DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS
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INGRID ULST

Balancing the rights of consumers and service providers in electronic retail lending in Estonia

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LIST OF ORIGINAL PUBLICATIONS

This dissertation is based on the following publications:

1. Ulst Ingrid, "Connecting Prepaid Cards and Retail Loans: Innovative Practical Solution or Confusing Legal Combination? Implications of the EU Financial Services Law from an Estonian Perspective", Review of Central and East European Law, Vol 34 No 2 (2009), 173–191.

2. Ulst Ingrid, "Legal Problems with Electronic Retail Loans: Balancing the Freedom of Contract and the Protection of Consumers – The Case of Estonia", The Journal of Eurasian Law, Vol 2 No 2 (2009), 23–50.

3. Ulst Ingrid, "Electronic Retail Lending in Estonia: Legal Limits on the Cost of Credit", Review of Central and East European Law, Vol 35 No 3 (2010), 257–291.

INTRODUCTORY CHAPTER TO A CUMULATIVE DISSERTATION

1. INTRODUCTION

The last years have seen a significantly fast development of financial services, the expansion of service volumes and the entry of innovative service providers in the market of financial services. Retail lending is an important part of financial services. In the euro-area the total volume of loans to households in August 2010 was 5106,1 bn EUR with retail loans amounting to 643,1 bn EUR (~12,5%).[1] Although the recent financial turmoil has influenced the growth trend of consumer credit everywhere in the European Union (EU), retail lending has become an important element of financial services also in the new member states from Central and Eastern Europe with younger credit markets[2]. In Estonia, the portfolio of retail lending by commercial banks was around 8,7 bn EEK as at 31.12.2010.[3] The overview of the market of financial services in Estonia prepared by the Estonian Financial Supervision Authority (EFSA)[4] indicates that at the end of 2010 the number of loan agreements concluded between commercial banks and private individuals was as follows: 158 000 mortgage loan agreements, 107 400 study loan agreements, 246 100 retail loan agreements, 142 500 overdraft agreements, 436 400 credit card agreements and 43 300 other types of loan agreements. Although in most loan categories lending to private individuals has somewhat decreased due to the impacts of economic recession, it is interesting to note an increase in the number of agreements concluded between commercial banks and private individuals in the categories of retail loans and consumer overdraft agreements in 2010: respectively by 7% and 12%. The development of innovativeness in the financial services market of Estonia has among others been marked by the

[1] The source of these data is the Central Bank of Germany. The data are available at http://www.bundesbank.de/
statistik/statistik_eszb_neuesfenster_tabelle.php?stat=outstanding_amounts&lang=en (30.09.2010).

[2] European Commission, Directorate-General Health and Consumer Protection. Study on the Calculation of the Annual Percentage Rate of Charge for Consumer Credit Agreements, Final Report 2009, 85. Available at http://ec.europa.eu/consumers/rights/fin_serv_en.htm (13.06.2011).

[3] Rahandusministri määruse "Tarbijakrediidi kulukuse määra arvutamise kord" eelnõu seletuskiri (Explanatory note to the regulation of the Minister of Finance "Procedure for Calculation of the Rate of the Cost of Consumer Credit"), June 2010, 5. Available at http://eoigus.just.ee/?act=6&subact=1&OTSIDOC_ W=292658 (01.06.2010) (in Estonian).

[4] The data are based on the Estonian Financial Supervision Authority (EFSA) overview of the market of financial services in Estonia as at 31.12.2010. *See* Finantsinspektsioon, Eesti finantsteenuste turg seisuga 31.12.2010 (The market of financial services in Estonia at 31.12.2010). Available at http://www.fi.ee/failid/Ylevaade_turg_seisuga_2010_12_eesti.pdf (12.06.2011) (in Estonian).

increasing importance of electronic retail loans (also hereinafter referred to as 'SMS loans'). Today, the estimated market share of electronic retail lenders is below 5% of the whole retail lending market.[5] Thus, next to regulated commercial banks, part of consumer lending is today carried out by electronic retail lenders.

No authorization is required for the granting of credit in Estonia. Prudential supervision is exercised only with regard to those credit-granting entities which have gained an authorization from the EFSA (and respectively provide other regulated services too). Electronic retail loans granted by non-bank institutions are financial services which are not under the supervision of the EFSA. Therefore there is no actual overview of the total market of retail loans and the volumes of different credit products in Estonia; the total market volume is an estimate.[6] Although no official data exist about the whole market of retail loans in Estonia (including electronic retail loans), the above figures would indicate that retail lending is an important component of Estonian credit market.

The major purpose of innovative financial services is the increased practical comfort of consumers. Retail loans, especially electronic loans, often serve as a source for funding to cover ordinary daily expenditures or some extraordinary costs. The financing of ordinary daily expenses presents the biggest share of retail loans provided by commercial banks in Estonia, amounting to 37% of total retail loans.[7] The field of electronic retail lending, which provides consumers with fast and flexible access to loans, has proved to be an efficient financing solution. However, innovation and comfort often comprise legally complex and costly situations, and the use of legal gaps or taking higher legal risks for the sake of innovation on behalf of service providers. Electronic retail lending has led to several problems such as deficient information of consumers, the real cost of borrowing, and malpractices. All of these problems have received greater or lesser attention by legislators, resulting in the respective amendment of laws[8]. For example, in the beginning of 2008 Estonia tackled the lack of necessary customer identification through the rules in the new Money Laundering and Terrorist Financing Prevention Act[9], requiring face to face

[5] The Bank of Estonia, Lending Review, November 2010, 19. Available at www.eestipank.info/pub/en/dokumendid/publikatsioonid/seeriad/rahast_2010/_2010_10/mra_1010.pdf (14.06.2011).

[6] Rahandusministri määruse "Tarbijakrediidi kulukuse määra arvutamise kord" eelnõu seletuskiri, *op.cit.* note 3, 4.

[7] Rahandusministri määruse "Tarbijakrediidi kulukuse määra arvutamise kord" eelnõu seletuskiri, *op.cit.* note 3, 4.

[8] In Latvia, for example, the activity license for non-bank electronic retail lenders has been under consideration. In Estonia no separate licensing attempts are under way but there are several other mechanisms such as these discussed in this dissertation to respond to the problems of electronic retail lending.

[9] Rahapesu ja terrorismi rahastamise tõkestamise seadus, signed 19 December 2007, *Riigi Teataja (RT) I* (2008) No. 3, 21; (2010) No. 26, 129 (in Estonian) (hereinafter "Money Laundering and Terrorist Financing Prevention Act").

identification of all first-time customers by all financial service providers. Although designed to increase consumer protection, this change itsself has created additional problems and even facilitated some law-suits. Also, as a response to the rapidly expanding and sometimes aggressive business of retail lending in Estonia, the marketing rules of electronic retail loans became stricter under the new Advertising Act[10] effective from November 2008, requiring better consumer information especially in terms of the disclosure of interest rate information in marketing activities. In the context of this research, the amendments of 2002 General Part of Estonian Civil Code Act[11] which became effective on 1st May 2009 are important because they brought some fundamental change into the legal fabric of Estonia in terms of wider grounds for void transactions and the "soft" upper limit to the cost of credit. All these issues have been addressed in more detail in the articles which form the basis for this dissertation.

Innovativeness consists of both possibilities and risks which are important to be addressed in legal writing. My key challenges in designing and carrying out this research were to understand the innovativeness and future perspectives of electronic lending products, to find out the bottlenecks in balancing the consumer protection and the freedom of contract, and to suggest the solutions to overcome some of the interpretation gaps in order to contribute to better business and legal environment regarding electronic retail lending. I have chosen this research area because it is a modern and fastly developing field which comprises significant inter-disciplinary element. I have taken interest in the questions of financial services law ever since the finalization of my baccalaureate studies in summer 2000 and continued researching this area throughout my following master studies at the Institute for Law and Finance, J.W.Goethe-Universität in Frankfurt am Main. Thanks to my combined background in law, finance and business administration I much appreciate the challenge available in relation to this research field. I find it important to contribute to legal writing in Estonia in the field which has been so far subject to limited academic research but which facilitates, due to its evolving and complex character, certainly crucial and very interesting discussion points. First and foremost, the evaluation of legal issues in relation to electronic retail loans is topical from the perspective of harmonization of the new Consumer Credit Directive[12] and the related recent amendments of 2002 General Part of Estonian

[10] Reklaamiseadus, signed 12 March 2008, *Riigi Teataja (RT) I* (2008) No.15, 108; 06.01.2011, No. 1 (in Estonian) (hereinafter "Advertising Act").

[11] Tsiviilseadustiku üldosa seadus, signed 27 March 2002, *Riigi Teataja (RT) I* (2002) No.35, 216; 06.12.2010, No. 1 (in Estonian) (hereinafter "General Part of Civil Code Act" or "GPCCA").

[12] 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, *Official Journal (OJ) L 133* (2008), 66–92 (hereinafter "Consumer Credit Directive"). The directive aims at maximum harmonization, i.e. member states are not allowed to maintain or impose

Civil Code Act (GPCCA) and 2001 Law of Obligations Act[13] (LOA). Among others, the adoption of the 2008 Consumer Credit Directive has been triggered by remarkable expansion of the types of consumer credit and new retail financing solutions in the credit market in recent years.[14] The rapid development of the field and its regulation is one of the reasons for choosing to complete this dissertation as the series of articles rather than a monograph.

The main statement of this thesis is that from the perspective of balancing the protection of consumers and commercial freedom in the regulation of electronic retail lending in Estonia, the major bottlenecks related to the applicable consumer protection measures are the requirements for client identification and limiting the annual percentage rate of charge (APRC), whereby the latter would disproportionately restrict the constitutional rights of service providers. The research at hand has been designed as the collection of three internationally published articles which address the issues of financial services innovation and consumer protection in one of the niche fields of financial services – the offering of electronic retail loans. The innovation of financial services and the protection of consumers are the keywords of this research, surrounded by the relevant more specific research questions addressed in separate articles. Respectively, the research at hand has 2 sub-statements. The main statement on the basis of the first article contained in this thesis is that the increasing innovativeness of electronic retail loans through their combination with prepaid cards involves additional risks for consumers but it also entails additional restrictions in public law towards service providers; hence, there is balance in the protection of consumers and commercial freedom in such cases. The main statement on the basis of the second and third article contained in this thesis is that the requirements for client identification and limiting the APRC excessively restrict the freedom of service providers in electronic retail lending and the current provisions of the APRC limit disproportionately restrict the constitutionally protected right of entrepreneurship freedom of service providers.

Should the thesis statement be verified in the course of the research, the thesis would result in the conclusion that from the perspective of balancing the protection of consumers and commercial freedom the consumer protection

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other national provisions besides the provisions of the directive. Such complete harmonization is necessary in order to ensure equally good protection of the interests of consumers within the European Community. Yet, there are a few issues in which the directive allows the discretion of member states. First and foremost this relates to the right of member states to broaden the scope of application of the rules. Ideally the directive should streamline the EU market of retail credit as a whole with total value of more than 800 bn euro.

[13] Võlaõigusseadus, signed 26 September 2001, *Riigi Teataja (RT) I* (2001) No.81, 487; 04.04.2011, No. 1 (in Estonian) (hereinafter "Law of Obligations Act" or "LOA").

[14] Rahandusministri määruse "Tarbijakrediidi kulukuse määra arvutamise kord" eelnõu seletuskiri, *op.cit.* note 3, 4.

measures applicable to electronic retail lending in Estonia constitute excess burden for service providers and need to be changed in terms of client identification rules and the limiting of the APRC. The face-to-face identification requirement should not be applied to electronic retail lenders because electronic retail loans do not involve the risk of money laundering and the existing requirement to identify all first-time clients through direct face-to-face contact excessively restricts the freedom of transaction of the electronic lenders. The existing legal provisions in Estonia regarding the APRC limit and the related extensive but unclear burden of proof of service providers are not in accordance with the Constitution of Estonia and therefore need amending or annulment.

The major content of this compilation is contained in Chapters 2 and 3, and in the respective articles attached to this compilation. Chapter 2 aims at presenting a summary of the main features and conclusions of the articles attached to this compilation. This chapter aims at introducing the core topics, discussion and conclusions deriving from the articles without an intention to provide additional analyses or in-depth explanations in respect of the topics addressed in the articles. The chapter provides an overview of the issues and my viewpoints as at the time of publishing the articles. All the developments and changes which have taken place after the publishing of the articles are presented in Chapter 3 together with additional analysis, explanations and conclusions, especially in respect of evaluating the constitutional compliance of the APRC limit.

The first article "Connecting Prepaid Cards and Retail Loans: Innovative Practical Solution or Confusing Legal Combination? Implications of the EU Financial Services Law from an Estonian Perspective" has a service-related focus. It addresses the legal problems of regulating electronic retail lending as an innovative product solution and increasing its innovation by combining electronic loans with prepaid cards. Since the combination of loans with prepaid cards is one of the most logical innovation possibilities for developing electronic retail loans further, it would be necessary to discuss whether and how this can be done and which legal problems might arise. The second article "Legal Problems with Electronic Retail Loans: Balancing the Freedom of Contract and the Protection of Consumers – The Case of Estonia" has a consumer-related focus. It analyses the risks deriving from the innovation of financial services for consumers and discusses whether and to what extent the rights of consumers and the freedom of transactions are balanced when trying to mitigate the risks by regulative means. The third article "Electronic Retail Lending in Estonia: Legal Limits on the Cost of Credit" focuses on service providers. It addresses the impact of limiting the APRC as one of the major legal limits on electronic retail lending established for the protection of consumers. The article analyses the possibilities for sharing the burden of proof and suggests how service providers could exercise the obligation of reasonable care.

In the completion of this thesis I have used comparative, systematic and teleological methods of jurisprudence, with most focus on comparative and teleological methodology. Comparative method serves as a central tool for this

thesis because in the situation of somewhat limited original legal writing in Estonian language this method is the only considerable option for well-established legal research. Additionally, this method would allow participating in the legal debate involving other countries, given that the research area of this thesis is of relevance for other EU countries too. The use of comparative method is topical both in science as well as the practical implementation of law, having increased its importance as an acknowledged method both in the process of legislation as well as in justice[15]. When it comes to teleological approach in the research, it can be said that in principle law always seeks for purpose as the provisions of law always have the value of a tool[16]. Teleological method has been used in my research for identifying the meaning of a respective research aspect such as a legal act through the objective of its adoption and the intentions of its authors. Within the frames of this methodology, I have used several explanatory notes of legal acts as important research sources.

On one hand, the research field enables combining legal issues with economic considerations, explaining the legal problems on the basis of actual cases arisen in the daily electronic retail lending business and analyzing the respective views of the Supreme Court of Estonia. On the other hand, a comparative methodology has been used in compiling this research, drawing parallels between Estonian laws and the laws of some other member states and the EU. For example, the legal framework of other countries is examined in such issues as consumer information in credit contracts and requirements for the marketing of electronic retail loans. One of the sample countries used in this research is Finland because similarly to Estonia the offering of electronic retail loans is a significant business in Finland too. Also, German law is examined in some aspects such as the definition of usurious practice and the related aspects of the voidance of transactions. A comparative view to the EU regulation of financial services is taken in terms of defining loan-related prepaid cards as e-money and identifying the legal status of card issuers. Also, some aspects of the new 2008 Consumer Credit Directive are addressed in the context of the recent amendments to the GPCCA and the LOA.

In addition to the EU directives (such as the 2008 Consumer Credit Directive, Money Laundering Prevention Directive[17], 2005 Unfair Commercial

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[15] Irene Kull, "Eesti tsiviilõiguse allikatetugev ja nõrk kohustuslikkus" (Strong and Weak Binding Nature of Sources of Estonian Civil Law as a Basis for the System of Sources), *Juridica No 7* (2010), 463–472 (in Estonian).

[16] Aulis Aarnio, *Õiguse tõlgendamise teooria (A Theory on Interpretation of Law)*, (Õigusteabe AS Juura, Tallinn, 1996), 188 (in Estonian).

[17] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, *Official Journal (OJ) L309* (2005), 15–36 (hereinafter "Money Laundering Prevention Directive").

Practices Directive[18] and so on), legal acts and explanatory notes, the articles contained in this compilation are based on the information gained from the editions and journals of the fields of law, economics and finance (e.g. Banking Law Journal; Journal of International Banking Law and Regulation; Computer and Telecommunications Law Review; etc). Also, recommendations, working documents and guidelines of international institutions and national professional associations (e.g. Consumer Agency and Ombudsman of Finland, Association of E-Money Institutions in the Netherlands, the Bank of Estonia, etc) have been used. The practical aspects of the research are supported by the cases of the Supreme Court of Estonia, and the statistics and data available on the homepages of different service providers and banks. In some issues[19], the positions of the European Court of Justice (ECJ) are analysed, seeking to support the theoretical concepts with some principles of the EU case-law.

As indicated earlier, the research field of electronic lending as such is novel and has been subject to somewhat limited research. When it comes to similar earlier legal writing by Estonian researchers, the specialised topic of electronic retail loans has been addressed by only a few authors. Among Estonian authors, Kalev Saare, Karin Sein and Mari Ann Simovart are the major researchers in this field. Their recent publications include a thorough joint article published in the European Review of Private Law, covering certain legal issues of consumer protection and electronic retail loans (SMS-loans). There have also been occasionally a few short articles in local law journals (Juridica) and specialized issues, including my own publication in the journal MaksuMaksja of October 2008.

The research of the authors from other countries which I have come across regarding the particular topic of electronic retail loans is mostly related to the discussion of usurious practice, responsible lending and the effect of interest rate ceilings in consumer lending, involving and often highlighting economic considerations and consumer survey aspect rather than thorough legal case analysis. Although not only of purely legal nature and often containing also quantitative aspects as their research methodology, such research certainly adds value to the concept of any research of this field because the particularity of the field is that economic and legal aspects are strongly inter-related. In the course

[18] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament of and of the Council and Regulation (EC) No.2006/2004 of the European Parliament and of the Council, *Official Journal (OJ) L 149* (2005), 22–39 (hereinafter "Unfair Commercial Practices Directive").

[19] One of such issues is interpreting the extent of the burden of proof which is supported by the analysis of the ECJ case-law as the principle of effectiveness is regarded. See, *e.g*., case 106/77 *Amministrazione delle Finanze dello Stato vs. Simmenthal SpA,* ECR *(*1978) 629; and case C-213/89 *The Queen vs. Secretary of State for Transport, ex parte: Factortame Ltd and others*, ECR (1990) I-2433.

of preparing this compilation (although after the publication of the three articles) I have come across a few interesting pieces of such research, e.g. a study completed by the Institut für Finanzdienstleistungen e.V. and Zentrum für Europäische Wirtschaftsforschung GmbH on interest rate restrictions in the EU[20] (2010); the UK Office of Fair Trading Review of high-cost credit[21] (2010); the survey of the usurious lending practice on consumers with moderate means in Germany[22] (2009) and the survey on the use of instant small loans by Finnish consumers[23] (2009). Additionally it is important to point out that a number of reports on interest rate ceilings have been produced over the past years in different EU countries, reflecting the fact that interest rate restrictions have a strong cultural and traditional foundation. These reports examine the problems related to exorbitant prices of consumer credit. The reports are available on the webpage of the European Coalition for Responsible Credit[24]. However, since most of them are available only in their original non-English languages (covering the situation in such countries as the Czech Republic, Slovakia, Belgium, the Netherlands), I have not been able to use these reports in complementing this research.

In the course of the research I have also come across some articles in international journals of information technology law, explaining the nature and characteristics of e-money and prepaid cards (e.g. Janson (2003), Lanskoy (2000), etc). As the research field in more general terms is considered, the broad issues of lending and the means of electronic payments have been addressed both in Estonian legal writing (e.g. Ligi (2006)) and in international journals (e.g. Batalla (2001)). Additionally, there is sufficient theoretical information about usurious practice and the voidance of transactions both in Estonian law

[20] Udo Reifner *et al*, Study on interest rate restrictions in the EU. Final Report for the EU Commission DG Internal Market and Services, Project No. ETD/2009/IM/H3/87, 2010. Available at http://ec.europa.eu/internal_market/finservices-retail/docs/credit/irr_report_en.pdf (25.05.2011).

[21] UK Office of Fair Trading, Review of high-cost credit. Final report, June 2010. Available at http://www.responsible-credit.net/media.php?t=media&f=file&id=3819 (26.05.2011).

[22] Udo Reifner & Michael Knobloch, Access to Credit for Poor People in Germany. Expert Opinion for DOOD, August 2009. Available at http://www.responsible-credit.net/media.php?t=media&f=file&id=3837 (25.05.2011).

[23] Minna Autio *et al*, "The use of small instant loans among young adults – a gateway to a consumer insolvency?", International Journal of Consumer Studies No 33 (2009), 407–415. Available at http://www.responsible-credit.net/media.php?t=media&f=file&id=3475 (26.05.2011).

