APRC limits is justified for protection of consumers, especially in account of the fact that in various European countries similar or even more restrictive interest limits exist; see K. Saare, K. Sein, M.A. Simovart (see Note 9), pp. 141–142.

²⁷ Instant loans marketed to the young as a way to [a] good life. *Current Issues in Consumer Law* 2012/5. Available at <http://www.kuluttajavirasto.fi/Page/34eb3afa-518b-450d-ab79-b13b2e0256b8.aspx?groupId=6090d570-ba72-4182-82f8-300406e80f02&announcementId=621124d5-ddbe-4129-9e6b-3a76d1d9dd21> (most recently accessed on 3.4.2013).

²⁸ For further information, see I. Ramsay. From truth in lending to responsible lending. – G. Howells, A. Janssen, R. Schulze. *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness*. Aldershot: Ashgate 2005, p. 15.

²⁹ Decision of Tartu County Court 2-11-4320.

Although the principle of responsible lending is set forth in the full harmonisation CCD, that directive gives Member States broad discretion over regulation of how exactly the creditor is to assess the consumer's creditworthiness and what the sanctions should be for the breach of such obligation.^{*30} In Estonia, the principle of responsible lending was implemented in §403² of the LOA, requiring that, prior to conclusion of a consumer-credit agreement, creditors 1) acquire the information necessary to assess the creditworthiness of the consumer; 2) assess the consumer's creditworthiness, and 3) counsel consumer before he takes out credit so that the consumer can evaluate whether the consumer-credit contract offered to him is adjusted to correspond to his needs and financial situation. When acquiring information for the assessment of creditworthiness, the creditor is obliged to solicit information from the consumer and, where appropriate, consult relevant databases. If the consumer can be expected to need or wish for more explanations as to the pre-contractual information or the main features or legal consequences of the contract, including legal consequences of default by the consumer, the creditor is obliged to furnish corresponding explanations and to warn the consumer of the risks incidental to consumer credit (see §403² (4) of the LOA). Thus the standard of responsible lending has been set relatively high in Estonia: although there is no prohibition of conclusion of a credit contract with a non-creditworthy consumer, the creditor is obliged to warn such a consumer^{*31} and failing to do that may lead to sanctions for the creditor.

Those sanctions are not harmonised by the CCD; instead, this was left to the discretion of the Member States, with Article 23 of the CCD requiring only that 'the penalties provided for must be effective, proportionate and dissuasive'. Estonian law provides for public-law sanctions in §41¹ (1) of the Consumer Protection Act, entitling a supervisory official to issue an injunction to cease the breach of the obligation and to refrain from it in the future. If the order is not complied with, a penalty payment may be imposed, with its upper limit being 650 EUR. Furthermore, recent case law has also awarded the borrower a damages claim for negative interest if the creditor is in breach of the responsible-lending obligation. Namely, in case 3-2-1-136-12, the Estonian Supreme Court stated that the obligation of the creditor to assess the creditworthiness of the borrower constitutes a pre-contractual obligation under the LOA's §14 (1), according to which persons engaged in pre-contractual negotiations or other preparations to enter into a contract shall take reasonable account of one another's interests and rights.^{*32} Breaching this obligation may give the consumer a right to damages under §§14 and 115 of the LOA whereby the damages should be assessed on the basis of the expectation of (negative) interest. Therefore, the borrower should be compensated for all negative consequences of the credit (interest for late payment, penalty for breach of contract, and decrease in assets) and the borrower can set off this claim for damages with the repayment claim of the creditor.^{*33}

Here we see that the private-law sanctions for breach of the responsible-lending obligation can be relatively far-reaching under Estonian law. Further, the recent legislative amendments of the LOA specified the obligations of the creditor in respect of assessing the consumer's creditworthiness and stated clearly that it is the creditor who—in case of a dispute—has to prove that he has fulfilled all his obligations required for compliance with the principle of responsible lending (LOA, §403² (7)).^{*34} This is, no doubt, a positive development, as a recent study by the Estonian Consumer Protection Board^{*35} has shown that in practice the principle of responsible lending is not observed by all creditors even though awareness of it is constantly increasing. It remains to be seen, however, whether those private-law sanctions will really be enforced in case law or whether, instead, they will again be outweighed by procedural-law aspects.

³⁰ For further information, see K. Sein. Transposition of the new Consumer Credit Directive in Estonia. – *European Review of Private Law* 2012/2, pp. 439–440.

³¹ SCCCd 27.11.2012, 3-2-1-136-12, para. 24. Available at <http://www.nc.ee/?id=11&tekst=RK/3-2-1-136-12> (most recently accessed on 10.4.2013) (in Estonian).

³² *Ibid.*

³³ *Ibid.*, para. 25.

³⁴ Those amendments entered into force on 1.7.2013. – RT I, 11.6.2013, 3 (in Estonian).