[24] The European Coalition for Responsible Credit (ECRC) is a networking and policy influencing association of consumer agencies, academics, and other non governmental organisations. The ECRC contributes to the development of the principles for responsible financial services provision, including the promotion of access to credit for low income households within the EU; the sharing of expertise on regulatory systems; and the promotion of ethics in financial services provision. Available at http://www.responsible-credit.net/index.php?id=2040 (20.05.2011).

journals and literature, including the official comments of the LOA and the GPCCA.[25]

In addition to legal knowledge this research field requires the understanding of the functioning of financial services and markets. I believe that from academic perspective the results of this research are original because certain questions addressed in this research have been discussed by other authors only to limited extent. The research at hand also has a practical value because the analysis of some of the problems addressed herein is based on the actual issues arisen in the daily provision of electronic retail lending services. Therefore the results of this research may well serve as a basis for market participants and supervisory agencies for better understanding of practical aspects of this field. Understanding the legal solutions and outlook is also important for other disciplines in order to assess the attractiveness of certain financial services and the related risks in the context of continuous globalisation of markets and services.

[25] *See* Paul Varul *et al, Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne (General Part of Civil Code Act. Commented Edition)* (Kirjastus Juura, Tallinn, 2010) (in Estonian) and Paul Varul *et al, Võlaõigusseadus II. Kommenteeritud väljaanne (Law of Obligations Act II. Commented Edition*) (Kirjastus Juura, Tallinn, 2007) (in Estonian).

2. SUMMARY OF THE MAIN CONCLUSIONS OF THE PUBLICATIONS INCLUDED IN THIS COMPILATION

2.1. Connecting Prepaid Cards and Retail Loans: Innovative Practical Solution or Confusing Legal Combination? Implications of the EU Financial Services Law from an Estonian Perspective

In the article "Connecting Prepaid Cards and Retail Loans: Innovative Practical Solution or Confusing Legal Combination? Implications of the EU Financial Services Law from an Estonian Perspective" the positioning of a prepaid card, which is combined with a retail loan, and the status of the issuer within the existing legal framework in Estonia are examined. The article discusses the treatment of a loan-linked prepaid card as an instrument of electronic money or some other form of payment, and examines the functions and licensing of an issuer. The clear legal positioning of a prepaid card within the existing legal framework and interpretation of the rules governing card issuers are the major legal challenges from the perspective of Estonia. This is due to the fact that a prepaid card that is loaded with loan funds represents a complex set of arrangements and such increased innovativeness of an electronic retail loan involves additional risks for consumers. Therefore a thorough examination of the product structure and involved legal relationships are required. It is also necessary to understand that the card issuer is to be treated as a regulated entity; therefore, a complete set of schemes for EU passporting and services provision applies. The article briefly explains the framework rules applicable to the EU and third-country issuers of cross-border prepaid card products. This reveals that additional restrictions in public law are applicable to related service providers, indicating respective balance between the protection of consumers and commercial freedom in the provision of electronic retail lending services in combination with prepaid cards.

As the above referred article explains, a prepaid card is a means of payment that can be loaded with money by the customer or another person. It is not a credit card, because the client prepays the card value.[26] In the case of combining prepaid cards and retail loans the funds used to load the card come from a loan, and it is the lender who takes care of topping up the card. The primary network of agreements for such transaction structure involves three parties: the card holder, issuing institution and non-bank financing company. There is no specialized regulation in Estonia that specifically covers prepaid cards and their combination with loans because the legal provisions in Estonia are normally

[26] Gregory E. Maggs, "New Payment Devices and General Principles of Payment Law", 72 *Notre Dame Law Review* (1997), 753–798, at 758.

designed for wider product types (e.g. for electronic payment instruments or loans as such). From the contract law perspective, there is no such specialized regulation at the EU level either[27] and therefore such combined products normally are regulated by domestic legislation.

The above referred article explains that the identification of whether prepaid cards are to be treated as ordinary payment instruments or e-money is important because it determines the respective interpretation of issuer status. Legal treatment of the card issuer raises the question of whether the issuer of a loan-linked prepaid card is subject to the rules applicable to e-money institutions or whether the features and legal treatment of the prepaid card allow assuming the collection and command of funds. If the latter were to be the case, the issuer would be subject to stricter rules governing credit institutions.

The above referred article discusses the issue of positioning a prepaid card that is loaded via the funds of a loan as e-money. The 2000 E-Money Directive[28] which sets forth the base rules for the legal treatment of prepaid cards in the EU, defines e-money as cash in digital form.[29] In Estonia, the definition and contractual functionalities of remote access payment instruments and electronic money are covered by the provisions of the 2001 LOA, while the principles of the 2000 E-Money Directive regarding the nature and limits of e-money business and institutions have been transformed into Estonian law through the 2005 E-Money Institutions Act.[30] In the light of the implementation of Payment Services Directive[31] the LOA has recently been amended and the E-Money Institutions Act has been repealed with the adoption of the new Payment Institutions and E-Money Institutions Act in 2009[32]. Some of these amendments, relevant in the context of this dissertation, will be explained in more detail below in Chapter 3.

The above referred article suggests that if the product scheme is such that the financing company opens a bank account in the issuer bank and, based on a loan

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[27] Due to an acknowledged need for consumer protection in retail lending, however, there are certain separate EU rules for consumer credit as such, deriving from 2008 Consumer Credit Directive. The principles of the Directive are reflected in the Estonian LOA.

[28] Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions, *Official Journal (OJ)* L 275 (2000), 39–43.

[29] Enrique J. Batalla, "Electronic Commerce: Online Payments", 7(4) *Computer and Telecommunications Law Review* (2001), 80–84, at 83.

[30] Art. 3(1), E-raha asutuste seadus, signed 19 October 2005, *Riigi Teataja (RT) I* (2005) No.61, 473; (2007) No.65, 405 (repealed) (in Estonian).

[31] Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, *Official Journal (OJ)* L 319 (2007), 0001 – 0036 (hereinafter "Payment Services Directive").

[32] Makseasutuste ja e-raha asutuste seadus, signed 17 December 2009, *Riigi Teataja (RT) I* (2010) No.2, 3; (2010) No.34, 182 (in Estonian) (hereinafter "Payment Institutions and E-Money Institutions Act").

agreement, allows to load the card issued to the card holder with money from the company's account, such an electronic payment product does not appear to be linked to the accounts of the card holder and should be treated as an e-money product. The issuer only provides the medium on which the cash is held, but it does not collect or manage any of the funds of the card holder; rather, it distributes the loan amount on behalf of the lender by topping up the card. Consequently, the amount loaded onto the card is equal to the loan amount agreed between the lender and the card holder and should thus meet the respective criterion of e-money.

Another important legal issue is the determination of the card issuer status. The issuance of electronic money implies the creation of liabilities on the balance sheet of the issuer that are generally payable (or redeemable) at face value to those entities accepting electronic money as payment. The issuer must guarantee that the card holder can use the funds loaded onto the card.[33] E-money may only be issued by an electronic money institution or a credit institution. The above referred article explains that depending on how the prepaid card is legally positioned, the issuer can be defined either as a credit institution or an e-money institution. When the prepaid card is related to the administration of the client's own funds and where the issuer commands such funds, the issuer would be treated as a credit institution subject to all of the rules and licensing applicable to credit institutions under the Credit Institutions Act (CIA).[34] The article reveals that the definition of an e-money institution in different EU countries has 2 core approaches which may result in regulatory arbitrage. The first approach holds that an e-money institution is a subcategory of credit institution while the second regards an e-money institution as a separate financial institution that is duly authorized to issue e-money.

Estonia has chosen the second approach. Estonian law does not contain straightforward provisions in order to classify the issuer of a loan-related prepaid card. In the case of a loan-related prepaid card, there is no link to the bank account of the card holder. The loadable funds come from the lender. Cards holders or third parties do not have the ability to load money onto the card, and the issuer has no access to command the funds loaded onto the card. The article suggests that such an issuer is not involved in deposit collection and should be treated as an e-money institution rather than a credit institution. This is particularly important both from the perspective of an issuer and of supervision, because if the issuer qualifies as an e-money institution rather than a credit institution, its prudential obligations are somewhat reduced in comparison to those of a credit institution, while its activities allowed by the law are also reduced in comparison to a credit institution. On the other hand,

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[33] The characteristics of e-money are introduced on the homepage of the Bank of Estonia. Available at http://www.eestipank.info/pub/et/yldine/pank/finantskeskkond/maksesysteem/1ERaha.html?ok=1(13.06.2011) (in Estonian).

[34] Krediidiasutuste seadus, signed 9 February 1999, *Riigi Teataja (RT) I* (1999) No.23, 349; 24.03.2011, No. 1 (in Estonian) (hereinafter "Credit Institutions Act").

however, the prudential obligations of an e-money institution exceed the regular obligations of a non-regulated entity, including an unregulated electronic retail lending company, thereby balancing the interests of service providers and the interests of consumers.

Finally, the above referred article explains the relation of 'European passporting' system for the provision of financial services in the EU to the offering of prepaid cards across borders. Any issuer needs to be licensed either as a bank or an e-money institution. Both an issuer from a member state or an EEA country and an issuer from a non-EU or non-EEA country can provide services in the EU based on the authorization of their home countries, but the former may act via branches or cross-border services, while the latter are restricted only to branches.[35] From a practical point of view, the article suggests that a third country issuer outside the EU/EEA could also consider issuing cards in its home country to the citizens of any country, without a separate license in other countries, assuming that it has made the necessary arrangements for the use of such cards in other countries and that there is the necessary financial infrastructure for delivering such cards and loans to customers in other countries.[36] On the other hand, as already mentioned with regard to 'European passporting', the issuers may choose to establish a branch in an EU member state for the rendering of services, using the license from their home country but acting in accordance with the product rules of that member state. The third alternative would be to establish a subsidiary in an EU member state, subject to licensing and respective treatment as a legal entity in that particular member state.

2.2. Legal Problems with Electronic Retail Loans: Balancing the Freedom of Contract and the Protection of Consumers – The Case of Estonia

The article "Legal Problems with Electronic Retail Loans: Balancing the Freedom of Contract and the Protection of Consumers – The Case of Estonia" aims at analyzing the regulatory balance in Estonia between consumer protection and the freedom to provide services. For this reason, six most important elements of electronic retail loans are examined. The article analyses the major legal problems related to the requirements for client identification; the

[35] The adoption of the 2009 Payment Institutions and E-Money Institutions Act has somewhat altered the rules regarding the provision of services by third-country service providers in the EU. These changes are addressed more detailed in Chapter 3.1. of this dissertation.

[36] Prudential rules may nevertheless apply to the scheme of such products as a result of linkages with other EU-based institutions (e.g., in ensuring the financial infrastructure for delivering the cards). Also, attention needs to be paid to the issues of consumer protection because of different product rules, restrictions with regard to the choice of law and so on.

application of legal minimum thresholds[37], allowed by the Consumer Credit Directive; the presentation of interest rate information; the upper limit to the APRC and related voidance of transactions; the legal treatment of penalties; and information obligations in the marketing of SMS loans. These six elements are the most important ones in terms of evaluating the level of freedom to provide efficient and flexible electronic retail lending services. The article questions whether the recent amendments of Estonian laws concerning some of the abovementioned elements have been stretched too far with regard to consumer protection purposes, decreasing the freedom of contract in return.

The application of "know-your-customer" rules has already for some time been one of the basic prudential requirements for all regulated financial sector entities. In electronic retail lending, client identification is an important element mainly for the reason of preventing malpractice. Until the beginning of 2008, electronic retail lenders in Estonia were allowed to identify their customers without direct contact with them (for example, through a bank link). Since the concerns for malpractice were serious, the situation was changed in early 2008 by the provisions of the new Money Laundering and Terrorist Financing Prevention Act[38], requiring also electronic retail lenders to identify face to face all persons with whom they have had no earlier business relations[39]. This legal amendment was a first step towards more responsible practice of electronic retail lending and after its adoption most lenders implemented some changes in their procedures, usually arranging it so that the first-time identification is done either in the office of the lender or using the courier service. However, the above referred article explains that the major legal problems with regard to customer identification derive from the fact that within the meaning of the new Money Laundering and Terrorist Financing Prevention Act the identification is first and foremost mandatory from the perspective of combating money laundering and terrorist financing.[40] Hence, in the light of such somewhat questionable justification, the application of these identification rules to electronic retail lenders has already been brought to the attention of courts by some electronic retail lenders opposing the precepts of the Money Laundering Data Bureau and claiming that these rules, without any grounded justification, pose unreasonable obstacles to their normal business because lending in small amounts to private individuals has almost no potential for money laundering or terrorist financing.

The requirement of face to face identification of all first-time customers certainly makes the business of electronic retail lending less flexible for service

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[37] Credit agreements involving a total amount of credit less than EUR 200 (or more than EUR 75 000) as well as those under the terms of which the credit has to be repaid within three months and only insignificant charges are payable are exempted from the scope of the Directive (Art. 2).

[38] Money Laundering and Terrorist Financing Prevention Act, *op.cit.* note 9.

[39] Art. 15 (1), Money Laundering and Terrorist Financing Prevention Act.

[40] Art. 13(1) 2, Money Laundering and Terrorist Financing Prevention Act.

providers. The above referred article suggests that although fighting malpractice is an important issue for the protection of consumers, such face to face identification requirement remains indeed legally problematic since its primary purpose within the meaning of the law is the combating of money laundering. In the light of the mentioned court action the article also recognizes another problem: since the electronic lenders are not regulated institutions, no such supervisory authorities[41] can manage or put moral pressure on them to apply the identification rules as part of regular banking standards applicable to regulated entities. The article concludes that Estonian identification rules may somewhat hinder the freedom to provide services, given that these rules first and foremost aim at the combating of money laundering while small-scale retail loans hardly contain any such potential. However, this issue will be further elaborated and some interesting interpretations to contest this view will be briefly introduced in the follow-up research results presented in Chapter 3.3. of this dissertation.

The above referred article explains that the thorough set of rules on borrower information which initially did not cover small-scale retail loans with short maturities became applicable to all consumer credit agreements as at 1st May 2009, aiming at enhanced consumer protection. Consumers are assumed to be the weaker party and thus, in need of protection in contractual relations. Moreover, some level of consumer protection is also necessary due to the need for overall economic, social, and political stability. However, overriding the freedom of contract for the purposes of consumer protection may on one hand lead to difficulties in normal business environment, hinder innovation, and result in the insecure functioning of the market for this service. On the other hand, too much protection for the less sophisticated private individuals may override the private autonomy of more educated individuals, hindering their access to electronic lending services. Thus, achieving regulatory balance is a difficult but necessary task. The article agrees that the wider scope of consumer information rules would certainly contribute to more responsible lending practice. However, the article also suggests that in return such wider scope of rules is likely to decrease the flexibility of SMS loans and make them more expensive. Additionally, it should be noted that the neighboring countries of Estonia (e.g. Finland) have chosen to have more flexibility, allowing the exclusion of certain small retail loans from the stricter procedural requirements which aim at consumer protection.

When it comes to the expression of interest rates, the above referred article discusses that some electronic retail lenders have developed a specialized practice for expressing the compensation for the use of loan as a fixed "loan fee". The article suggests that any such compensation should be seen as interest

[41] The activities of electronic retail lenders are to some extent monitored by the Consumer Protection Board which is the main authority to handle and solve consumer claims with regard to electronic retail lending business. However, this authority does not have similar supervisory functions towards electronic retail lenders as the Financial Supervision Authority has towards regulated entities.

in its essence, although not expressed as a percentage rate but as a fixed fee, because the traditional essence of interest is the cost of or gain from the use of resources. Given that electronic retail lenders usually gain their lending resources through a loan from some third party, the article seriously questions that the lenders who do not calculate interest on their borrowers could actually bear their own interest cost. The article also adds a behavioral misleading aspect. Because of the numeric value of a "loan fee", consumers would not pay much attention to their real economic cost in terms of percentage rate, when comparing numeric values. Thus, the article takes the view that consumer protection would be further enhanced without much burden on service providers by requiring that any compensation for the use of funds should be expressed as a percentage rate.

Another problematic issue which is also covered more thoroughly in the above referred article is the cost of borrowing. Before 1st May 2009, the regulation of the cost of credit (APRC) in Estonia did not contain any limits. Given the interest rates and APRC on electronic loans in Estonia which continue to be much higher than on regular bank loans[42], and taking into account the related problem with the expression of interest rates, the above referred article analyses whether electronic retail lending can be considered contrary to good morals for such grounds. When looking at how the provisions of the 2002 GPCCA in relation to usurious practice have so far been interpreted by the Supreme Court of Estonia, the article reveals that usurious practice has not been evaluated only from the perspective of disproportionate rates but there should also exist the aspect of gross disparity.[43] The Court has taken the position that a loan agreement could not be declared void on the grounds of contradiction to good morals only due to disproportionately high interest rates. However, the validity could de disputed on the grounds of conclusion under extremely unfavorable conditions, gross disparity and taking advantage of the situation of the other party. Also, short-term unsecured loans should not be compared with ordinary secured bank loans for considering a transaction concluded under extremely unfavorable conditions which would therefore give grounds for declaring it void.[44]

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[42] On average, the annual cost rates on electronic retail loans in Estonia amount to some 400%. Occasionally these cost rates can be even close to 1000% or higher. One of such cases with the annual cost rate of around 800% has been recently addressed by the Supreme Court of Estonia. *See* the Supreme Court 17 June 2011 ruling in civil case 3-2-1-49-11. Available at http://www.nc.ee/?id=11&tekst=RK/3-2-1-49-11 (28.06.2011) (in Estonian).

[43] Maris Kuurberg, "Head kommetega vastuolus olevad tehingud kui tühised tehingud" (Transactions Contrary to Good Morals as Void Transactions), *Juridica No 3* (2005), 200–208 (in Estonian);

[44] *See* the Supreme Court 16 October 2002 decision in civil case 3-2-1-80-02, *RT III* (2002) No. 27, 302 (in Estonian), Sec 9, 11–13 and the Supreme Court 22 October 2002 decision in civil case 3-2-1-108-02, *RT III* (2002) No. 27, 305 (in Estonian), Sec 11. *See* also the Supreme Court 24 April 2006 decision in civil case 3-2-1-21-06, *RT III* (2006) No. 16, 145 (in Estonian), Sec.20.

The above referred article provides a detailed analysis of the major amendments of the GPCCA and the LOA which became effective on 1st May 2009. The article reveals that by these amendments the lending environment in Estonia went through fundamental changes. The changes mainly comprise the widening of the grounds for void transactions and setting a "soft" upper limit to the APRC. In situations where mutual obligations are unreasonably out of balance and thus contrary to good morals, it is assumed that the gaining party knew or had to know about the difficult situation of the other party. To ensure the validity of a loan transaction, the lender has to prove that the agreement was not concluded using the difficult situation of the borrower and that all reasonable steps have been taken to identify the economic situation of the borrower.[45] When electronic retail loans are regarded, the article considers fulfilling such obligation of proof problematic because it is difficult to assess the borrower's active legal capacity, payment ability and other such circumstances from distance. The article points out an important aspect regarding this change: different from earlier legal situation, courts can now evaluate the validity of a loan agreement without the request from a party. This means that if the lender submits, for example, a claim for payments in arrears against the borrower and the loan has an unbalanced interest rate, the court can instead declare the agreement void and the lender would not be able to have its claim for payments in arrears approved.

Next to all the previously explained aspects that the article has analysed, the preconditions for assuming the unbalanced value of mutual obligations seem to be the most questionable part. In case of consumer credit agreements, the unbalanced value of mutual obligations as contrary to good morals is assumed if the APRC exceeds 3 times the average cost of consumer credits as provided in the last commercial banking statistics of the Bank of Estonia. Thus, it means that there is certain upper limit for the cost that retail lenders can obtain from their borrowers without the shift in the burden of proof. Upon exceeding the limit, it is automatically the lender who would have to prove all the circumstances to avoid the invalidity of such lending transaction. The article does not favor the limiting of APRC because this affects the freedom of contract in an overly consumer-driven manner which is quite unusual in the legal environment in Estonia. In the same light, no *ex ante* analysis has been carried out to evaluate the actual economic impact and proportionality of such legal means. It is also worth mentioning that in the course of preparing the article the limiting of the APRC facilitated a discussion among market participants

[45] Tsiviilseadustiku üldosa seaduse ja võlaõigusseaduse muutmise seaduse eelnõu seletuskiri (Explanatory note to the amending act of the General Part of Civil Code Act and Law of Obligations Act), 365 SE, 14 October 2008, 8. Available at http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=420369 (13.06.2011) (in Estonian).

regarding its possible contradiction to the Constitution[46]. It is interesting to note that there are no upper limits to the APRC or interest rates in most of the countries neighboring Estonia[47]. The article explains that from the practical perspective, most electronic retail lenders continuously seek to be free in their business, setting the APRC according to their business models and not according to the legal limit. This reflects their willingness to bear the burden of proof and enter into the respective court proceedings, if necessary. On the other hand, the lenders have started changing their procedures accordingly, making the collection of borrower information more detailed.

Starting from the claim under a loan agreement falling due, the calculation of interest loses its legal grounds and thereafter it is only possible to calculate penalties or damages.[48] When it comes to the rate of penalties, the above referred article concludes that different from the situation with interest rates, the usurious practice against good morals in relation to unreasonably high penalties can be solved through the decreasing of penalties. The Supreme Court of Estonia has taken the view that clearly disproportionate penalty in comparison to the amount due should be decreased down to at least the amount due.[49] The article points out that together with legal treatment of penalties, the issue of a potential "closed circle" situation is also relevant. The most common way of debt collection of electronic retail lenders is refinancing – the merging of all amounts due (incl. interest and penalty amounts) into a new loan. Such refinancing, if done continuously, may result in the borrower having to pay back much more than was initially borrowed, using another high-rate SMS loan to cover the debts of previous ones.

The article suggests that instead of limiting the freedom of contract and setting a limit to the APRC, it is more appropriate to influence the delivery channels of electronic retail lending because SMS loans rely heavily on advertising and more educated consumers can not be restricted to access the flexible lending instruments just because of inadequate decision-making of less educated consumers. The most common reasons for defaults include the strong supply of credit and the ease with which it is granted. Therefore, the marketing of electronic retail loans must take these aspects into consideration.

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[46] This issue became topical in the final phase of preparing this article and therefore it has been addressed only briefly in the article. However, in the light of further developments and positions taken by the Chancellor of Justice and the Supreme Court, the possible contradiction of Art. 86 to the Constitution of Estonia has become subject to thorough research in this thesis and will follow below in Chapter 3.3.

[47] The only exemption is Lithuania which did not have APRC restrictions in the time of preparation of the articles contained in this compilation. However, on 1st April 2011 the first Consumer Law was adopted which limits the total annual APRC at 250%. *See* a brief introduction about the new act at http://www.rln.lt/index.php/pageid/411.

[48] *See* the Supreme Court 29 January 2007 decision in civil case 3-2-1-137-06, *RT III* (2007) No. 4, 33 (in Estonian), Sec 17 and the Supreme Court 12 December 2006 decision in civil case 3-2-2-5-06, *RT III* (2006) No. 47, 399 (in Estonian), Sec 12.

[49] The Supreme Court decision in civil case 3-2-1-137-06, *op.cit.* note 48, Sec 18.

Consequently, the article explains that an important improvement has been carried out with regard to the disclosure of interest rate information in marketing activities. The new 2008 Advertising Act broadened the scope of advertising limits, requiring that all the advertisements of small or short term loans contain information about the APRC. These advertising rules have become supportive to the consumer lending regulation in the LOA.

2.3. Electronic Retail Lending in Estonia: Legal Limits on the Cost of Credit

As I have explained in the above Chapter 2.2. of this dissertation, a legal limit to the APRC was established in Estonia in May 2009. The limit is 'soft' in its nature, allowing a lender to opt for exceeding it but simultaneously placing the burden of proof on the lender opposing the declaration of such lending transaction void on the ground that it was contrary to good morals. There is no doubt that a certain level of consumer protection needs to exist to support the functioning of markets and services. However, it is necessary to evaluate potential 'bottlenecks' with regard to any new legal solution, especially when it contains fundamental changes in the legal environment of a country, as has been the case in Estonia. The amendment of Estonian law has shifted the burden of proof with regard to the existence of the subjective composition of a transaction in cases where the value of the mutual obligations of the parties is noticeably out of balance. The article "Electronic Retail Lending in Estonia: Legal Limits on the Cost of Credit" aims at addressing the legal problems that may result from the limiting of the cost of credit in Estonia. The article examines the legal function of the APRC limit, analyses the legal problems with the extent of the burden of proof and makes suggestions as to how lenders would be able to comply with their obligation of proof in the daily practice of electronic retail lending. As the latter is regarded, the article looks at the possible alternatives of case law interpretations (such as the ECJ rulings defining the principle of effectiveness) and legal analogy which might be useful for developing the practice of electronic retail lenders.

The APRC means the cost of the loan to the consumer expressed as an annual percentage calculated on the basis of the net amount[50] or net price[51] of

[50] The net amount of a loan is the loan amount which is to be disbursed to the borrower as agreed in the loan agreement.

[51] Net price is the price of the thing or service acquired for a loan, if payment is to be made immediately. This definition for the APRC calculation has been slightly revised in October 2010 by the amendments of the LOA. Since the definition stipulated in the 2008 Consumer Credit Directive does not link the calculation of the APRC to net price, such linkage present in the regulation at the time of preparing the third article contained in this compilation has been abandoned also in Estonian laws. See more detailed explanation below in Chapter 3.2.

the loan, provided that the loan agreement is valid for the agreed term.[52] The above referred article describes that under the current provisions of 2001 LOA some costs (e.g. insurance costs, the costs of means for obtaining the service, etc) are excluded from the APRC calculation. Respectively, upon the calculation of the APRC for an electronic retail loan the lender would not need to take into account the costs of the consumer with regard to SMS-service, internet connection or the use of other electronic means that are necessary for applying for/servicing of an SMS loan. The article also highlights the constant importance of consumer information and its relation to APRC, explaining that the 2008 Consumer Credit Directive sets forth a Standard European Consumer Credit Information form. By using this form the lenders are expected to provide the consumer with information necessary for the consumer to compare different lending products and make an informed decision regarding credit agreement. The information should, *inter alia*, specify the APRC and the total amount payable by the consumer, illustrated by means of a representative example mentioning all the assumptions used for calculating the rate.[53]

As mentioned above, the article explains that the amendment of the 2002 GPCCA does not directly prohibit the provision of consumer loans with disproportionately high rates. However, if the value of mutual obligations of the parties is unreasonably out of balance to an extent that is contrary to good morals, it is assumed that a party knew (or should have known) about the difficult circumstances of the other party. In the case of consumer credit agreements, the unbalanced value of mutual obligations as contrary to good morals is assumed if the APRC exceeds the multiple-of-three-figure of the average cost of consumer credits according to latest official commercial banking statistics.[54]

To explain the legal function of the APRC limit, the article suggests that its key characteristics are 'soft' and dynamic. The above referred article explains that the upper limit can be called 'soft' or 'optional' because lenders may choose not to meet the legal limit; in doing so, the lender may have to face the consequences where the borrower argues that the transaction is void as being contrary to good morals and the lender is obliged to bear the burden of proof in determining that it is not. The article explains that the legal function of the APRC limit, which is linked to the market of consumer credit, is to prevent usurious practices and to disincentivize the conclusion of credit agreements in which the mutual obligations are unreasonably out of balance to an extent contrary to good morals. In case the parties have agreed on the payment of APRC under a loan agreement, exceeding the legal limit, the lender is assumed to be aware of the difficult circumstances of the borrower. Thus, the lender needs to be ready to prove that the loan agreement was not concluded dependent

[52] Art. 406(1), LOA.
[53] Arts. 5(1) and 10(2), 2008 Consumer Credit Directive.
[54] Art. 86 (3), GPCCA.

upon extraordinary circumstances and that the lender has taken all reasonable steps to identify those circumstances upon the conclusion of the agreement in order to prevent the transaction being declared void. The dynamic nature of the APRC limit is reflected in the fact that it is tied to the average cost of consumer credit provided by Estonian credit institutions. This means that the limit is flexible and can change over time, depending on the market situation in retail lending by commercial banks.

The main risk of the lender exceeding the 'soft' APRC limit and facing the voidance of transaction is that the lender loses the possibility of collecting at least a rate equal to the average market rate and would have to accept only the legal minimum rate[55]. This may include the situations where the borrower has initially performed under a loan agreement but later – based on her lack of knowledge with regard to the invalidity of the transaction – submits a claim of unjust enrichment against the lender. Additionally, a borrower may find it appealing to claim the violation of good morals even in those cases where there were no actual extraordinary circumstances present which would have made the borrower agree on high rate. Also, we should not forget the following. A lender can submit a claim against a non-performing borrower regarding payments in arrears to be solved in expedited procedure in matters of payment order. If the borrower does not present objections in such expedited procedure, the lender's claim will be approved without closer examination of its contents.[56] However, I believe that the provisions of the GPCCA have established such strong potential for borrowers' objections that the borrower is likely to object and the expedited procedure would become a regular court action upon the filing of an objection on behalf of the borrower. In regular action a court may evaluate the validity of a loan contract on its own initiative whenever there is a claim related to it (including the claim of a lender regarding payments in arrears) and therefore the lender claiming payments in arrears might risk losing the contractual interest instead.

The above referred article suggests that identifying the extent of the lender's burden of proof could be based on the principles of reasonableness and effectiveness. The principle of reasonableness refers to the perception of the reasonable man.[57] Reasonableness with regard to an obligation is to be judged by what persons acting in good faith would ordinarily consider to be reasonable in the same situation. In assessing what is reasonable, the nature of the obligation, the purpose of the transaction and the practices in the fields of

[55] Art. 86 (4), GPCCA.

[56] Kalev Saare, Karin Sein & Mari-Ann Simovart, "Laenusaaja õiguste kaitse SMS-laenu lepingute puhul" (Protection of Consumer Rights in SMS Loan Agreements), *Juridica No 1* (2010), 41–50 (in Estonian), at 49.

[57] Derek William Elliott, *Elliott and Phipson Manual of the Law of Evidence* (Sweet & Maxwell, London, 1987), 61.

activity or professions involved need to be taken into account.[58] Accordingly, the article suggests that the lender would be reasonably expected to ensure the understanding and willingness of the borrower with regard to the lending transaction, and be convinced about his/her repayment ability.

The principle of effectiveness indicates that law needs to be applied in such manner as to ensure the efficient achievement of its goals.[59] Of primary importance is the fact that the fulfillment of the obligation of proof must not be overly difficult or impossible for a party[60]. This means that the party – having followed the normal course of its activities and having acted in accordance with laws and good business practices – should be able to have an adequate set of data and material in hand to fulfill its burden of proof. The article concludes that anything that goes beyond normal and reasonable activities and procedures would fail to comply with the principle of effectiveness. Respectively, the principle of effectiveness implies that, at a minimum, the extent of the lender's burden of proof should include the identification of a borrower profile and, furthermore, that necessary care should be exercised in such identification. As there are no legal directions about the meaning of 'necessary care' or the details of 'profile identification' in lending, the prime practical legal question for electronic retail lenders is: what are the minimum parameters regarding identification of a borrower profile which would successfully meet the burden of proof standards? The article suggests applying the analogy of law – the

[58] Art 7. (1) and (2), LOA. Reasonableness is an objective principle which assumes good faith. However, reasonable behaviour always assumes higher standards than behaviour in good faith: reasonableness as an objective requirement seeks to take into account the actual intention of parties and standards of ethical behaviour as well as the essence of a transaction, business practice and other such circumstances which limit the activity of parties. The assessment of a transaction is based on the model of a neutral person and the circumstances of a concrete transaction in order to ensure the economic efficiency of transactions. The reasonableness of a transaction is defined on the basis of objective circumstances and respectively a model for rational and balanced behaviour is constructed. Only such legal decision is applicable which is reasonable, given the circumstances. Reasonableness also includes the requirement of ethical behaviour as well as the realisation of the idea of fairness. *See* Paul Varul *et al, Võlaõigusseadus I. Kommenteeritud väljaanne (Law of Obligations Act I. Commented Edition*) (Kirjastus Juura, Tallinn, 2006) (in Estonian), 33–35.

[59] The ECJ refers to this principle in the context of the EU law about discarding by the national court of a law contrary to Community law. See, *e.g*. case 106/77, *op.cit.* note 19 and case C-213/89, *op.cit*. note 19.

[60] Such scope for interpreting the extent of the burden of proof can be derived from the explicitly stated principle of effectiveness which has been used in the practice of the ECJ as part of the general principles of law: the rules which make the exercise of rights and fulfilment of obligations overly difficult or impossible, may be found contradictory to law (depending on the case, either to the EU or constitutional law). *See* Kaarli Harry Eichhorn & Carri Ginter, *Euroopa Liidu ja Eesti konkurentsi*õigus (*Competition Law of the European Union and Estonia*) (Juura, Tallinn, 2007) (in Estonian), 172.

provisions of the 2001 Securities Market Act[61] which govern the exercise of necessary care in identifying an investor profile. The business particularities of investment advice and lending activities are naturally somewhat different. Investment advice entails potential risk allocation with regard to the investor's assets and the respective responsibility for appropriate investment decisions matching the investor's experience, needs and other circumstances. Lending services, on the other hand, entail risk exposure of the lender's assets and the respective responsibility for their acceptable risk level but also ensuring the appropriate and well-informed loan transactions on behalf of borrowers. The application of legal analogy for determining the contents of the lender's obligation of care is appropriate[62] because in its nature, investor profile identification is largely similar to the identification of borrower profile. They both involve risk-related services provision. More importantly, the objective of both is to identify the crucial circumstances related to the party receiving the risk-related services which would allow concluding informed and proper risk transactions, thereby exercising necessary care in services provision. On the basis of analogous legal framework for exercising necessary care in the provision of investment advice, electronic retail lenders could exercise necessary care by identifying the purpose of a loan, earlier experience with loans, education, profession, income, assets and obligations, payment discipline and repayment sources of the borrower in order to design good practices which, in turn, should help them comply with the obligations deriving from the legal limit of the APRC. Based on the legal analogy and having examined the ways in which credit institutions normally collect data on retail borrowers,[63] the article suggests a checklist example for the use in electronic retail lending.

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[61] Väärtpaberituru seadus, signed 17 October 2001, *Riigi Teataja (RT) I* (2001) No.89, 532; 24.03.2011 No.1 (in Estonian) (hereinafter "Securities Market Act"). The requirements for the identification of investor profile and suitability of service are based on the 2004 Markets in Financial Instruments Directive (MiFID). Therefore the solution offered might have even a broader scope of application than only in Estonia.

[62] The concept of analogy is based on the principle of universality. Normative analogy as a form of conclusion seeks to demonstrate the analogical aspects of the case categories covered by two or more legal norms, suggesting that in such cases different norms can support each other with interpretation. The core of normative analogy lies in the fact that the contents of certain legal norm X are open for interpretation but the object of the norm is analogous to the object of some other norm Y. The contents of Y are clearly defined. Thus, Y can be used to help determine the contents of X. The conclusion made on the basis of analogy is the most typical possibility for filling legal gaps. *See* Aulis Aarnio, *op.cit.* note 16, 190, 192, 201.

[63] In the preparation of the article the contents of retail loan application forms of the four biggest credit institutions in Estonia (Swedbank, SEB, Nordea and Danske Bank A/S) were examined in order to draw parallels with the potential use of these elements in the loan applications of non-bank electronic retail lenders. Clearly, the non-bank lenders are not expected to fully meet the same requirements and expectations as supervised regulated institutions. Also, their information collection does not necessarily have to consist of the same elements. However, balancing the nature of non-bank lenders, the purpose of such lending and the legal provisions in Estonia, the article provides for a checklist example as one which seems most suitable for use in non-bank electronic retail lending.

3. FURTHER DEVELOPMENTS RELATING TO SOME OF THE ANALYZED ISSUES

3.1. The Regulation of Payment Instruments

The research subject of the first article of this dissertation – "Connecting Prepaid Cards and Retail Loans: Innovative Practical Solution or Confusing Legal Combination? Implications of the EU Financial Services Law from an Estonian Perspective" – is the combination of electronic retail loans with prepaid cards. We have seen that loan-linked prepaid cards should be positioned as e-money. As was assumed in the article, there are some developments and respective legal amendments which have been carried out after the publication of the article and which I therefore find important to be addressed hereto.

The major development is the new Payment Institutions and E-Money Institutions Act[64] which became effective in January 2010. The act reflects the harmonization of changes in the EU rules with regard to the regime of payment services and, among others, it also comprises some changes regarding e-money business and institutions. The new act is based on the principles of the 2007 Payment Services Directive[65] which in itself presents a completely new piece of regulation at the EU level. The 2009 Payment Institutions and E-Money Institutions Act has been designed on the basis of 2005 E-Money Institutions Act, consolidating the rules for both payment institutions and e-money institutions into one law[66]. The new act sets forth new rules for the operations, responsibilities and supervision of banks and other institutions that offer payment services. Respectively, these rules are accompanied by some changes in the LOA, first and foremost clarifying the requirements for the provision of payment services from the perspective of consumer protection. The changes in the LOA mostly cover the improved transaction requirements for payments (e.g. uniform dates for national and EU bank transfers) which do not relate to the topic of this dissertation. However, there are also some new provisions regarding the specialized treatment of "low-value" e-money products which I find interesting to explain in the context of following up the above referred article.

With the adoption of the 2009 Payment Institutions and E-Money Institutions Act, the definition of e-money as an electronic payment instrument has not changed in its essence, continuously comprising three major components: (i) the possibility of storing electronic money on an electronic device, (ii) the requirement for equal amounts of stored electronic money and respective 'real'

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[64] Payment Institutions and E-Money Institutions Act, *op.cit.* note 32.

[65] Payment Services Directive, *op.cit.* note 31.

[66] The consolidation of laws takes into account the similarity of requirements for both payment institutions and e-money institutions. The consolidation of laws seeks to follow the principle of efficiency of legislation. In the future it is also foreseen to consolidate the similar provisions in other legal acts regulating other financial sector entities.

money; (iii) and the acceptance of e-money as a means of payment by at least one third party. It is important to note that the third party must, upon the use of electronic money as a means of payment, have direct transactional relation with the client of e-money institution. In comparison to the earlier 2005 E-Money Institutions Act, the limitation on the total transaction amount has increased so that one electronic money device used in Estonia may be now used for the storage of electronic money to a maximum amount equal to 1000 euro (earlier the amount for one device was 300 euro).[67] Thus, in the context of the above referred article, it must be noted that e-money solutions such as prepaid cards can now be linked to loan agreements of much bigger loan amounts. This certainly meets the changing needs of electronic retail lending, following the general trend of increased electronic retail loan amounts and longer maturities.

Similar to earlier rules, the new 2009 Payment Institutions and E-Money Institutions Act maintains the requirement for licensing and supervision of e-money institutions. Similar to other financial sector entities, the system of 'European passporting' is continuously applicable in the establishment and supervision of e-money institutions: it is the home-country authority that is responsible for the supervision of the institution in the EU.[68] In principle, the 'European passporting' system between the EU/EEA countries has not changed under the new act. The payment and e-money institutions established and licensed in Estonia may offer payment and e-money services in other EU/EEA countries by establishing a branch or rendering cross-border services, including by the intermediation of an agent. The EFSA needs to be notified about both forms of activities. Thus, in the frames of 'European passporting' the institutions can continuously use their existing license issued in Estonia for cross-border operations in other EU/EEA states. The same applies to the operations of payment and e-money institutions from other EU/EEA countries in Estonia.[69]

However, the provision of cross-border services between third non-EU/EEA countries and Estonia has now somewhat different legal treatment. When Estonian service providers are regarded, the payment and e-money institutions established and licensed in Estonia may offer payment and e-money services in third non-EU/EEA countries by establishing a branch or rendering cross-border services, including by the intermediation of an agent. The establishment of a branch requires a license from the EFSA while the rendering of cross-border services requires notification. When it comes to payment and e-money institutions established and licensed in third non-EU/EEA countries, their service provision in Estonia has been narrowed down to stricter licensing rules under the new act. Such institutions may continuously offer payment and

[67] Art. 6(1) and (2), Payment Institutions and E-Money Institutions Act

[68] Makseasutuste ja e-raha asutuste seaduse eelnõu seletuskiri (Explanatory note to the Payment Institutions and E-Money Institutions Act, 610 SE, 26 October 2009, 3. Available at http://www.riigikogu.ee/index.php? page=en_vaade&op=ems&eid=802133 (13.06.2011) (in Estonian).

[69] Arts. 24(1), 29(1), and 35(1), Payment Institutions and E-Money Institutions Act.

e-money services in Estonia. However, different from earlier regulation which allowed the issuers to act based on the authorization of their home countries and respectively establish branches in Estonia, they can now provide services by establishing a branch or rendering cross-border services but need to obtain a license from the EFSA for any form of their activities.[70] This indicates that, on one hand, the increasing interest in cross-border services provision has resulted in the broadening of the scope of activity forms for also third-country issuers. On the other hand, the prudential rules aiming at financial stability and consumer protection in financial sector seek to have better control over all non-EU/EEA service providers, requiring now a local activity license for any form of activities.