³⁵ Tarbijakrediidi uuring ['Study of consumer credit']. Available at <http://www.tarbijakaitseamet.ee/tarbijakrediidi-uuring/> (most recently accessed on 10.4.2013) (in Estonian).

4. Unfair terms and other party-autonomy restrictions in consumer-credit contracts

4.1. Contractual penalty for late payment

One of the most important aspects of consumer protection in consumer-credit transactions is related to the limitations to party autonomy—i.e., whether and to what extent the statutory rules may be derogated from by (standard) contract. Although it could be argued that current restrictions of party autonomy in consumer law are over-protective and paternalistic, the Estonian experience suggests that, rather, the view of I. Ramsay might be true: regulation of contractual terms and mandatory terms may increase consumer autonomy, defined as future (economic) freedom.^{*36} Step by step, Estonian case law has acknowledged the dangers associated with absolute party autonomy (which in practice means the freedom of the creditor to dictate contract terms) and has started to dismiss the abusive clauses in credit contracts.

A good example can be cited in relation to the contractual penalty for late payment. Before 2008, it was common practice among creditors (mostly those offering usurious consumer credit) to provide for a contractual penalty for late payment, which was claimed in addition to the interest on late payments. The Estonian Supreme Court declared such clauses void in case 3-2-1-120-08, as contrary to the mandatory provisions of the LOA's consumer-credit contract terms.^{*37} After that decision, the legislator even inserted an express provision in the LOA precluding such contract terms: according to the newly added third sentence of §415 (1) of the LOA, agreements that allow claiming payment of earnest money or contractual penalty from the consumer in the case of late payments are void. This has brought about changes in creditors' practices—largely thanks to continuous supervision by the Estonian Consumer Protection Board—and today such clauses cannot be found in most standard terms anymore. Here we can again observe one positive development in the consumer protection in credit transactions in recent years.

4.2. Liquidated-damages clauses for debt-collection and payment-reminder costs

Another positive development, although thus far somewhat less successful, has to do with liquidated-damages clauses involving debt-collection and payment-reminder costs. Charging unreasonably high fees for debt collection and payment reminders has been regular practice among credit providers, again mostly those providing usurious consumer loans. Here too, the Supreme Court intervened and ruled in case 3-2-1-120-08 that clauses according to which consumers have to compensate for debt collection and for payment-reminder fees as fixed in the standard terms of the creditor can be deemed unfair under §42 (3), item 5 of the LOA, if they are unreasonably high.^{*38}

There is, however, no consistent understanding of when such costs can be considered unreasonably high and the clauses thus void. One can find decisions wherein the court has deemed such costs to be unreasonably high and, accordingly, unfair and, therefore, in which the consumer does not have to bear them or has to compensate for them only to a reduced extent.^{*39} On the other hand, there are also decisions in which the court has held those clauses to be valid and ordered the consumer to pay collections costs in considerable amounts.^{*40}

The absence of uniform case law is, of course, understandable, since Estonian law does not provide for clear criteria to apply in decisions upon the possible unfairness of such clauses. One possibility for creation of legal certainty on the extent to which the debt-collection costs of the credit provider should be subject to compensation would be to turn once more to the Finnish model: in Finland, the maximum amounts of

³⁶ I. Ramsay (see Note 28), p. 16.

³⁷ SCCCd 14.1.2009, 3-1-1-120-08, para. 15. – RT III 2009, 3, 17 (in Estonian).

³⁸ *Ibid.*

³⁹ E.g., decisions of Tartu County Court 2-08-14356 and 2-11-19661, wherein said court considered 3,100 kroons (approx. 199 EUR) and 166.14 EUR debt-collection fees to be unreasonably high.

⁴⁰ See, for example, decision of Harju County Court No. 2-07-3204, wherein the creditor was afforded 86.92 EUR in debt-collection fees.

debt-collection and reminder costs are set forth by law.^{*41} Very recently, the Finnish Debt Collection Act was amended, and those maximum amounts have been lowered, especially for small debts, of no more than 100 euros, in which case the debtor's total liability for fees may be no greater than 60 euros.^{*42} For a normal payment reminder, the maximum amount under Finnish law is 5 EUR^{*43}; in Estonia, one can often find much higher fees in the standard terms of credit providers, although the actual costs should be considerably lower in Estonia than in Finland.