The 2009 Payment Institutions and E-Money Institutions Act contains some new provisions regarding the requirements for the provision of e-money services. Article 63 of the act sets forth a detailed information obligation towards consumers. This is necessary from the perspective of mitigating the risks of consumers regarding the lack of knowledge about the contents of the service.[71] Upon the rendering of e-money services the issuer is obliged to (i) provide necessary information about all authorised e-money distributors; (ii) explain all the risks related to e-money services, taking into account the type and extent of services; and (iii) provide the client, upon his/her request, with information about the balance of e-money available on e-money device and other circumstances of e-money services provision. The terms of issuing and use of e-money must contain data about the effective period of e-money; the period for the withdrawal of expired e-money; and the minimum limit for the balance of e-money that can be withdrawn (not more than 10 euro).[72] In the context of the above referred article it must be noted that the compliance with the information requirements on behalf of the issuer becomes certainly more complicated in the case of loan-linked prepaid cards. On one hand, the risk specter is much more varied. On the other hand, there is also a third transaction party (the lender) whose involvement needs to be taken into account, for example the balance and changes of funds on an e-money device depend a lot on that third party involvement.

In relation to the above referred information obligation, the adoption of the 2009 Payment Institutions and E-Money Institutions Act brought also the specialized legal treatment of payment instruments in small amounts and e-money products, respectively complementing the second part of Chapter 40 of the LOA. These provisions seek to harmonize Article 34 of the 2007 Payment Services Directive, regulating exceptions for the low-value payment instruments and electronic money as regards information obligation of payment services.[73]

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[70] Arts. 25(1), 30(1) and 32(1), Payment Institutions and E-Money Institutions Act.
[71] Makseasutuste ja e-raha asutuste seaduse eelnõu seletuskiri, *op.cit.* note 68, 14.
[72] Art. 63(2) and (8), Payment Services Directive.
[73] Art. 733^{12}, LOA.

According to 2007 Payment Services Directive[74] the payment instruments for low-value payments in case of cheap products and services should be alternative, cheap and easy to use, and they should not be subject to too many extra requirements. Therefore the requirement for information provision as regards such payment instruments is limited and the information should only consist of relevant information, taking into account the technical functionalities of the instruments which one can normally expect.[75] On the other hand, it needs to be pointed out that for consumer protection purposes there must be some sort of information provision always in place because e-money products such as loan-linked cards are mostly prepaid products and therefore consumers need to know their characteristics.

Reduced information provision means that only the information regarding the main characteristics of a payment product is given and the location for obtaining additional information is indicated, given the payment instrument can be used according to a contract for single payment transactions of up to 30 euro or the payment instrument has a cost limit of 150 euro or the amount stored on the payment instrument does not exceed 150 euro at any time[76]. Additionally it is possible to agree between the parties to refrain from information provision, given that the payment instrument is used anonymously or the issuer is not technically able to provide the information. In any case, the client must be able to control the amount stored on the payment instrument. [77] In the context of the above referred article it must be noted that although prepaid cards can now be linked to loan amounts of up to 1000 euro, reduced information requirements which form an essential part of a flexible product solution would most likely contribute to more interest of service providers in linking the cards to electronic retail loans in smaller amounts.

3.2. Amendments Relating to Consumer Credit Regulation

The main research subject of the second article of this dissertation – "Legal Problems with Electronic Retail Loans: Balancing the Freedom of Contract and the Protection of Consumers – The Case of Estonia"– is consumer credit regulation, more precisely the selection of aspects of electronic retail loans which allow evaluating the level of freedom to provide efficient and flexible electronic retail lending services. We have seen that the abolishment of

[74] Art. 30, Payment Services Directive.

[75] Makseasutuste ja e-raha asutuste seaduse eelnõu seletuskiri, *op.cit.* note 68, 49.

[76] Member states have discretion to decrease or double these criteria for low-value payment instruments in case of national payment transactions. In case of prepaid instruments member states are not allowed to increase the criteria above 500 euro. In the implementation of Payment Services Directive, Estonia has chosen not to use this discretionary option.

[77] Makseasutuste ja e-raha asutuste seaduse eelnõu seletuskiri, *op.cit.* note 68, 49.

minimum thresholds allowed by 2008 Consumer Credit Directive has resulted in the application of thorough information requirements on all electronic retail loans, thereby distinguishing Estonian legal fabric from other neighboring countries. Among others, we have also seen that the presentation of interest rate information can be subject to interpretation differences and that the adoption of upper limit to the APRC may affect the freedom of contract in an overly consumer-driven manner which is quite unusual in the legal environment in Estonia. The main research subject of the third article of this dissertation – "Electronic Retail Lending in Estonia: Legal Limits on the Cost of Credit" – is the APRC limit effective as at 1st May 2009, more precisely its legal functions and potential problems in relation to its application. Among others, we have seen that the calculation of APRC seeks to adequately capture all the cost elements that may incur in retail lending transactions although the limit itself is legally "soft" in its nature. There are some further developments and legal amendments shaping the consumer credit regulation in Estonia. As these developments are related to the research subjects of the above referred articles, indicating a few changes in the regulative environment of some of the examined issues in the future, I find it important to address these changes hereto.

Before addressing the major new developments related to consumer protection rules in Estonia, I will briefly discuss one of the issues I raised in the above referred articles. As explained earlier, Estonia decided to abolish the minimum thresholds allowed by the 2008 Consumer Credit Directive. More precisely, the directive stipulates that its rules, including information obligations, do not apply to credit agreements involving a total amount of credit less than 200 euro or more than 75 000 euro and to credit agreements under the terms of which the credit has to be repaid within three months and only insignificant charges are payable.[78] Until 1st May 2009 Estonian consumer credit regulation consisted of similar exemption and the general rules of consumer credit did not apply to credit contracts with a net amount of credit less than 200 euro (or where the maturity of the credit facility was less than three months). From 1st May 2009 this exemption has been removed from the law and the Estonian information disclosure and other requirements in relation to consumer credit are applicable to all consumer credit agreements, irrespective of their amounts and maturities. Regular consumer loans in Estonia often start from 10 000 kroons. The survey on the factors influencing the behavior of retail loan customers[79] indicates that more than 65% of people that participated in the survey had retail loans with loan amounts exceeding 10 000 kroons while only

[78] Art. 2(2), Consumer Credit Directive.

[79] Maksim Melamed, Tarbimislaenu klientide käitumise mõjutegurite uuring – 2. osa (Survey on the factors influencing the behaviour of retail loan customers – part 2), February-March 2009. Available at http://kiirlaen.info/blog/tarbimislaenu-klientide-kaitumise-mojutegurite-uuring-2-osa (13.06.2011) (in Estonian).

20% of the people had retail loans with loan amounts up to 5000 kroons.[80] However, in case of electronic retail lending, loan amounts usually stay below 10 000 kroons, often even below 5 000 kroons. Thus, the change aimed at enhanced consumer protection and mainly resulted from the fact that a big part of electronic retail loans was not captured by general consumer credit regulation and in some cases electronic retail lenders indeed took advantage of less restrictive legal environment.

We have seen that the result of the change was that the thorough set of rules on borrower information became applicable to all electronic retail loans in Estonia, thus reducing the possibilities of legal arbitrage and seeking to contribute to more responsible lending practice. However, in the above referred articles I questioned whether the removing of the thresholds in Estonia contradicts the principles of the 2008 Consumer Credit Directive because the directive clearly sets forth the exemptions from its application. The answer to this concern which I also briefly discussed in the third article of this dissertation is that these thresholds are the exemptions deriving from the EU secondary law, allowing member states to apply certain degree of discretion in deciding the scope of application of the rules. Such conclusion can be drawn from the guidance in the preamble of the directive on the scope of its harmonization. The directive should be without prejudice to the application by member states, in accordance with Community law, of the provisions of the directive to areas not covered by its scope. Respectively, recital 10 in the Preamble to Consumer Credit Directive states that a member state may maintain or introduce domestic legislation corresponding to the 2008 Consumer Credit Directive outside its scope, for example on credit agreements involving amounts less than 200 euro. Thus, the abolishment of exemptions would not contradict the directive although Estonia has chosen less flexibility in retail lending. The removal of this exemption is continuously important at present; especially in the context of new legal amendments to consumer information requirements which will be explained below.

The major new development regarding consumer credit regulation is the amendment of the 2001 LOA effective from 1 July 2011. The amendments, mostly included in Chapter 22 part 2 of the LOA, transpose the 2008 Consumer Credit Directive into Estonian law. Some changes are respectively also related to the Consumer Protection Act[81] and Advertising Act[82]. The key issues addressed hereto to follow the above referred articles are the legal amendments relating to consumer information, responsible lending and the cost of credit (APRC).

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[80] Rahandusministri määruse "Tarbijakrediidi kulukuse määra arvutamise kord" eelnõu seletuskiri, *op.cit.* note 3, 4.

[81] Tarbijakaitseseadus, signed 11 February 2004, *Riigi Teataja (RT) I* (2004) No.13, 86; (2010) No.31, 158 (in Estonian) (hereinafter "Consumer Protection Act").

[82] Advertising Act, *op.cit.* note 10.

First, the amendments of the LOA remarkably broaden the scope of information to be provided to the consumer before the conclusion of a loan agreement. The increased information requirement seeks to support the consumer in making a reasonable and well-founded decision with regard to the loan agreement. The scope of mandatory information to be provided in retail loan agreements has also become wider.[83] The LOA has been complemented by some additional rules regarding the pre-contractual information provision to retail borrowers. Accordingly, the borrower must be given a possibility to compare different offerings so that he/she could make a decision to conclude a retail loan agreement, taking all circumstances into account. For this purpose the lender will provide the borrower with the list of pre-contractual information, including such information items as the total amount of payments to be made by the borrower to repay the loan and cover the total cost of credit; annual interest rate and the terms of its application; APRC and the borrower's right to obtain information about the data used to assess his/her repayment ability. This information should be given to the borrower within a reasonable time before the conclusion of loan agreement or acceptance of offering.[84]

APRC as the full cost of credit is naturally an important component of information obligation both in contractual relations and the marketing of lending products. Next to amending the LOA, the new Amending Act made changes into the 2008 Advertising Act, in particular the part concerning the advertisements of retail lending agreements. The change resulted in the provisions requiring each advertisement which is targeted at the possible conclusion of a retail loan agreement to indicate the APRC of such a loan agreement in the form of a typical example.[85]

As mentioned, the lender is obliged to disclose the annual interest rate and the terms of its application. Deriving from Annex II of the 2008 Consumer Credit Directive, the lender is obliged to inform the consumer about interest rate as a percentage rate, and also to notify whether the rate is fixed or floating.[86] I find the latter important especially from the perspective of the discussion raised in one of the above referred articles which, among others, covers the issue of interest rate presentation. Theoretically interest consists of three functions: (i) the inflation indicator of loan amount (i.e. its value in certain period of time); (ii) a fee for the period during which the lender could not himself use/invest the

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[83] Võlaõigusseaduse ja teiste seaduste muutmise seaduse eelnõu seletuskiri (Explanatory note to the amending act of the Law of Obligations Act and other acts), 761 SE, 17 May 2010, 2–3. Available at http://www.riigikogu.ee/ ?page=en_vaade&op=ems&eid=1033413 (13.06.2011) (in Estonian);

[84] Võlaõigusseaduse ja teiste seaduste muutmise seadus, signed 30 September 2010, *Riigi Teataja (RT) I* (2010) No. 77, 590; 04.02.2011 No. 2 (in Estonian) (hereinafter "The Amending Act").

[85] Art. 2(1), The Amending Act.

[86] Võlaõigusseaduse ja teiste seaduste muutmise seaduse eelnõu seletuskiri, *op.cit.* note 83, 18.

loan amount; (iii) the risk of repayment inability[87]. The natural element of interest is its dependence on the length of the use of money. However, in loan agreements it is not always the case that the fee for the use of money is called interest. Sometimes it is "hidden" behind other definitions.[88] Estonian legal theory suggests that any fee which can be treated as a fee for the use of money, even if the definition "interest" itself is not directly used, should be considered interest[89]. The new provisions would help avoiding the hidden pricing of credit products on behalf of electronic retail lenders, especially in the light of earlier practice of replacing credit interest as a percentage rate with loan fees.

In this context, an important new provision which the amendments of the LOA establish is the requirement for submitting information to the consumer on a permanent information device, using the European consumer credit standard information sheet. The establishment of this standard sheet and its mandatory use results from the transposition of the 2008 Consumer Credit Directive into Estonia laws. The standard information sheet will not be required for such retail loan agreements which are concluded with a limited number of consumers based on laws and in public interests, given that the contractual terms are more advantageous than those of the market, and the interest rate is below the average market rate. In case of retail loan agreements concluded via electronic means the lenders are expected to provide the consumer with the standard information sheet, including additional required information about the distance marketing of financial services, and make the information available on a permanent information device. In addition to the above information items, the lenders are expected to use the standard information sheet also for the number of other cases, such as informing the borrower about the fees in relation to consumer credit (e.g. the fees for account maintenance, usage of payment devices and so on) and the obligation of the borrower to conclude a side-contract (such as insurance contract).[90] The information about fees is an important issue for electronic retail lending, because this type of consumer lending is especially dependent on different account and payment solutions (e.g. loan-linked prepaid cards).

The standard information sheet with its clear and simple structure would help avoiding the situation of over-information of the consumer, and ensure the easy monitoring and comparison of loan data of different lenders. Since the obligation of the use of standard information sheet is applicable to all lenders

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[87] Irene Kull *et al*, "Riigikohtu tsiviilkolleegiumi praktika seadusandja mõjutajana (The Influence of Decisions of the Civil Chamber of the Supreme Court on Legislation), *Juridica No 8* (2009), 555–569 (in Estonian), at 563.

[88] Paul Varul *et a*l, *Võlaõigusseadus II. Kommenteeritud väljaanne (Law of Obligations Act II. Commented Edition)* (Kirjastus Juura, Tallinn, 2007) (in Estonian), 388.

[89] Paul Varul *et al, Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne (General Part of Civil Code Act. Commented Edition)* (Kirjastus Juura, Tallinn, 2010) (in Estonian), 281.

[90] Art. 1(33), The Amending Act.

operating in the EU, the consumer would be able to compare different credit products of both local and foreign service providers. This would ideally facilitate the use of retail lending services across borders and the establishment of consumer credit market within the EU. The breach of information obligations would result in the consumer's right to bring an action to the court, in particular with the claims of performance and compensation for damage[91]. Respectively, the breach of information obligation may result also in public sanctions: the Consumer Protection Act has been supplemented by the provision (Article 411) which allows the Consumer Protection Board to issue a precept, requiring the lender to stop the breach and prevent from further breaches of law.[92] Furthermore, the lender may be required to pay a penalty payment in case of continuous non-compliance with the precept[93].

Another set of new rules which has been integrated into the LOA is related to the principle of responsible lending. The principle of responsible lending is directly linked to the principles of sustainable operation and the purpose of these provisions is to avoid over indebtedness. The principle of responsible lending means that credit solutions must meet the needs of the consumer and need to be adjusted to his/her repayment ability. In brief, any loan needs to be suitable for certain borrower.[94]

According to the amendments of the LOA, the application of the principle of responsible lending requires 3 types of activities to be carried out by the lender before the conclusion of a retail loan agreement: (i) obtaining information, including from public databases, which would enable assessing the credit-worthiness of the consumer (ii) assess the repayment ability and credit-worthiness of the consumer (iii) give sufficient explanation to the consumer so that he/she could assess whether the potential retail loan agreement meets his/her expectations and financial circumstances.[95] Thus, in addition to pre-contractual information obligation the lenders will have the obligation of pre-contractual counseling and explaining the main characteristics and impact of potential loan agreement.

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[91] Since the information provision takes place in the course of pre-contractual negotiations, the breach of information obligations stipulated in Art. 403[1] of the LOA simultaneously means the breach of Art. 14 (2) of the LOA because the information obligation stipulated in Art. 14 (2) is directly derived from Art. 403[1]. Thus, a consumer may use all reasonable protective legal means as stipulated in Art. 101 of the LOA against the lender in breach. First and foremost, the claims of performance (Art. 108 of the LOA) and compensation for damage (Art. 115 of the LOA) can be applicable.

[92] Art. 3(1), The Amending Act.

[93] Art. 40 (5), Consumer Protection Act.

[94] Võlaõigusseaduse ja teiste seaduste muutmise seaduse eelnõu seletuskiri, op.cit. note 83, 25.

[95] Art. 1(33), The Amending Act.

Generally interest rates on loans depend on the estimation of creditworthiness.[96] Based on my practical experience in commercial banking it can be said that the assessment of creditworthiness aims at reducing credit risks and should result in lower credit cost for consumers. Respectively, the assessment of creditworthiness is not a unilateral operation but also requires adequate input from the consumer. In the process of credit application the consumer must submit true, adequate and complete data about his/her financial state and confirm his/her ability to make informed and sustainable decisions regarding the loan agreement. Again, as was the case with the standard information sheet, the assessment of creditworthiness will not be required for such retail loan agreements which are concluded with a limited number of consumers based on laws and in public interests, given that the contractual terms are more advantageous than those of the market, and the interest rate is below the average market rate[97].

In the above referred articles I have highlighted that electronic retail lending as a flexible financing product usually entails less background checks and assessment of creditworthiness. This is one of the components which makes such lending more expensive for the consumers. Under the Amending Act electronic retail lenders, similar to any other lenders, also need to comply with the requirement of assessing the creditworthiness of borrowers. Yet, in practical terms the scope of such assessment would naturally be problematic. On one hand such assessment will continue to vary among service providers and electronic retail lenders are likely to prefer keeping the scope of assessment cost-efficient. Also, getting the adequate picture of creditworthiness would be particularly problematic because electronic retail loan agreements are normally concluded from distance and so is done the preliminary communication with the client, including the assessment of the client's financial situation. As stated above, electronic lenders will be required to use public registers as their sources of information. On the other hand, one would assume that in order to mitigate their risks and handle the obligation of the burden of proof in relation to high APRC, the lenders are surely interested in gaining information necessary for sufficient assessment. Yet, I am of the opinion that the component of distant communication in this type of lending would not always ensure getting a true picture about the borrower.

Third important change is the composition of the APRC. In the beginning of consumer credit regulation in the EU in 1987 most of the aspects in relation to the APRC calculation were left to be decided by member states. Later the base indicators and assumptions for APRC calculation were harmonized and a single base formula was stipulated. The calculation is carried out according to the method of present value calculation which is a common economic method,

[96] Ingrid Ulst & Rain Raa, "Basel II and Lending to SMEs: What Lies Ahead?", *EBS Review* No 16 (2003), 62–74, at 72.

[97] Art. 1 (33), The Amending Act.

allowing to compare the cash flows of different periods converted into their present values.[98] The rate is a synthetic indicator which takes into account credit amount and related costs during the whole credit period, reflecting the periodic obligations of the consumer to service the respective credit line[99]. First and foremost the APRC reflects an important element of transparency and comparability of credit products in the EU. The 2008 Consumer Credit Directive does not provide for the possibility to leave the total amount of payments to be made for the repayment of credit and the covering of total cost of credit undisclosed. The rate aims at suggesting a numeric and comparable indicator which would enable consumers to understand the costs of certain credit product in comparison to credit amount and repayment period.[100] Thus, one can assume that pre-contractual information about the APRC would ideally lead a consumer to choose more beneficial alternatives on credit market. On the other hand, if the consumer's creditworthiness is low, this would in turn reduce the possibility for more beneficial alternatives, regardless the consumer's knowledge about the actual cost of credit.

Both the LOA and the Procedure for Calculation of the Rate of the Cost of Consumer Credit[101] have been respectively amended, widening the scope of elements included in the APRC calculation. According to the amendment of the LOA, the APRC (annual percentage rate of charge) means all the costs that a consumer is obliged to pay in relation to consumer credit agreement, including interest and contractual fees, which the lender knows of upon the conclusion of the agreement. The APRC is expressed as annual percentage rate on the credit amount or maximum credit limit in use. The APRC needs to be presented in the form of a typical example, indicating all the relevant base data and assumptions used in the calculation of the APRC. A slight change has been provided with regard to the definition of the APRC. Earlier definition of the APRC was based on net amount or net price. The definition stipulated in the 2008 Consumer Credit Directive does not tie the calculation of the APRC to net price and therefore such reference was also abandoned in the Amending Act of Estonia. In comparison to the earlier procedure, the base indicators and formula for the APRC calculation have been somewhat revised in the Amending Act and the

[98] European Commission, *op.cit.* note 2, 52.

[99] The sample calculator of the APRC calculation is available on the homepage of the European Commission. However, it should be noted that this calculator is an example which is not updated. *See* Excel simulator for the calculation of the APRC available at http://ec.europa.eu/consumers/rights/fin_serv_en.htm (18.06.2011).

[100] Rahandusministri määruse "Tarbijakrediidi kulukuse määra arvutamise kord" eelnõu seletuskiri, *op.cit.* note 3, 1.

[101] Tarbijakrediidi kulukuse määra arvutamise kord, signed 31 October 2010, *Riigi Teataja (RT) I* (2010) No. 76, 584 (in Estonian) (hereinafter "The APRC Procedure"). The adoption of this procedure was related to the adoption of the new Amending Act and it replaced the earlier procedure which had been effective from 2002.

APRC Procedure. Also, some additional assumptions[102] have been set forth, making the calculation of the APRC possible when some of the base indicators are not known.[103] This is a positive change which brings more clarity in practical terms. Under earlier regulation lenders did not have such guidance and they needed to invent the assumptions for the APRC calculation in case of missing parameters to be able to identify the APRC. Also, it goes without saying that the different assumptions used by different lenders could have created regulatory arbitrage. This is the gap which has been filled by the Amending Act.

One of the important changes in comparison to the earlier definition is that the amendments of the LOA now include the costs of side-agreements into the calculation of the APRC. Accordingly, in case it is mandatory to conclude a side-agreement (such as an insurance agreement) for obtaining a loan, the costs of such a side-agreement, especially insurance payments, will be taken into account in the calculation of the APRC. Respectively, the costs of payment transactions, account maintenance and the use of payment devices in relation to the use of credit should be generally taken into account in the APRC calculation, unless the opening of an account is voluntary and the costs of account maintenance are clearly separately indicated in the retail loan agreement or some other agreement.[104]

Side-agreements are a new issue in the APRC calculation. Respectively, the definition of a side-agreement is a new concept in the LOA. Side-agreement means an agreement which is linked to a retail loan agreement through the need for concluding such an agreement deriving directly from the retail loan agreement. In order to take the costs of a side-agreement into account in the APRC calculation, the conclusion of the side-agreement needs to be set as a pre-condition for obtaining credit or obtaining credit on terms advertised/offered to the consumer.[105] This means that the costs of a side-agreement should be taken into account in such cases where the consumer, without the conclusion of the side-agreement, would not get any loan or would get it on less favorable

[102] These assumptions are related to such aspects as credit period, difference between interest rate and fees, payment schedule and so on. For example, if a retail loan agreement enables to choose the start date for using the loan, the assumption in APRC calculation is that the loan is taken in use immediately and in full. If no repayment schedule is agreed by the parties, the assumptions in the ARPC calculation are that the loan is granted for 1 year and it will be paid back in twelve equal instalments after equal periods. If no maximum credit amount is determined in the loan agreement, the maximum in APRC calculation is set at 1500 euro. In case the consumer is offered different interest rates and fees during certain period of time, the assumption is to use the highest of agreed interest rates and fees in the APRC calculation. *See* Art. 1(45), The Amending Act.

[103] Võlaõigusseaduse ja teiste seaduste muutmise seaduse eelnõu seletuskiri, *op.cit.* note 83, 34.

[104] Arts. 1(33) and 1(41), The Amending Act.

[105] Võlaõigusseaduse ja teiste seaduste muutmise seaduse eelnõu seletuskiri, *op.cit.* note 83, 35.

conditions. All side-agreements which are concluded on voluntary basis without the clear requirement from the lender stay outside the scope of the APRC calculation.[106]

This change of including the costs of side-agreements, particularly insurance agreements, in the APRC calculation, is probably triggered by the potential for the circumvention of rules which the earlier provisions regarding the APRC contained. We have seen that the current APRC limit assumes that electronic retail lenders grant credits with reasonable cost of credit rates or bear the burden of proof regarding transaction circumstances. We have also seen that the APRC of electronic retail loans is usually much above the market rates, reflecting both the high financing and administration costs but also the margin expectations of electronic retail lenders. Thus, the lenders would naturally seek legal ways to avoid exceeding the APRC limit. One of the possibilities to "decrease" the APRC under earlier regulation was to offer credit insurance services, switching part of financing and other costs or margin expectations into such insurance premiums. Since the inclusion of insurance costs in the APRC calculation was somewhat questionable under earlier rules, the service providers could use this scheme to maintain their cost and margin levels without exceeding the APRC limit. The amendment now includes any insurance agreements which the lender has made mandatory for the consumer to conclude before receiving a loan and also other type of side-agreements such as agreements for payment services. This solution should much decrease the possibilities for inventing different types of services to circumvent the APRC rules. It is interesting to note that the circumvention has been found problematic in other countries too. From the EU-wide perspective, analyses have revealed that lenders may tend to offset the effect of interest rate restrictions by designing credit contracts or additional service contracts charging fees which are not captured by the interest rate regulation.[107] Also, when looking at country specifics, a good example is Germany where a research was carried out in 2009. It revealed that the payment protection insurance fees introduced by American and English banks in the last years have become the main form of circumvention of the usury ceilings in Germany and have resulted in the surplus of nearly 80% of the fee paid back to the lender as a secret and undisclosed kick-back provision. Legally it has been argued that such payment protection insurance contracts are either linked contracts or that the kick-back provision is hidden interest which falls under the circumvention rule of the Consumer Credit Directive.[108]

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[106] Also, in this light the knowledge of the lender about costs is of importance and this is something the borrower should consider. For example, given the lender requires the conclusion of an insurance agreement but the choice of insurance company is left to the borrower who would not inform the lender about the insurance agreement, the costs of such insurance agreement are not taken into account in the APRC calculation.

[107] Udo Reifner *et al*, *op.cit.* note 20, 328–329.

[108] Udo Reifner & Michael Knobloch, *op.cit.* note 22, 8.

3.3. The APRC Limit and Constitutional Rights

3.3.1. Introduction to the Discussion

In the articles contained in this dissertation I have explained that the unbalanced value of mutual obligations is the issue which might cause interpretation problems. When assessing performance from the perspective of good morals, one should look for the average sense of moral of the members of society. It is not important to take into account the assessment by a concrete person whose sense of moral can be higher or lower than the general value judgement of society as a whole.[109] Respectively, the Supreme Court of Estonia has found that transactions can contradict good morals for different reasons which could be considered immoral and condemnable according to the common belief of the society. A transaction contradicts good morals if it is against the sense of justice and value judgement of a just and reasonable person as well as the general principles of law at the time of the transaction, and the contradiction to good morals may result from the objective of the transaction or immoral behavior of one of the parties with an objective to conclude the transaction.[110] Both morale and values are such elements which change in the course of time. Respectively, the meaning of how we perceive contradiction to good morals is also changing. When it comes to disproportionate obligations, one of the ways to determine the contradiction to good morals is to examine whether the situation would be acceptable to a reasonable person.[111]

The analysis provided in the articles of this compilation shows that as a rule the generally accepted view of Estonian courts is to evaluate the compliance of a transaction with good morals on case-by-case basis, taking into account the circumstances and values applicable at the time of the transaction. "A reasonable person" is an undefined legal concept. However, it is often put into a clearer framework by defining or indicating some parameters for non-acceptable situations. For example, German legal writing suggests that mutual obligations are contrary to good morals if the difference between performance and counter-performance exceeds 100%. In the case of interest rates there is a generally accepted rule in German jurisprudence that the rates should not exceed twice the average market rate for a particular field of business. The average market rate is a monthly disclosed rate by the European Central Bank.[112]

We have seen that in case of consumer credit agreements, the unbalanced value of mutual obligations as contrary to good morals is assumed if the APRC exceeds 3 times the average cost of consumer credits as provided in the last

[109] Paul Varul *et al, op.cit.* note 8, 276.
[110] The Supreme Court 21 November 2008 decision in civil case 3-2-1-111-08, *RT III* (2008) No. 47, 325 (in Estonian), Sec 23.
[111] Paul Varul *et al, op.cit.* note 89, 276.
[112] Udo Reifner & Michael Knobloch, *op.cit.* note 22, 8.

commercial banking statistics of the Bank of Estonia. In this context, the articles have indicated that there is a possibility that the setting of such upper limit to the APRC contradicts the Constitution of Estonia. After the limiting of the APRC took place in 2009, a procedure was initiated by a market participant and brought to the attention of the Chancellor of Justice (ombudsman)[113]. The aim of the procedure was to evaluate the compliance of the civil law provisions limiting the APRC with the Constitution of Estonia[114]. In the beginning of 2011 the Chancellor of Justice of Estonia took an official stand in this question[115]. Drawing parallel to this official viewpoint, I will address the issue of the APRC limit and its possible contradiction to constitutional rights. Following I will seek to explain whether and why I think that the current provisions of the APRC limit disproportionately restrict the constitutional rights of service providers, more precisely their constitutionally protected right of entrepreneurship freedom. In the course of discussion I will also address contradiction between the right of entrerpreneurship freedom and the principle of social state deriving from Art. 10 of the Constitution.

3.3.2. The Right of Entrepreneurship Freedom and its Restriction

To start a discussion regarding the possible contradiction of certain legal provisions to constitutional freedom, it is necessary to commence with briefly looking at the particular freedom as such, thereafter explaining the core elements of the evaluation of constitutional compliance which are relevant in

[113] The institution of the Chancellor of Justice is established by the Constitution of the Republic of Estonia. The institution is not part of the legislative, executive or judicial powers; it is not a political or a law enforcement body. The institution combines the function of the general body of petition and the guardian of constitutionality. It is an official who is independent in his activities and who reviews the legislation of general application of the state's legislative and executive powers and of local governments to verify its conformity with the Constitution and the laws. Another important constitutional task entrusted to the Chancellor of Justice is the function of the ombudsman which contains the monitoring of whether state agencies comply with people's fundamental rights and freedoms and with the principles of good governance. The Chancellor of Justice also supervises local governments, legal persons in public law and private persons who exercise public functions.

[114] E-mail correspondence of 06 September 2010 with Ave Henberg, Adviser-Head of the Second Department, Office of the Chancellor of Justice of Estonia.

[115] Õiguskantsleri märgukiri nr. 6-1/091076/1100273 justiitsministrile "Tsiviilseadustiku üldosa seaduse § 86 põhiseaduspärasus" (The note No 6-1/091076/1100273 of the Chancellor of Justice to the Minister of Justice regarding the constitutional compliance of Art 86 of the General Part of Civil Code Act), 19 January 2011. Available at http://www.oiguskantsler.ee/public/resources/editor/File/NORMIKONTROLLI_MENETLUSED/Margukirjad/2011/JuM_kiirlaenud_m_rgukiri.pdf (10.05.2011) (in Estonian).

our case. According to Art. 31 of the Constitution of Estonia[116] everyone has the right to be engaged in entrepreneurship. The scope of protection of entrepreneurship freedom contains any activity carried out with an objective to gain profit. Entrepreneurship freedom contains legal and factual freedom. On one hand, a person has entrepreneurship freedom if there are no legal obstacles, i.e. no legal prohibitions or directives which would restrict person's ability of entrepreneurial decision making. On the other hand, a person is factually free to act as an entrepreneur if the person has enough skills, financial means and connections. The lack of skills, money or connections is a factual obstacle to the freedom and it is not related to legal environment.[117]

In our case, Art. 31 of the Constitution aims at protecting the right of natural and legal persons to grant credit to other persons with an objective to gain profit. The freedom of an entrepreneur (i.e. electronic retail lender) to agree on fees related to the use of credit is protected by Art. 31 while the rights of a consumer are protected by Art. 19 of the Constitution. The contractual freedom is protected by the provisions of Art. 19 declaring that anyone has the right for free self-performance. This covers the right to conclude contracts both by service providers and consumers. Art. 31 of the Constitution is a specialised norm of the general norm contained in Art. 19 of the Constitution. The Supreme Court has stated that contractual freedom is part of free self-performance[118]. Also, the constitutionally protected right of ownership as stipulated in Art. 32 (1) of the Constitution assumes the freedom of an entrepreneur to determine the fees for the use of credit. We have already noted that entrepreneurship freedom contains legal freedom as one of its elements: although free to do business, including the determination of the size of fees for the use of credit, an entrepreneur may be limited in his activities by the provisions of regular law. For example, the activity of a lender offering retail credits to consumers is limited by the consumer credit rules of the LOA.[119]

Art 19 (2) expresses the idea that in exercising his/her rights and freedoms, everyone must respect and consider the rights and freedoms of others.[120] The fundamental rights in private law are expressed by the obligation of the legislator to specify the contents of fundamental rights in a respective field of

[116] Eesti Vabariigi põhiseadus, signed 28 June 1992, *Riigi Teataja (RT) I* (1992) No.26, 349; 27.04.2011 No. 1 (in Estonian) (hereinafter "The Constitution").

[117] Eesti Vabariigi põhiseaduse ekspertiisikomisjoni lõpparuanne (The final report of the Constitutional Expert Commission), 1998. Available at http://www.just.ee/10716 (02.05.2011) (in Estonian).

[118] The Supreme Court 30 April 2004 decision in constitutional supervision case 3-4-1-3-04, *RT III* (2004) No. 13, 160 (in Estonian), Sec 21.

[119] Õiguskantsleri märgukiri, *op.cit.* note 115, 8.

[120] Robert Alexy, "Põhiõigused Eesti põhiseaduses" (Fundamental Rights in the Estonian Constitution), *Juridica Special Edition* (2001), 5–96 (in Estonian), at 35.

law and balance the positions of persons against each other.[121] The things that can be limited are constitutionally protected interests and prima facie positions protected by constitutional rights. A norm can only limit constitutional rights if it is itself constitutional.[122] A constitutional right can be restricted by a legal act or a deed. A restrictive legal act includes normative obligations or prohibitions which require the subject of the constitutional right to do something or refrain from doing something. Obligations and prohibitions have a restrictive character by definition. Restriction within its wider meaning includes any hindrance, damage and elimination by the state. Only such activities, characteristics and statuses can be hindered, damaged or eliminated which are subject to the scope of protection of a respective right. Also, the requirement for wider interpretation applies in identifying a restriction: in case of doubt it is always necessary to assume that public means restrict the scope of protection of the respective right.[123] The scope of protection of a certain right is considered restricted also in such cases where there is disadvantageous influence on the right.[124] A restriction to entrepreneurship freedom may derive from the person relying on the freedom as well as from objective circumstances (e.g. limiting the opening times for certain types of stores). It is allowed to restrict entrepreneurship freedom on the grounds of the rights and freedom of other persons as well as public interests.[125]

In our case the constitutionally protected entrepreneurship freedom of electronic retail lenders is restricted by Art. 86 of the GPCCA which provides for a limit to the cost of credit, thereby limiting the free choice of electronic retail lenders in setting the fees for the use of credit. The provisions of Art. 86 (2) and (3) assume that if a consumer has taken a loan with the cost of credit rate which is higher than 3 times the average of consumer credits as provided in the last commercial banking statistics of the Bank of Estonia, such loan transaction is by assumption contrary to good morals and therefore void. Respectively, according to Art. 86 (4) of the GPCCA the lender is entitled to collect a fee of only in the amount of legal interest rate (Art. 94 (1) of the LOA) on such loan transaction and loses the possibility to collect the initially planned fees. Such restriction has impact on electronic lenders mainly for 2 reasons. On one hand, the restriction would force some lenders to adjust the fees so as to match the legal limit, entailing the risk that they would not be able to meet their

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[121] Anneli Alekand, *Proportsionaalsuse printsiip põhiõiguste riive mõõdupuuna täitemenetluses. Doktoritöö (The principle of Proportionality as a Measure for Restrictions of Fundamental Rights in Enforcement Proceeding. Doctorate Thesis)* (Tartu Ülikooli Kirjastus, Tartu, 2009) (in Estonian), 24–26.

[122] Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2010), 181–182.

[123] Eesti Vabariigi põhiseaduse ekspertiisikomisjoni lõpparuanne, *op.cit.* note 117.

[124] The Supreme Court 12 June 2002 decision in constitutional supervision case 3-4-1-6-02, *RT III* (2002) No. 18, 202 (in Estonian), Sec 9.

[125] Taavi Annus, *Riigiõigus (State Law)* (Kirjastus Juura, Tallinn, 2006) (in Estonian), 360.

commercial objectives and cover the costs of their business, eventually resulting in their exit from the market of electronic retail lending services. Making a lender to choose such alternative certainly restricts the entrepreneurship freedom stipulated in Art. 31 of the Constitution. Moreover, the decreased number of market participants would have negative effect on the competitiveness and efficiency of the market. On the other hand, some lenders certainly continue granting credit with the rates which exceed the legal limit. These lenders need to consider the following. If a consumer does not perform payment obligations under the loan agreement and a lender files a respective claim, the lender must prove that the loan transaction is not contrary to good morals and therefore void. The lender must prove that (i) the value of mutual obligations of parties was not contrary to good morals despite the fact that the cost of credit exceeds the legal limit; and (ii) the lender did not know or should not have known that the consumer concluded the transaction due to his/her extraordinary need, dependence, inexperience or other such state. The actual fulfillment of such obligation of proof is not an easy task in terms of time, complexity and resources. Also, the potential for collecting only legal interest instead of actually expected fees, should the lender fail to fulfill the obligation of proof, has additional negative impact on the lender. Thus, these measures in combination certainly restrict the entrepreneurship freedom (including the right to gain profit) as stipulated in Art. 31 of the Constitution.

A restriction to a fundamental right does not automatically mean the violation of the right. A provision which restricts the scope of protection of a constitutional right does not violate the right when it is formally and materially in compliance with the Constitution. Formal compliance means that a legal act must meet the authorization, procedural and formal requirements. Formally, every restriction assumes the existence of a respective legal act. When it comes to the theoretical approach of assessing the compliance of a legally imposed restriction with the Constitution, the material compliance with the Constitution can be looked at from 2 different aspects. First, the restriction must have a legitimate reason and secondly, the restriction must be proportionate.[126] Art. 11 of the Constitution stipulates that the restrictions to rights and freedom must be necessary for the democratic society and should not distort the nature of the rights and freedom.[127] This provision sets forth the principle of constitutional proportionality (also known as the principle of equality) which requires every restriction to a constitutional right to be appropriate, necessary and proportionate within its narrower meaning.[128]

According to the theoretical concept of constitutional assessment as explained above, the assessment of constitutional compliance of the APRC limit stipulated in Art. 86 of the GPCCA entails both formal compliance and material

[126] Taavi Annus, *op.cit.* note 125, 360.
[127] Art. 11, The Constitution.
[128] Eesti Vabariigi põhiseaduse ekspertiisikomisjoni lõpparuanne, *op.cit.* note 117.

compliance. The evaluation of material compliance includes 4 important categories: the achievement of the constitutionally allowed objective, appropriateness, necessity and proportionality. As also indicated earlier, the Chancellor of Justice has taken an official stand in this issue. This official stand reveals an opinion that the provisions of Art. 86 (3) and (4) of the GPCCA disproportionately restrict the constitutional rights of the providers of electronic retail lending services[129]. Following I will provide my view as regards the material compliance of the APRC limit stipulated in Art 86 with the Constitution. I will analyse whether the restriction of entrepreneurship freedom through the setting of a legal limit on the cost of credit has been in accordance with the constitutionally allowed objective and whether the restriction has been appropriate, necessary and proportionate. Since constitutional assessment is not my core competence in law, I have gained support in formulating my following analysis both from the theoretical concepts as well as from the recent note of the Chancellor of Justice. I will only evaluate material compliance but I will not address formal compliance of the GPCCA. On one hand, there has been no indication of formal deficiencies on behalf of state authorities (including the Chancellor of Justice) or market participants as this act is regarded. On the other hand, such analysis of formal compliance would move much away from addressing the major statements and the planned scope of this research.

3.3.3. Material Constitutional Compliance: Legitimacy of the Objective

Legitimacy of the objective means that any restriction needs to have justification.[130] Constitutional obligations, constitutional rights and other material principles of the Constitution are general legitimate reasons for the restriction. Such general reasons can form a basis for the restriction of a fundamental right with either the qualified reservation of law, regular reservation of law or without the reservation of law. The legitimacy of the objective of restriction is particularly important as regards the fundamental rights deriving from the qualified reservation of law as well as the rights without the reservation of law. In the case of fundamental rights without the reservation of law the legitimate objectives are directly limited only by the fundamental rights of other people or by constitutional values. In the case of fundamental rights deriving from the qualified reservation of law the objectives which justify the restrictions of fundamental rights are clearly stipulated in one of the legal provisions covering

[129] The Chancellor of Justice has defined electronic retail loans as unsecured loans generally granted via the means of distant communication in relatively small amounts with short maturities (less than 1 year). There is no fixed legal term for electronic retail loans in Estonia.