4.3. The court's right to assess unfairness of a contract term in order-for-payment procedure

As described above, the substantive consumer-protection norms are often ineffective if the creditor asserts his claim via the order-for-payment procedure. The same is true for provisions of substantive contract law aimed at combating unfair contract terms: when issuing the order for payment, the judge does not assess the possible unfairness of the contract term on which the claim is based. These negative effects of procedural law have been acknowledged also by the Court of Justice of the European Union (CJEU), in the *Banco Español de Crédito* case, wherein a Spanish court asked for a preliminary ruling on the question of whether a national court should be able to assess the unfairness of a term related to interest on late payments of its own motion in the order-for-payment procedure proceedings, in situations wherein the consumer has not lodged an objection.^{*44} It has long been established in CJEU case law that in ordinary court proceedings the court should always determine *ex officio* whether the contractual term is unfair or not.^{*45} The order-for-payment procedure, however, is a specific procedure characterised by the purpose of offering creditors easier and more rapid access to justice; therefore, it is not at all self-evident that the *ex officio* obligations of the court should be applied in this kind of procedure as well.

The CJEU stated that 'Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, in *limine litis* or at any other stage during the proceedings, even though it already has the legal and factual elements necessary for that task available to it, whether a term relating to interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, in the case where that consumer has not lodged an objection'.^{*46} In essence, the CJEU ruled that if a judge responsible for an order-of-payment procedure notices that there is an unfair contract term upon which the creditor's claim is based, he should be entitled—but not obliged—to assess it of his own motion even if the consumer has not objected and that a national procedural law that does not give the judge such a right is contrary to the Unfair Terms Directive. The CJEU justified such intervention in the procedural autonomy of Member States with the argument that otherwise businesses would be able to deprive consumers of the benefit of the protection intended by the Unfair Terms Directive just by initiating an order-for-payment procedure instead of ordinary civil proceedings.^{*47}

What does the judgement of the CJEU in *Banco Español de Crédito* mean for Estonian civil-procedure law? Subsection 489 (1) of the Estonian Civil Procedure Code stipulates that if the debtor has neither paid the debt specified in the application nor lodged an objection, the court shall issue an order of payment. This order is enforceable even before it is served to the debtor (see §489 (7) of the Civil Procedure Code). Under Estonian rules on order-of-payment procedure, there is no requirement to find out and prove the facts of

⁴¹ Debt Collection Act (*laki saatavien perinnästä*). Available at <http://www.finlex.fi/fi/laki/ajantasa/1999/19990513> (most recently accessed on 10.4.2013) (in Finnish).

⁴² Key reforms in collection and instant loan legislation. *Current Issues in Consumer Law* 2013/1. Available at <http://www.kuluttajavirasto.fi/en-GB/articles/current-issues-in-consumer-law-1-2013/key-reforms-in-collection-and-instant-loan-legislation> (most recently accessed on 3.4.2013) (in Estonian).

⁴³ Finnish Debt Collection Act, §10a, item 1.

⁴⁴ Judgement of the Court of Justice of the European Union, 14.6.2012, in Case C-618/10, *Banco Español de Crédito SA v. Joaquín Calderón Camino*, not yet published, paras 37–38.

⁴⁵ See, in depth, V. Trstenjak. Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU. – *European Review of Private Law* 2013/2, pp. 463–472.

⁴⁶ C-618/10, *Banco Español de Crédito*, para. 57.

⁴⁷ *Ibid.*, para. 55.

the case; neither is the court obliged to assess of its own motion whether the claim is well-founded.^{*48} Nor is there a right of the court to do so. As the Estonian civil-procedure law does not entitle the court to assess of its own motion the possible unfairness of the contract term upon which the claim of the creditor is based, it is, in my view, not in conformity with the European Union law on unfair contract terms as explained by the CJEU in *Banco Español de Crédito*.^{*49} Therefore, it is necessary either to interpret the Estonian civil-procedure rules on the order-for-payment procedure in conformity with European law or—preferably—to amend the Estonian Civil Procedure Code accordingly.

5. Conclusions

The most acute consumer-protection problems in consumer credit in Estonia have largely stemmed from usurious and irresponsible lending practices of unsecured electronic consumer credit, leading in many cases to a vicious circle of debt and consumer insolvency. The unconscionability doctrine introduced in Estonian law for purposes of combating those problems has proved to be ineffective in practice, largely for procedural-law reasons. Therefore, the author makes a plea for introducing APRC restrictions into Estonian law—in a parallel to what was done recently by our neighbours Finland and Lithuania—as this seems to be the best way to protect consumers against usurious lending practices. It is also worth opening discussion about setting forth maximum amounts for debt-collection fees by law. The positive tendencies in consumer protection in Estonian consumer-credit law are related primarily to gradual removal of unfair contract clauses and also to the possibility of claiming expectation damages from the creditor for breaching the principle of responsible lending.

The Estonian experience shows once again that substantive-law provisions alone are not enough for effective consumer protection. The fact that consumers tend to be rather passive in asserting their rights means that in practice procedural-law factors such as whether and when the court is entitled or obliged to take action of its own motion or who bears the burden of proof are at least equally important.

⁴⁸ M. Vutt (see Note 16), p. 3.

⁴⁹ Such doubts have also been expressed by V. Kõve (see Note 19), p. 671.