[130] Kalle Merusk & Raul Narits, *Eesti konstitutsiooniõigusest (Constitutional Law of Estonia)* (Juura Õigusteabe AS, Tallinn, 1998) (in Estonian),189.

the respective fundamental right. When it comes to the fundamental rights deriving from the regular reservation of law, it is important to examine whether the objective is in compliance with the Constitution – an objective which directly contradicts the Constitution cannot restrict a fundamental right.[131]

Evaluation of the legitimacy of the objective is problematic mainly due to the fact that the objective is generally hidden. As a rule, legislators do not formulate the objectives directly in laws. If the objective is formulated but the law allows also other objectives (which have not been formulated *expressis verbis*), these other objectives too justify the restiction of fundamental rights.[132] A restriction to entrepreneurship freedom must not damage legally protected interests and rights more than is justifiable by the legitimate objective of a legal act. Applied means need to be proportionate to the expected objective.[133]

In our case the objective of the restriction has been rooted in 2 major problems which became topical in the course of rapid growth of electronic retail lending market in 2007–2008 against the background of legal acts and case law at the time. On one hand, the legal framework at the time enabled to declare a loan transaction with disproportionately high interest rate void only on the grounds that a lender had taken advantage of the difficult situation of a borrower. On the other hand, the occurrence of taking advantage of the difficult situation of the borrower could be identified only on the basis of an application from the borrower (and not on the initiative of a court). To solve these problems the amending act of the General Part of Civil Code Act and Law of Obligations Act was initiated on 14 October 2008, aiming at imposing the measures which would ensure that the clients of electronic retail lenders (consumers) should not bear unreasonably high costs of credit.[134] Here it is interesting to draw attention to the aspect which was also pointed out by the Chancellor of Justice: the measures proposed in this first version of the draft amending act were softer than those of the finally adopted version. In the first draft there were no provisions which would have assumed contradiction to good morals if the cost of credit rate exceeds 3 times the average of consumer credits as provided in the last commercial banking statistics of the Bank of Estonia. However, the following discussions over the draft amending act resulted in stronger consumer protection measures and the respective proposal on 16 February 2009 to supplement Art 86 (3) of the GPCCA by creating the limit to the APRC as is applicable today.[135] These stricter provisions aim at better protection for

[131] Taavi Annus, *op.cit.* note 125, 244–245.
[132] Taavi Annus, *op.cit.* note 125, 245.
[133] Erik-Juhan Truuväli et al. (Eds.), *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented Edition)* (Kirjastus Juura, Tallinn, 2002) (in Estonian), 272. *See* also the Supreme Court 20 April 2000 decision in constitutional supervision case 3-4-1-6-2000, *RT III* (2000) No. 12,125, Sec 13.
[134] Tsiviilseadustiku üldosa seaduse ja võlaõigusseaduse muutmise seaduse eelnõu seletuskiri, *op.cit.* note 45.
[135] Õiguskantsleri märgukiri, *op.cit.* note 115, 11–12.

consumers, given the earlier background of various poorly-informed loan decisions on behalf of electronic retail borrowers as well as the cases of malpractice and fraud in SMS-lending in Estonia. In this light the objective of the legislator to impose certain protective measures in order to improve the situation of consumers is understandable. I believe that the protection of consumers as a weaker party in lending transactions would be well grounded in most legal systems. The protection of a party who is by the nature of certain activity designed to be a weaker party in a transaction is a legitimate goal. Thus, the consumer protection objective of the restriction established by the GPCCA is justified and the objective itself would not contradict the Constitution. However, on the basis of legal theory addressed earlier in this Chapter we have seen that the measures for achieving the consumer protection objective have to meet 3 more criteria accommodated under one common title "proportionality": they need to be appropriate, necessary and proportionate. Following I will examine whether the restriction in question meets these criteria.

3.3.4. Material Constitutional Compliance: Proportionality

3.3.4.1. Appropriateness of the Restriction

A measure is appropriate if it in some way facilitates the achievement of the objective of the restriction and it is certainly disproportionate if it does not contribute to the achievement of the objective.[136] Such restrictions which do not support the achievement of the goals contradict the Constitution and are therefore prohibited.[137] As indicated earlier the objective of the APRC limit is consumer protection. The legal consequences related to the APRC limit contribute to the protection of consumers mostly for 3 reasons. Given a loan agreement with the APRC exceeding the limit, the first important aspect for consumer protection is that consumers needn't prove contradiction to good morals in case of objections to the validity of such loan agreement. While the general rule for the burden of proof in civil procedure is that in an action a party should prove the facts on which the claims and objections of that party are based[138], this legally provided switch in the burden of proof and related potential for the loss of contractual interest by lenders certainly strengthens the position of consumers in lending transactions. Secondly, in case of such a loan agreement consumers gain the right to pay only legal interest instead of contractual rate and will be therefore financially better off. Last but not least,

[136] The Supreme Court 26 March 2009 decision in constitutional supervision case 3-4-1-16-08, *RT III* (2009) No. 15, 109 (in Estonian), Sec 29.
[137] Eesti Vabariigi põhiseaduse ekspertiisikomisjoni lõpparuanne, *op.cit.* note 117.
[138] Art. 230 (1), Tsiviilkohtumenetluse seadustik, signed 20 April 2005, *Riigi Teataja (RT) I* (2005) No. 26, 197; 21.04.2011, No. 17 (in Estonian).

courts evaluate the validity of lending transactions on their own initative[139], thereby enabling also inexperienced consumers to have their rights protected and avoid the payment of overly high costs. For these reasons we can conclude that the limit to the APRC facilitates the achievement of the consumer protection objective in question and can be therefore considered appropriate.

3.3.4.2. Necessity of the Restriction

A measure is necessary if its objective cannot be achieved by some other less restrictive but similarly efficient measure.[140] If there is a less restrictive measure which is similarly efficient for the achievement of expected goals, then the more restrictive measure is considered contrary to the Constitution and it is therefore prohibited.[141] The principle of necessity (similar to the principle of appropriateness) follows from the nature of principles as optimization requirements relative to what is factually possible[142], thereby expressing the idea of Pareto-efficiency[143]. The interpretation of the principle of necessity by the European Court of Human Rights has a broad meaning, establishing a stereotype expression "pressing social need". This adds a value judgement to the simple relation between the objective and means of the principle of necessity, indicating that it is necessary to evaluate the significance of the objective for which the restriction is used. A pressing social need for the restriction exists if it is necessary for achieving or promoting an objective which is required according to the pressing social need.[144]

To examine the principle of necessity in the light of the APRC limit in Estonia, it must be repeated that the first draft of amending act of the General Part of Civil Code Act and Law of Obligations Act inititated on 14 October 2008 contained less restrictive measures towards the activity of service

[139] *See* the Supreme Court decision in civil case 3-2-1-111-08, *op.cit.* note 109, Sec 23 and the Supreme Court 8 May 2006 decision in civil case 3-2-1-32-06, *RT III* (2006) No. 20, 187 (in Estonian), Sec 14. The only exception to the rule is a specialized accelerated procedure for a payment order.

[140] The Supreme Court decision in constitutional supervision case 3-4-1-16-08, *op.cit.* note 136, Sec 29.

[141] Eesti Vabariigi põhiseaduse ekspertiisikomisjoni lõpparuanne, *op.cit.* note 117.

[142] Robert Alexy, *op.cit.* note 122, 67.

[143] Pareto efficiency, or Pareto optimality, is a concept in economics used to study economic efficiency and income distribution. Given an initial allocation of goods among a set of individuals, a change to a different allocation that makes at least one individual better off without making any other individual worse off is called a Pareto improvement. An allocation is defined as "Pareto efficient" or "Pareto optimal" when no further Pareto improvements can be made. Pareto efficiency is a minimal notion of efficiency and does not necessarily result in a socially desirable distribution of resources: it makes no statement about equality, or the overall well-being of a society. The concept was established by Vilfredo Pareto in his *Manual of Political Economy* (1906).

[144] Robert Alexy, *op.cit.* note 120, at 39–40.

providers. Had these initial provisions[145] which I addressed earlier in this Chapter been adopted, electronic retail lenders would not have had so much uncertainty about the validity of the transactions with the APRC exceeding the legal limit. Also, the lenders would not have had such extensive burden of proof as they are having today. From the perspective of consumer protection I think that the initial draft of the amending act would have offered sufficient protection to consumers but it would not have had the same scope as the provisions which are effective today. In this respect I agree with the view of the Chancellor of Justice who states: "*[...] At the same time, earlier regulation would not have offered the same extent of protection to the consumers as the effective regulation because the burden of proof was shared according to the earlier regulation but today it is only the lenders' obligation. [...].*" [146] On the other hand, the APRC limit as it is effective today is relative in its nature and therefore less restrictive than any absolute limit would have been, if it had been considered[147]. According to the Chancellor of Justice, the Minister of Justice too has suggested that the switch in the burden of proof may result in remarkable extra burden for the parties of a legal relationship and must therefore be well justified but it certainly needn't be justified at such high level as it would be in the case of setting an absolute and irrevocable limit.[148] Thus, it can be concluded that the limit to the APRC, although more restrictive than its alternative solution, can be considered necessary for the achievement of the consumer protection objective in question to wider extent than the less restrictive alternative solution while it provides similar extent of consumer protection with less restriction to its subjects than would the potential absolute option.

3.3.4.3. Proportionality of the Restriction

3.3.4.3.1. The Conflict of Fundamental Rights and Weighing

Art 10 of the Constitution stipulates that the rights, freedoms and obligations stated in the second chapter of the Constitution (Fundamental Rights, Freedoms and Obligations) do not set prejudice to any other rights, freedoms and

[145] Initially the draft contained no such provisions which would have assumed contradiction to good morals with the cost of credit rate exceeding 3 times the average of consumer credit statistics of the Bank of Estonia. However, resulting from the various discussions in the Parliament the draft was supplemented, establishing such limit to the APRC as is applicable today.

[146] *See* Õiguskantsleri märgukiri, *op.cit.* note 115, 14. The quote is my own unofficial translation of the text from Estonian into English.

[147] An absolute limit was never considered in Estonia but it is applicable in a few other EU countries. A good example of a system with absolute limit is Lithuania where the recent adoption of new Consumer Law set a limit of 250% to the APRC. A brief overview with other interesting aspects about the situation with limiting the cost of credit in the EU countries is provided below at the end of this Chapter.

[148] Õiguskantsleri märgukiri, *op.cit.* note 115, 3.

obligations which derive from the meaning of the Constitution or comply with it and meet the principles of human dignity, social state and democratic rule of law. This article contains the development clause for fundamental rights, keeping their catalogue open. Fundamental rights are such principles which form basis for all the other principles and rules of the Constitution.[149] Fundamental obligations are such constitutional obligations which are addressed to the bearers of fundamental rights. Fundamental obligations restrict certain fundamental rights. The Constitution of Estonia contains a self-evident indication that there are collective (societal) benefits. Among others, fundamental obligations are also such obligations which derive from the individual rights of other persons. Since the correct limiting of individual legal spheres in a liberal state serves to promote public order as a whole, fundamental obligations in their broad sense are related to collective benefits.[150]

Among the fundamental principles contained in the Constitution and expressed by the Supreme Court, there are the principles of social state and rule of law which are relevant in our case. Although the principle of social state is not defined in the Constitution, the ensuring of social justice through the elimination of social risks and the reducing of social and economic inequality is generally seen as the objective of social state.[151] The fundamental principle of social state is that the state should take care of those citizens who cannot take care of themselves. Subjective and objective dimensions need to be differentiated in this case. First, there are the objective obligations of the state to ensure its social goals. The measures applied for social reasons usually contain the redistribution of benefits and the objective dimension of social state therefore serves as additional justification to the restrictions of ownership and so on.[152] A state should not be "blind" as regards its existing and potential social problems[153]. When there is less economic balance in the society which would not enable efficient self-regulation, the social fundamental rights need to be redistributed. Such redistribution deriving from the principle of social state has 2 forms. On one hand the state can organise redistribution of resources through its tax and support system. On the other hand, such redistribution can take place at micro-level from one person or group to another.[154] The challenge related to the objective dimension is to define how far the respective obligation of the state should be stretched. This is a question of redistributing social risks. It is necessary to point out that the Constitution of Estonia states that the Republic of

[149] Erik-Juhan Truuväli *et al, op.cit.* note 133, 110–111.
[150] Robert Alexy, *op.cit.* note 120, at 26.
[151] Martin Triipan, "Proportsionaalsuse printsiip riigi- ja haldusõiguses" (The principle of proportionality), *Juridica No 5* (2001), 305–313 (in Estonian), at 305.
[152] Erik-Juhan Truuväli *et al, op.cit.* note 133, 114–115.
[153] Taavi Annus, *op.cit.* note 125, 115.
[154] Robert Alexy, "Kollisioon ja kaalumine kui põhiõiguste dogmaatika põhiprobleemid" (Conflict and weighing in the doctrine of fundamental rights), *Juridica No 1 (*2001), 5–13 (in Estonian), at 7–8.

Estonia is first and foremost founded on freedoms and therefore there is also a strong dimension of freedom next to the social dimension of the Constitution. The subjective dimension of social state represents the corresponding right of a citizen against the obligation of the state.[155]

The principle of rule of law has a complex structure. One of its elements is the principle of legal certainty.[156] The principle of legal certainty contains the principle of reliability protection which, among others, is based on the principle of legitimate expectations. The latter is expressed in massive case law of the Supreme Court of Estonia. According to this, anyone must have a possibility to design his/her activities in a reasonable belief that his/her rights and obligations deriving from legal order remain stable and do not significantly change to his/her disadvantage[157]. The principle of legitimate expectations protects the autonomy of a person to be able to plan and reasonably predict the results of his/her activities. However, this principle does not assume absolute continuation of certain legal situations because upon the change of circumstances it might be necessary to review legal relations and amend the existing regulations[158]. In order to evaluate the amendment, the balancing of principles (addressed and examined as "weighing" later in this Chapter) must be carried out.

The conflict of fundamental rights in its broad sense means a conflict between constitutional rights and collective benefits.[159] The task of social fundamental rights is to compensate the deficit of financial resources of individuals and market. We have seen that social fundamental rights usually mean redistribution. As opposed to strong arguments against social fundamental rights, there are considerate arguments for these rights. First, the argument of freedom which indicates that the free self-performance as a principle of democratic state also includes factual freedom. On the other hand, there are the arguments of suffering the lack of resources and being a weaker party. There are situations in which these arguments prevail in front of the argument of freedom.[160] Consumer rights are not directly social fundamental rights but consumers certainly deserve more focused attention on behalf of the state because of being a weaker party in multilateral relations. In our analysis, the conflict of fundamental rights is an important issue: we could question whether the principle of social state would justify more protection for consumers as opposed to the fundamental right of entrepreneurship freedom? The question of whether the acknowledgement of the impact of fundamental rights on third persons could endanger private autonomy is generally the major problem of the conflict of fundamental rights. The problem of the conflict of fundamental

[155] Erik-Juhan Truuväli *et al, op.cit.* note 133, 114–115.
[156] Erik-Juhan Truuväli *et al, op.cit.* note 133, 119.
[157] The Supreme Court 2 December 2004 decision in constitutional supervision case 3-4-1-20-04, *RT III* (2004) No. 35, 362 (in Estonian), Sec 13.
[158] Erik-Juhan Truuväli *et al, op.cit.* note 133, 122.
[159] Robert Alexy, *op.cit.* note 154, at 7–8.
[160] Robert Alexy, *op.cit.* note 120, at 76.

rights inevitably arises in a country which considers fundamental rights as values or the prevailing principles of legal order. For this reason there cannot be such legal areas which would exclude them. It does not mean that fundamental rights destroy private autonomy but their inclusion in all legal areas means that they must be considered in any act of weighing. As already mentioned, the fundamental norm contained in Art 19 (2) of the Constitution sets the centre of all constitutional legal relations at the universal obligation to respect and consider the rights of others.[161]

In our case there is clearly a conflict between the principle of social state and the fundamental right of entrepreneurship freedom. The idea of a social state expresses the general obligation of a state to function socially and take care of social justice. In legal writing the idea is seen as an objective to which a state has to endeavour – a balancing factor to liberalism, individual liberal rights, free self-performance, and the freedom of contract, ownership and entrepreneurship. Since all the members of a society are not equal in ensuring their own fundamental rights, it is the state which needs to interrupt and make sure that some members of a society would not face significantly uneven situations due to circumstances which they cannot directly influence.[162] We have seen that the principle of social state seeks to ensure redistribution of resources if there are sufficient social reasons. In respect of consumer protection in electronic retail lending I think a good argument is that the principle of social state would require ensuring that consumers as a socially weaker group would not excessively depend on high-rate credit and electronic lenders. This would decrease the social risks related to the consumers. From this perspective I believe that the principle of social state would well justify restrictions to another fundamental right such as the right of entrepreneurship freedom. On the other hand, the right of entrepreneurship freedom assumes constitutionally protected possibility of a person to carry out economically reasonable business activities. When the income level of electronic lenders is limited and the cost structure of their business is not taken into account, the economic rationale of their business is under pressure. I think this raises an important issue of whether such scope of the restriction which decreases economically reasonable exercise of entrepreneurship freedom can be justified, regardless the principle of social state.

Also, I think it would be interesting to consider another aspect which relates to the right of free self-performance as stipulated in Art. 19 (1) of the Constitution. Under this provision very different forms of activity are protected such as sporting, artistic, spiritual and economic activities, including the freedom to conclude contracts[163]. Although consumers are assumed to be a weaker and less informed party in electronic retail lending, many of them are

[161] Robert Alexy, *op.cit.* note 120, at 84.
[162] Rait Maruste, *Põhiseadus ja selle järelevalve (Constitution and Constitutional Supervision)* (Juura Õigusteabe AS, Tallinn, 1997) (in Estonian), 99.
[163] Taavi Annus, *op.cit.* note 125, 225.

well aware of the particularities of SMS-loans and related risks. Hence, many of them would prefer good access, maximum flexibility and competitive market in this type of services. Restrictions to service providers which make the service economically less attractive would likely result in less competition and decreased flexibility. If this were the case, I believe that many consumers could not consume their preferred volume and type of SMS-lending services. Thus, another issue is whether the scope of the restriction which decreases economically reasonable exercise of entrepreneurship freedom and thereby limits the fundamental right of free self-performance, can be justified by the principle of social state. The conflict of these fundamental rights should be subject to weighing.

Here I would like to point out two more aspects which I find similarly very important. First, it is difficult to justify why the restriction which is assumed to protect the interests of consumers as a whole would actually make only a part of (less-informed) consumers better off while the situation of another part of (well-informed) consumers would likely deteriorate for the reasons explained above. Secondly, I agree that a state has to seek for social balance and protect those who cannot directly influence the proper ensuring of their fundamental rights. However, I do not agree that the principle of social state assumes that a state should bear significant amount of responsibility for the decisions of active private individuals in their commercial dealings when those individuals have active legal capacity, and they have been properly informed about the risks and particularities of their transactions. Consequently, I find it difficult to justify the redistribution of significant portion of risks deriving from decision-making of informed private individuals of active legal capacity and placing those risks on the shoulders of service providers on the basis of the principle of social state. I would rather suggest relying on the assumption of responsible borrowing linked to the idea that a reasonable person usually takes reasonable care of personal transactions and finance.

In multilateral relations the protection of someone's rights usually means the restriction to the rights of someone else. Therefore, legislators are expected to consider proportionality from the perspective of the protection of rights. Law is directed toward the social reality of a concrete moment in time and exists for this reality.[164] Any conflict of fundamental rights can be solved in only 2 ways: either restricting both parties or sacrificing the interests of one party in favor of another party.[165] Weighing leads us to the minimal model of social fundamental rights established in the Constitution[166]. Conflict of fundamental rights should be resolved by appeal to balancing which is the optimal form of legal reasoning in dealing with competitive principles[167]. According to Alexy[168] a constitutive

[164] Anneli Alekand, *op.cit.* note 121, 22.
[165] Robert Alexy, *op.cit.* note 154, at 8.
[166] Robert Alexy, *op.cit.* note 120, at 76.
[167] Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford University Press, Oxford, 2007), 12.

rule for this kind of balancing of principles is as follows: the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other. From this we can see that the weight of principles is never absolute: it cannot be determined independently but we can only speak about the relative weight of principles. To illustrate the weighing of principles (without providing a definite decision-taking procedure), Alexy suggests an indifference curve model as is used in economics. It serves as a means of representing a relation of substitution between interests. Assume X is in favour of both entrepreneurship freedom and consumer protection and he is prepared to accept certain increase in entrepreneurship freedom for a certain loss in consumer protection (or vice versa). The importance of entrepreneurship freedom relative to consumer protection for X is expressed by the curve.[169] The fact that consumer protection is more important to Y than that is to X is illustrated in Figure 1. In constitutional balancing it is not the question of how important a principle is to somebody but how important it really is. Therefore Alexy suggests designing a correct indifference curve which is illustrated in Figure 2.

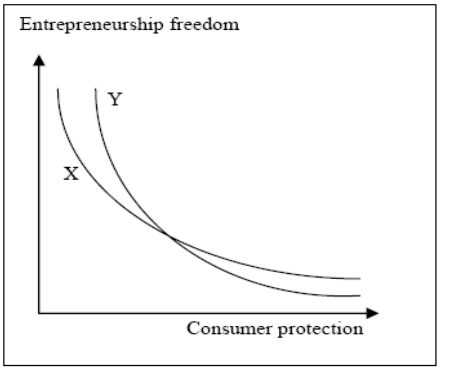

Figure 1.

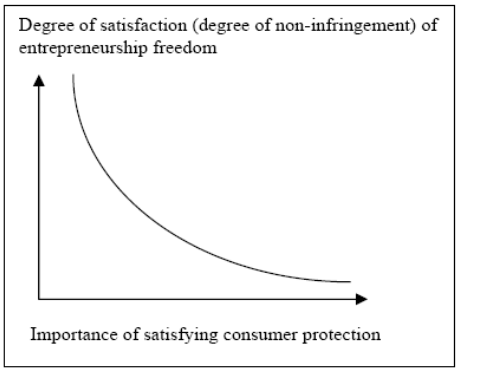

Figure 2.

Once X and Y accept that both principles are equally ranked, a smaller degree of satisfaction or a greater degree of infringement of entrepreneurship freedom is only permissible in favour of consumer protection when the relative degree of importance of consumer protection is high. Precisely the relative high importance of consumer protection has been the matter of disagreement between X and Y expressed in the first indifference curve. While the first curve simply illustrates different weighings, the correctness of these different weighings by the rule of balancing is represented in the second indifference curve.[170]

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[168] *See* Robert Alexy, *op.cit.* note 122. This constitutive rule has been established by the Federal Constitutional Court in Germany.
[169] Robert Alexy, *op.cit.* note 122, 102–105.
[170] Robert Alexy, *op.cit.* note 122, 104–105.

The weighing of restricted fundamental rights and the underlying justifications assumes the examination of all positive and negative arguments and thereafter establishing a respective value judgement. If the justifying reasons do not outweigh the restricted fundamental right, the restriction is contrary to the Constitution and therefore forbidden. Most of the cases in relation to fundamental rights are solved through the weighing as the only process of rational value judgement.[171] The rule for weighing in evaluating the proportionality of restrictions to constitutional freedom can be formulated as follows: the more intensive a restriction to fundamental rights is, the more serious need to be the justifications of such restriction. According to the rule for weighing, such evaluation needs to consist of 3 levels. At first level the intensiveness of the restriction needs to be determined. At the second level the importance of reasons justifying the restriction needs to be decided. Finally, the weighing in its narrow sense and actual meaning takes place. The most difficult cases of weighing are those in which either (i) the restriction and reasons for justifying the restriction are of similar significance or (ii) there is a fundamental discussion (e.g. of ideological or political nature) about the intensiveness of the restriction or the importance of its underlying justifications.[172]

I think that placing our case of weighing the principle of social state against the right of entrepreneurship freedom into the broad frames of the above model is a difficult task. On one hand, the restriction to the right of entrepreneurship freedom can be seen as intensive because it limits the income level of service providers, thereby influencing the flexibility and other parameters of the service and increasing the potential for less consumer-friendly service. As indicated earlier, this would result in restricting the free self-performance of certain consumers. On the other hand, the reasons justifying the APRC limit derive from the societal need for greater consumer protection and this is undoubtedly an important reason for restricting the entrepreneurship freedom. Hence, both the consumer protection arguments as well as the arguments supporting entrepreneurship freedom present strong cases in the broad framework of weighing. From the narrower perspective, a key point for weighing is proportionality. One of the means for state intervention and the protection of individual rights is the principle of proportionality.[173] A state must act in such a way as to ensure the liberties of individuals as the precondition for social state and simultaneously seek achieving social justice. Against this background, the role of the principle of proportionality serves as one of the criteria for weighing the public objectives and the respective restrictions of fundamental rights.[174] The principle of proportionality and assessing the compliance of the APRC limit to the Constitution on its basis will be addressed as follows.

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[171] Robert Alexy, *op.cit.* note 120, at 40.
[172] Robert Alexy, *op.cit.* note 154, at 12.
[173] Martin Triipan, *op.cit.* note 151, at 305.
[174] Martin Triipan, *op.cit.* note 151, at 306.

3.3.4.3.2. The Principle of Proportionality and the APRC Limit

The principle of proportionality is seen as one of the means for interpretation in the case of conflict between different fundamental rights. The uniformity of Constitution[175] requires an optimal solution and therefore both rights need to be restricted for the benefit of the other party so as to find this optimum. In any case these restrictions must be proportionate, i.e. both rights can be restricted only so much as is necessary for achieving the conciliation of conflicting rights. Hence, proportionality is seen as a relation between different factors, aiming at suggesting the best way for optimizing both rights.[176] The attribution of the role of a constitutional principle to the principle of proportionality as one of the elements of weighing is justified by the fact that fundamental rights restrict each other in order to be effective at all. Value-based argumentation facilitates emotions and existing politics to become part of legal interpretation. Simultaneously, the use of the principle of proportionality in the application of law assumes value judgement among others. Legal writing and case law have also used public interests and other similar considerations in defining proportionality.[177]

The principle of proportionality in its narrow sense derives from its relation to the legally possible. If a constitutional rights norm as a principle competes with another principle, then the legal possibilities for realizing that norm depend on the competing principle.[178] Since the effect of the principle of proportionality is not related to a concrete fundamental right but involves the whole range of fundamental freedoms, the principle aims at achieving suitable balance and promoting the principle of justice.[179] The major differenece from public law in applying the principle of proportionality in private law is the conflict of interests in which both parties have fundamental rights which deserve protection and the state needs to find a reasonable solution for the conflict. Hence, the principle of proportionality in private law is expressed in fair balance between different fundamental rights.[180]

In order to evaluate the proportionality of a measure, two aspects need to be considered: on one hand, it is necessary to examine the extent and intensiveness of the restriction of a constitutional right; on the other hand, the importance of the constitutional objective needs to be considered.[181] A limitation of a constitutional right is only permissible if principles competing with the principle underlying the right have greater weight in the circumstances of the

[175] A principle which requires that a constitutional norm should be interpreted so that it would not conflict other constitutional norms.
[176] Martin Triipan, *op.cit.* note 151, at 307.
[177] Anneli Alekand, *op.cit.* note 121, 20.
[178] Robert Alexy, *op.cit.* note 122, 67.
[179] Martin Triipan, *op.cit.* note 151, at 306.
[180] Anneli Alekand, *op.cit.* note 121, 24–26.
[181] The Supreme Court decision in constitutional supervision case 3-4-1-16-08, *op.cit.* note 140, Sec 29.

case.[182] A restriction is proportionate within its narrower meaning if its justification outweighs the restricted constitutional right. We have seen that the rule of thumb is that the more intensive restriction, the more serious justification is expected. This rule requires consideration between the restricted principle and the principles which justify the restriction. Thus, the consideration requires both argumentation and value judgement.[183]

I have explained above that a constitutional right can be restricted by a legal act or a deed and the restriction may include normative obligations or prohibitions. In our case, the freedom of business is limited for the purpose of consumer protection. Affirming the need to ensure a good level of consumer protection, it is also important to ensure balance between the consumer protection measures and the commercial freedom of service providers. Therefore we need to evaluate whether the objective to protect retail borrowers by the application of the APRC limit and related measures stipulated in Art. 86 of the GPCCA outweighs the restriction of entrepreneurship freedom of electronic retail lenders.

The Chancellor of Justice advises to analyse the issue from wider perspective, examining how the rights of electronic retail borrowers are protected in Estonia and to which extent these protection measures influence service providers. The wide approach is recommended because it allows to understand whether the consumer protection measures are utmost necessary and important or simply supplementary. Also, it enables to look at the restriction of commercial freedom of the participants on electronic retail lending market as a whole.[184] The explanatory note to the amending act of the GPCCA and the LOA places the focus of the restriction on ensuring that those consumers who conclude unsecured loan transactions in small amounts and with short maturities via the means of distant communication would not have to bear excessive costs in relation to the loan transactions.[185] There are also many legal requirements which aim at the protection of consumers in retail lending. In addition to the respective provisions of the GPCCA, a large share of the consumer protection rules are also stipulated in the LOA[186]. The core objective of these rules is to ensure the sufficient information of a consumer in order to make an adequate and well-informed decision regarding the conclusion and fulfillment of a loan agreement, including good understanding of his/her financial ability and appropriateness of the loan. When looking at all these provisions in their combination, it is clear that the position of retail borrowers

[182] Robert Alexy, *op.cit.* note 122, 192.
[183] Eesti Vabariigi põhiseaduse ekspertiisikomisjoni lõpparuanne, *op.cit.* note 117.
[184] Õiguskantsleri märgukiri, *op.cit.* note 115, 15.
[185] Tsiviilseadustiku üldosa seaduse ja võlaõigusseaduse muutmise seaduse eelnõu seletuskiri, *op.cit.* note 45, 2–4.
[186] I have addressed some of these rules in the articles contained in this compilation. Also, the new amendments of the LOA which were adopted in relation to the new Consumer Credit Directive are effective of 1st July 2011. These rules are introduced above in Chapter 3.2.

has been much strengthened due to significantly increased obligations of retail lenders. By complying with these obligations the lenders would contribute to more responsible and better informed lending. In return, the lenders who comply with their obligations can nevertheless not fully rely on the validity of their loan transactions.[187] From this perspective it is clear that the uncertainty of lenders has increased. Here one should argue whether the increased uncertainty of service providers is proportionate in comparison to the advantages gained by the consumers through the APRC limit. My view is that such situation is disproportionate and therefore overly restrictive to the entrepreneurship freedom of service providers.

The disproportionate nature of the restriction is expressed by the fact that even if electronic lenders provide consumers with the required information, follow all the rules for identification, advertising of SMS-loans and so on, they may nevertheless fail to prove in court that a transaction is not contrary to good morals. Providing evidence that a transaction was not concluded due to extraordinary circumstances and that all reasonable steps were taken to identify those circumstances upon the conclusion of the transaction is a challenging task. Moreover, the elements and extent of proof are much open to interpretation. Therefore there is a risk with every transaction exceeding the APRC limit that a lender is not sufficiently good at proving what is expected by the court, resulting in the voidance of the transaction and loss of expected business flow by the lender. Without any analysis of the market or particularities of this type of lending services, the law assumes that the nature of the lender's business itself is contrary to good morals, regardless the law-obedient and proper behavior of the lender. Without giving any consideration to the generally high business cost and risk level of this type of lending, the self-standing restriction which looks at only one parameter decreases the certainty and business potential related to electronic retail lending. This means that the business ability as well as competitiveness of this sector is decreased, too. The decrease in competitiveness limits the alternatives for consumers and cannot be therefore considered a positive aspect from their perspective. Moreover, such deterioration in the potential access and flexibility to conclude lending contracts may be seen as a limitation to the fundamental right of free self-performance of consumers. Thus, one can conclude that the promotion of increased uncertainty to the given extent as well as the negative impact on competitiveness are disproportionate in comparison to the improved consumer protection which has been anyhow regularly ensured by various other legal regulations.

The Chancellor of Justice has similarly taken the view that the APRC limit disproportionately restricts the entrepreneurship freedom of service providers and contradicts the Constitution. The market of electronic retail loans is a competitive market with about 20 active market participants and respective price differences which much depend on the size and length of loan. Normally

[187] Õiguskantsleri märgukiri, *op.cit.* note 115, 16–17.

the loans with shorter maturities are more expensive. In any case, the market of unsecured electronic retail lending has such business cost levels that the APRC of even the least expensive short term loan is much higher than the average rate of the Bank of Estonia as stipulated in Art. 86 of the GPCCA.[188] As electronic retail loans are offered on free competitive market where service providers include the regular costs of their business as well as expected margins into the pricing of their products as in any other field of business, it is wrong to assume that a loan granted on such a market at a respective market rate is contrary to good morals. Electronic retail loans, similar to other products and services, have economic value. Market competition in this field would ensure the widest possible range of products and prices which reflect their economic value (market rate). If an electronic lender grants credit at the respective market rate and meets the legal obligations of honest and adequate information provision to a consumer, including information about the relative expensiveness of the offered credit, and the consumer nevertheless accepts the credit, it is the informed responsibility of the consumer. The rights of electronic retail lenders are overly restricted by the regulation which assumes voidance of such properly informed transactions and places significant burden of proof to the lender whose failure to meet the obligation of proof would result in the entitlement only to legal interest for the use of credit.[189]

Last but not least, an important point in the note of the Chancellor of Justice coincides with my previous opinion that the market of electronic retail loans was not analysed in the course of imposing the APRC limit although it would have been necessary. In imposing the restriction no consideration was given to the fact that the above-average expensiveness of this type of services has the strong likelihood for economic reasons and it derives from the particularities of such loans (short maturities, high risk level, small loan amounts, etc). Without taking any of these aspects into account, the adopted rules assume the contradiction of a market-priced electronic retail loan to good morals, also placing a significant burden of proof to electronic lenders and imposing a threat of legal interest instead of contractually agreed rate.[190]

The official stand of the Chancellor of Justice is a thorough analytical document which supports the conclusion of this thesis. There are 3 aspects in

[188] It is important to note that in calculating its average rate the Bank of Estonia takes into account also some secured loans. This is related to the reporting by credit institutions of all loans to private individuals whose purpose is the purchase of goods and services as consumer loans according to Annex 3 p 14 of the degree of the President of the Bank of Estonia on bank reporting. For example, this category includes also such loans which are granted for the purchasing of furniture against mortgage on the residence of the borrower. In essence such loans are a completely different product category with completely different cost and pricing rates. *See* Krediidiasutuste bilansi täiendav aruandlus, signed 13 July 2010, *Riigi Teataja (RT) I* No 48, 304 (in Estonian).

[189] Õiguskantsleri märgukiri, *op.cit.* note 115, 17–18.

[190] Õiguskantsleri märgukiri, *op.cit.* note 115, 17–18.

which I have some criticism towards this document. First, the issue of contradiction between the principle of social state and the right of entrepreneurship freedom has not been analysed. Secondly, the document does not give consideration to the impact of the APRC restriction through potential deterioration of the access and flexibility of SMS-lending services which could consequently, in parallel to restricting the right of entrepreneurship freedom, become a restriction to free self-performance (including the freedom of contract) of certain part of SMS-borrowers. These two are the issues which I have already addressed in this research. Last, the Chancellor of Justice does not unfortunately provide any comparative aspect to the situation and legal framework in other EU countries. To make this Chapter more comprehensive and put the discussion related to the APRC limit in Estonia into EU-wide perspective, I will conclude by providing a brief overview of the situation regarding limiting the cost of credit in other EU countries. The following comparative view is mostly based on the information gained from the study on interest rate restrictions in the EU[191] which among others analyses the interest rate restrictions in all EU member states, provides details about which regulatory structures are in place as regards interest rate ceilings and discusses legal interest rate restrictions as interventions in the market with an effect on competition and welfare.

The overall situation in the EU is such that the member states can be divided in 2 rather equally sized groups according to their framework and practices: those who have some interest rate restrictions in place (either absolute or relative) and those who do not have any restrictions. In those EU member states where there are no rates in place, the absence of such regulations is justified mainly with the fact that interest rate restrictions would reduce access to credit, especially for people with moderate financial means. In those EU states where there are interest rate restrictions in place, the major concern is to avoid the increased consumer insolvency and the disfunctioning of markets due to high-rate credit. 15 member states have some form of interest rate restriction. In the majority of cases (11 countries, including Estonia[192]) it is a relative restriction and based on some reference rate or other variable. Such relative restrictions very much vary in different member states. For example, the restrictions can be related to average market rate and calculated as a multiple of that rate (e.g. 1/3 of average market rate in France and Portugal, 1/5 average market rate in Italy, etc) or money market rate (e.g. 4 times money market rate in Poland). In Estonia and Germany the ceilings are *de* facto ceilings[193]. The restriction in all

[191] Udo Reifner *et al*, *op.cit.* note 20.

[192] The EU countries which have a relative legal interest rate restriction are Belgium, Estonia, France, Germany, Italy, the Netherlands, Poland, Portugal, Slovakia, Spain and Slovenia.

[193] Ceiling rates are published but no strict limits exist (in Germany the rate is 2 times average market rate and in Estonia the rate is 3 times average rate of the Bank of Estonia). The ceiling in Estonia is „soft“ in its nature and eventually court based; the system in Germany is court based too.

these countries, except for Spain, is provided in the form of the APRC limit. In most countries with interest rate restrictions the concept of "usurious lending" or "unfair credit" is linked to the interest rate charged and taking advantage of the borrower. In the member states such as Italy, Malta and Denmark the concept is used more indirectly in the context of criminal lending. The concept may also be simply applied to high-priced loans (e.g. in Portugal, France, Belgium, Spain, Slovenia, the Czech Republic, Slovakia, Hungary, Ireland, the UK and in German case law). [194] In 4 countries (Greece, Ireland, Malta and Italy) the interest rate restrictions are absolute with their application limited to specific types of credit provider or place significant limitations on their scope[195]. In the remaining 12 EU countries[196] there are no restrictions that would limit the amount of contractual interest under a typical credit agreement.[197]

When looking at the future perspective of those countries which currently do not have interest rate restrictions in place and asking whether any such restrictions would be likely introduced in the future, it certainly depends much on political will. There are political discussions especially topical in the UK where there have been a number of attempts by consumer advocates to introduce interest rate ceilings, including the submission of the respective amendments during the adoption of 2010 Financial Services Act. However, these amendments were not adopted and instead the Office of Fair Trading (the OFT)[198] was commissioned to review the situation as part of a wider review of high-cost credit markets.[199] In addition to political reasons, the potential for introducing interest rate restrictions also depends on the development of

[194] Udo Reifner *et al*, *op.cit.* note 20, 4–5.

[195] In Greece, the restrictions do not apply to banks. Also, in Malta there are significant exemptions for banks, whilst in Ireland the level of interest rates that can be charged is limited in case of moneylenders and credit unions only. In Lithuania there were no restrictions for a long time but on 1st April 2011 the first Consumer Law was adopted, providing among others for a limit to the APRC. The newly established limit in Lithuania is absolute – the total APRC may not exceed 250%. *See* a brief introduction about the new act at http://www.rln.lt/index.php/pageid/411.

[196] In the UK there are restrictions to credit unions but in the light of their very small share of lending, the report has classified the UK as a country with no interest rate restrictions.

[197] Udo Reifner *et al*, *op.cit.* note 20, 4–5.

[198] The Office of Fair Trading (OFT) is the consumer and competition authority in the UK which aims at making markets work well for consumers. It is a non-ministerial government department established by statute in 1973.

[199] Among others, the OFT considered the case for price controls for pawn broking, payday loans, home credit and rent-to-buy credit and concluded that they will not address the problems identified in the high-cost credit sector, which stem from both limited supply options and consumers' lack of ability to drive competition. The concern of the OFT was that such controls may further reduce supply and considers there to be practical problems with their implementation and effectiveness. These problems include the potential for suppliers to recover income lost through price controls by introducing or increasing charges for late payment and default. Their report was published in June 2010. *See* The UK Office of Fair Trading, *op.cit.* note 21.

consumer credit in a particular country. For example, since 2009 there has been a respective debate in Denmark which has historically not favoured setting restrictions to interest rates. The discussion in Denmark started due to the declaration of the Government's opposition which announced that it would submit a bill to introduce an interest rate cap corresponding to the central bank base rate plus 15 percentage points. The bill was not submitted but the discussion was reopened in February 2010 by the Danish Consumer Council which expressed a wish to have interest rates legally restricted.[200]

To conclude, it must be said that it is important to protect consumers but it is similarly important to protect the entrepreneurship freedom of service providers. As I stated also in the articles contained in this compilation I do not favour the overly restrictive situation where consumer protection much outweighs the freedom of service providers. I think that the APRC limit in its current legal form does respond to consumer protection needs but it does not contribute to a balanced solution. Most of the related problems I have addressed in this thesis and in its base articles. The solution was adopted without a proper *ex-ante* analysis[201], including the lack of analysis on the availability of credit to different population groups. This is particularly important because analyses have shown that the lack of high-rate loans reduces credit access to those parts of the population which are considered to be high-risk and which demand small amounts of loan[202]. The lack of analytical basis is somewhat unusual for such a fundamental legal change. I fully support the rules against usurious practice for consumer protection purposes such as stipulated in Art 86 (2) of the GPCCA because there can always be cases where a consumer, although properly informed by the lender, is forced to take a loan (e.g. for the payment of medical fees, etc) and is therefore exposed to the influence on behalf of the lender. However, I think that Art 86 (3) of the GPCCA, and moreover so its adoption without a proper economic rationale, is stretching consumer protection too far on the account of entrepreneurship freedom of service providers and potentially also on the indirect account of contractual freedom of some other consumers.

As I have suggested earlier in the articles contained in this compilation, I favour high information, disclosure and prudent marketing requirements for achieving regulatory balance instead of limiting the cost of lending through a legal limit. I consider well-informed decisions to be the core of electronic retail

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[200] Udo Reifner *et al*, *op.cit.* note 20, 82.

[201] Regulatory Impact Analysis (RMA) is a widely used method for assessing the extent and nature of influence of a law or regulation on society. Although initially used for assessing the economic impact of laws and regulations, its scope has become wider and now involves both economic and social aspects. The methods of RMA consisting of such analyses as cost-benefit analysis; cost-effectiveness analysis; compliance cost analysis; business or small business impact analysis; risk assessment and so on. *See* Kalle Merusk *et al, Õigusriigi printsiip ja normitehnika (The Principle of the Rule of Law and Normative Technique.)* (SA Eesti Õiguskeskus, Tartu, 1999) (in Estonian), 32–34.

[202] Udo Reifner *et al*, *op.cit.* note 20, 328.

lending business because with sufficient information consumers would be able to bear the responsibility for their decisions which the legislators have so far ruled out. I believe that much more focus should be put on the responsibility of consumers for their decisions as long as they have been properly informed. This would help balance the proportionality of consumer protection means in the light of ensuring sufficient entrepreneurship freedom for service providers. Naturally it would be easier to adopt and monitor the restrictions in the form of the APRC limit, but simply restricting without much focus on increasing the awareness of consumers would not change the general attitude of consumers whilst there will nevertheless be circumventions of rules by service providers due to heavy restrictions. The need for better information as one of the regulatory alternatives also derives from the lessons learned from the study which suggests that circumventions with the effect of high-price credit would occur irrespective of the existence of interest rate restrictions and therefore improved EU regulation on price disclosure including all price elements which burden the borrower would be of help in clarifying the impacts.[203]

3.4. Other Relevant Issues

We have seen that all the three articles compiled in this dissertation discuss the issues related to the innovation of financial services, combining it either with product specifics, consumer protection or the perspective of service providers. In addition to the major recent developments which I have addressed above, there are also a couple of smaller issues raised in the articles which have faced some developments and a couple of points which are just interesting to mention against the background of the articles. Accordingly, in this chapter I shall briefly look at four issues under the joint "umbrella". I will start with the developments regarding the application of identification rules deriving from the Money Laundering and Terrorist Financing Prevention Act, examining a couple of court cases, the interpretations and views that Tallinn District Court has taken regarding the requirement of face to face identification. This will be followed by a brief introduction to a decision of the Supreme Court from the beginning of 2010 which clearly identifies the boundaries between interest and penalties claims in relation to the due date of a loan. This court decision relates to the legal treatment of penalties covered in the second article of this compilation. Thereafter I shall address some pieces of administrative case law by the Supreme Court of Estonia which I came across in my follow-up research and which support the views presented in the third article of this dissertation with regard to the principle of effectiveness. Last but not least, I shall present a few interesting recent viewpoints of the Supreme Court as regards the interpretation of the scope of the burden of proof in relation to Art 86 of the GPCCA.

[203] Udo Reifner *et al*, *op.cit.* note 20, 328–329.

Developments regarding the application of identification rules

Having earlier introduced the revised legal fabric of client identification rules I explained that from January 2008 all lenders became obliged to identify face to face all persons with whom they have had no earlier business relations[204]. Since most electronic retail lenders were used to doing their business, including identification, from distance at the time, they did not have proper identification systems in place. Also, the revised identification rules brought a discussion of whether these rules should be indeed applicable to small-scale lenders because within the meaning of the Money Laundering and Terrorist Financing Prevention Act the identification was first and foremost seen mandatory from the perspective of combating money laundering and terrorist financing. Against this background, some non-bank electronic lenders continued the practice of distant identification, claiming that the earlier face to face identification of their clients by a bank in the course of creating an electronic banking ID which the clients then used for obtaining an electronic loan from the non-bank lender without actually meeting the lender face to face would mean that the identification obligation has nevertheless been fulfilled. Some lenders, on the other hand, concluded identification contracts with courier service providers and postal offices which would identify their clients on their behalf face to face before entering into lending transaction. These contradicting practices were met by the Money Laundering Data Bureau with the issuing of precepts which in turn were contested by electronic retail lenders in courts. Following, I will address some administrative cases of Tallinn District Court to explain which positions have been taken in the interpretation of the identification rules and the practice of electronic retail lenders in Estonia.

The case 3-08-1771[205] is about defining the nature and scope of face to face identification obligation. The case concerns the second-level court decision regarding the appeal of Ferratum Estonia OÜ (hereinafter Ferratum) to annul the precept of the Money Laundering Data Bureau and a respective first-level court decision which requires the revision of the identification procedures of Ferratum and the conclusion of lending transactions only with those clients whose identification has been done properly. The proper identification procedure derives from Article 23 (1) and (2) of the Money Laundering and Terrorist Financing Prevention Act: the lender identifies the client on the basis of his/her identification document and makes a copy of the page with personal data of the identification document. Thus, the rules expect the presence of identifying person and the person to be identified in the same place. As the nature of identification obligation is regarded, Tallinn District Court has in its

[204] Art. 15(1) 2, Money Laundering and Terrorist Financing Prevention Act.

[205] Tallinn District Court 30 November 2009 decision in administrative case 3-08-1771. Available at http://kola.just.ee (11.10.2010) (in Estonian).

earlier decision regarding administrative case 3-08-1220[206] taken a view that the provisions of face to face identification obligation (i.e. Article 15 (1) of the Money Laundering and Terrorist Financing Prevention Act) are imperative and allow no deviation. Thus, lenders can not choose the ways of identification of their first-time clients and leave the identification to be done from distance. Tallinn District Court takes the similar position in the case of Ferratum.

As the scope of identification obligation is regarded, the case of Ferratum concerns the possible retrospective application of the Money Laundering and Terrorist Financing Prevention Act. We have seen that until 28 January 2008 the act did not consist of such provisions which would have required face to face identification of first-time clients. The earlier rules too provided for identification obligation upon the establishment of any business relation but there was no requirement for the presence of both the lender and the client in the same place during the identification. The precept of the Money Laundering Data Bureau required Ferratum to identify face to face all the clients to whom Ferratum provided electronic retail lending services, regardless the fact that Ferratum had identified these clients in the course of its earlier business before the face to face identification rules came into effect. The Money Laundering Data Bureau found that Ferratum had identified these clients earlier without the presence in the same place and therefore Ferratum should not continue with the provision of services unless repeating the identification according to face to face principle. Such requirement would mean that Ferratum should identify all existing clients again upon the granting of a new loan. The identification rules prior to 28 January 2008 did not include imperative obligation of face to face identification while the rules effective from 28 January 2008 contain imperative identification obligation with regard to the conclusion of first-time business relations. Thus, the new rules are not applicable and the precept and the respective first-level court decision with regard to the business of Ferratum don't have legal grounds. The decision of Tallinn District Court, annulling the first-level court decision and respectively ruling for Ferratum, became effective on 31 December 2009.

In its decision regarding administrative case 3-08-1220[207] Tallinn District Court has among others evaluated the contradiction of face to face identification obligation to constitutional rights. The case concerns the second-level court decision regarding the appeal of the Money Laundering Data Bureau to annul the first-level court decision which ruled for Monetti AS (hereinafter Monetti) and annulled the precept of the Money Laundering Data Bureau. According to the precept Monetti had not identified its clients face to face upon the first-time business contact and made copies of their identification documents when granting electronic retail loans. Monetti, on the other hand, claimed that these

[206] Tallinn District Court 24 April 2009 decision in administrative case 3-08-1220. Available at http://kola.just.ee (10.10.2010) (in Estonian).
[207] Tallinn District Court decision in administrative case 3-08-1220, *op.cit.* note 206.

rules pose unreasonable obstacles to its normal business and are respectively in contradiction to constitutional rights, more precisely with the freedom of entrepreneurship stipulated in Article 31 of the Constitution. An electronic retail loan is a flexible but sufficiently expensive financing service. If Monetti were to outsource the face to face identification, it would significantly reduce the flexibility and respectively the demand for the service. Also, it would not be possible any longer to provide the service profitably. Another argument of Monetti was that the application of such identification obligation to electronic retail lenders is not in accordance with the objectives of this provision. These identification rules have been established to minimize the risk of money laundering and terrorist financing. Lending in small amounts to private individuals does not belong to the risk group of money laundering and it would not be reasonably possible to organize money laundering through such transactions. Also, such identification obligation is disproportionate because the gain of state authorities from the formal application of this requirement would not exceed the harm to the service provider deriving from the limitation of economic activity.

In designing its position regarding the case of Monetti, Tallinn District Court asked for the opinion of the Ministry of Finance of Estonia who has developed the new identification rules. To summarise the major points of the Ministry of Finance in support of the court decision, they are related to the protection of the stability of financial sector and economy as a whole. First, the misuse of financial sector entities for the purposes of money laundering and terrorist financing would clearly endanger the functioning, stability and reputation of financial system. Thus, the need for the application of identification measures is not derived only from the need for fighting with criminal activities but also from the need for protecting the reliability of the economic environment as a whole. Secondly, the identification obligation stipulated in Article 15 (1) of the Money Laundering and Terrorist Financing Prevention Act has an imperative nature and the subjects of the obligation have to act accordingly. The third point of the Ministry of Finance explains that the purpose of such regulation is to avoid the higher risks entailed in the establishment of business relations via the means of communication. The providers of financial services must be able to be convinced that their services meet the actual needs of the client and the business relation to be established would not harm the reputation of the service provider or its other clients. In the establishment of a business relation via the means of communication it would not be possible to apply the principle of “know your customer”. Direct contact would enable obtaining information about the personal characteristics which wouldn’t be identifiable via the means of distant communication (e.g. appearance, manner of behaviour, etc). Also, direct contact would make it possible to compare the identification document with the person’s appearance, reducing the risk of anonymous or false identification. Last but not least, the Ministry of Finance pointed out that in its nature electronic retail

lending (SMS-lending) is the service of anonymity risk, enabling to obtain monetary resources on the basis of false identification rather easily.

With its decision regarding the case of Monetti, Tallinn District Court did not rule for the appeal of Monetti but left the precept of the Money Laundering Data Bureau and the respective first-level court decision in effect. The district court found that the identification obligation is not in contradiction with the Constitution. The objective of the Money Laundering and Terrorist Financing Prevention Act is to prevent the channeling of funds derived from criminal activities to be used for terrorist or other criminal purposes. The system of preventative objectives has been created to protect the reliability of financial sector and economic sphere as a whole in Estonia. The requirements for sufficient care in identification are the central means for achieving the objectives of the law. The need for exercising sufficient care does not only derive from the need for preventing criminal activity but also from the need to protect the financial sector and the economic environment of Estonia.

The purpose of applying the requirements for sufficient care in identification is to avoid the anonymity of transactions which has expanded rapidly together with globalization and more active use of communication means for the conclusion of transactions. The wide use of the means of information technology and the establishment of business relations without direct contact would create the risks of money laundering and terrorist financing. These are considered dangerous crimes and therefore the prevention of such crimes is seen as the dominant public interest which gives enough grounds for limiting the rights of persons, including basic constitutional rights. Due to higher risk profile of the activities of credit and financing institutions the law prescribes stricter identification obligations, aiming at reducing the risks which derive from the provision of financial services through the means of information technology. The establishment of business relations via the means of communication would not enable sufficient identification of client's risk profile. Thus, the face to face identification rules decrease the possibilities for mistakes such as using false identity in the conclusion of transactions and ensure the reliability of the markets for financial services. The identification requirements are the same for all lenders and the denial for making an exception to Monetti as a non-bank electronic retail lender can not be seen as the disproportionate limitation of Monetti's freedom of entrepreneurship.[208]

Interest and penalty claims after the due date

In the article "Legal Problems with Electronic Retail Loans: Balancing the Freedom of Contract and the Protection of Consumers – The Case of Estonia" I have explained the legal possibilities and positions which the Supreme Court has taken in relation to the claims for high interest rates and penalties. We have

[208] Tallinn District Court decision in administrative case 3-08-1220, *op.cit.* note 206. The decision became effective by the 25 June 2009 case 7-1-3-238-09 of the Supreme Court.

seen that different from interest rates, the usurious practice against good morals in relation to unreasonably high penalties can be solved through the request of decreasing penalties, thereby contradicting the claim for the payment of penalties in certain amount. In addition to contradicting the payment of penalties, it is possible to contradict the payment of interest. The above referred article explains that this relates to the situations where the due date of payment obligations has arrived. The Supreme Court has repeated such a view in its respective decision on 27 January 2010[209] with reference to its similar earlier decision from 2007. Due to imperative restrictions of the LOA, the obligation to pay interest ends upon the denouncement of loan agreement. The Supreme Court states that it is not possible to claim interest as damage for the period on which the lender lost the possibility to gain profit through the interest. Starting from the claim under a loan agreement falling due, the calculation of interest loses its legal grounds and thereafter it is only possible to calculate penalties or damages for delaying with the repayment of loan amount.[210]

The principle of effectiveness in Estonian case law

When it comes to the principle of effectiveness, the article "Electronic Retail Lending in Estonia: Legal Limits on the Cost of Credit" takes guidance from the interpretations established by the ECJ. Although Estonian courts have not clearly applied the principle of effectiveness in civil cases, there are 2 administrative cases in which Estonian Supreme Court applies respective EU case law and thereby addresses the principle of effectiveness. I came across these administrative cases in the follow-up research for this compilation and found them significant to support the views of the above referred article regarding the identification of the scope of burden of proof through the principle of effectiveness.

In administrative case 3-3-1-79-08[211] the Supreme Court of Estonia evaluates the compliance of Estonian environmental support rules with the principles of effectiveness and proportionality, seeking respective support from the case law of the ECJ. Respectively, the case law states that the sanctioning system established by a member state on the basis of EU law must comply both with the principles of effectiveness and proportionality. On several occasions the ECJ has highlighted that although according to the principle of procedural autonomy member states have to impose in their national laws the procedural rules for the protection of person's rights deriving from the Community law, the national rules should not make the use of rights deriving from the Community

[209] *See* the Supreme Court 27 January 2010 decision in civil case 3-2-1-153-09, *RT III* (2010) No. 6, 42.
[210] The Supreme Court decision in civil case 3-2-1-153-09, *op.cit.* note 208, Sec. 25 and the Supreme Court decision in civil case 3-2-1-137-06, *op.cit.* note 48, Sec 17.
[211] The Supreme Court 11 February 2009 decision in administrative case 3-3-1-79-08, *RT III* (2009) No. 8, 52, Sec 14, 15 and 20.

law practically impossible or overly difficult. Thus, the realization of rights and the presentation of claims need to be possible in practical terms in order to comply with the principle of effectiveness. In its decision the Supreme Court links this statement of the principle of effectiveness to the ECJ decisions in cases C-430/93, C-431/93 and C-53/04. The principle of effectiveness is also briefly dealt with in administrative case 3-3-1-86-07[212] whereby the Supreme Court of Estonia finds that such national publication of the provisions of Community law which provides less legal certainty than the publication of the provisions in the Official Journal contradicts the principle of effectiveness. In our context of identifying the scope of the lender's burden of proof these interpretations support the suggestion provided in the above referred article: anything beyond normal and reasonable course of particular service provision would not be in compliance with the principle of effectiveness. Thus, at a minimum, the lender should prove the identification of a borrower profile and that necessary care has been exercised in such identification.

Burden of proof in relation to Art 86 of the GPCCA

In the third article contained in this compilation I have made suggestions for interpreting the extent of the lender's burden of proof in case of loan agreements exceeding the legal APRC limit. As one of the solutions, I have suggested using the principles of reasonableness and effectiveness as the possible starting points for defining what should be proved as the measure of good morals. Using the principle of reasonableness as a borderline for transactions which comply with good morals has been also suggested in legal writing in Estonia. According to Kull, the sense of propriety of a just and fair person is seen as the measure of good morals. Hence, the interpretation of contractual provisions is done according to what a fair person would think is proper and reasonable in a particular situation.[213] I have explained that due to switch in the burden of proof defining the scope of the burden of proof and the respective ideas for guiding the interpretation are a major issue in relation to applying the effective Art 86 (3) of the GPCCA.

Very recently the Supreme Court has adopted a ruling with regard to Arts. 86 (2) and (3) of the GPCCA, providing some guidance to courts in interpreting the scope and contents of the burden of proof[214]. As this ruling fits well into the analysis provided in this research, I will conclude this Chapter by introducing some of the key points made by the Supreme Court.

According to the Supreme Court, courts are required to identify the assumptions for the application of Art 86 of the GPCCA. If the value of mutual

[212] The Supreme Court 7 May 2008 decision in administrative case 3-3-1-86-07, *RT III* (2008) No. 21, 147, Sec 49.

[213] Irene Kull, "Principle of Good Faith and Constitutional Values in Contract Law", *Juridica International No 7* (2002), 145.

[214] The Supreme Court 17 June 2011 ruling in civil case 3-2-1-49-11, *op.cit.* note 42.

obligations deriving from a transaction is out of balance to the extent which is contrary to good morals, the assumption on the basis of Art 86 (3) is that a party knew or had to know about the extraordinary need, dependence, inexperience or other such circumstances of the other party. Hence, in order to identify the invalidity of the transaction as contrary to good morals according to Art 86 (2) 2 and (3) courts always need to give legal evaluation to 3 aspects as follows.

1) Courts should identify whether the value of mutual performance deriving from a transaction is unbalanced to the extent which is contrary to good morals.

The general rule is that the unbalanced value of mutual obligations to the extent which is contrary to good morals must be proved by the party whose claim is based on the invalidity of a transaction.[215] In order to prove the difference between the values of mutual performance the party must show the difference between the objective values of comparable performance. This means that the party must show the usual equivalent of the transaction in question in regular business, not the subjective interest of one contractual party in the value of the transaction.

According to Art 86 (3) the burden of proof is reversed in case of consumer credit agreements in favour of the party whose claim is based on the invalidity of a transaction, assuming contradiction to good morals if the APRC exceeds 3 times the average cost of consumer credits as provided in the commercial banking statistics of the Bank of Estonia at the time of concluding the transaction in question. Here it is important to draw attention to 2 rules which the Supreme Court highlights regarding proof:

(i) a party whose claim is based on the invalidity of a transaction may present the circumstances indicating that the value of the performance of parties is disproportionately unbalanced to extent which is contrary to good morals even if the APRC of the transaction is below the legal limit;
(ii) in return, according to the principle of the freedom of contract the other party could prove that the difference between the values of performance was not important for contractual parties and therefore such APRC which exceeds the limit stipulated in Art 86 (3) of the GPCCA is not contrary to good morals.[216]

These rules are basically the repetition of the basic principles which the Supreme Court has earlier used in interpreting the invalidity of transactions as contrary to good morals and which we have discussed in the articles contained in this compilation. In declaring a transaction void, the Supreme Court has continuously followed the interpretation rules of Art 29 of the LOA. Such

[215] According to Art 230 (1) of the Code of Civil Procedure a party whose claim is based on the invalidity of the transaction bears the burden of proof. *See* Tsiviilkohtumenetluse seadustik, signed 20 April 2005, *Riigi Teataja (RT) I* (2005) No. 26, 197; 21.04.2011, No. 17 (in Estonian).

[216] The Supreme Court 17 June 2011 ruling in civil case 3-2-1-49-11, *op.cit.* note 42, Sec 8.

aspects as unfavourable contractual conditions (e.g. high interest rate), a difficult situation of one party upon the conclusion of the contract (e.g. involuntary situation where there are no choices available) and the usurious behaviour of one contractual party (e.g. taking advantage of the involuntary situation of the other party) may indicate the possibility of contradiction to good morals. These positions of the Supreme Court have maintained their topicality because the primary effect of the establishment of the APRC limit was the reversed burden of proof.[217] Thus, the principles that any transaction should be looked at as a whole and the excessively high cost rate alone is not the sufficient reason for declaring any transaction contrary to good morals and therefore void are still valid in case law.

2) Courts should control whether a party concluded a transaction in involuntary situation and has proved at least one of the assumptions indicating his/her involuntary situation[218] as stipulated in Art 86 (2).

In addition to difference between the values of performance, the invalidity of a transaction according to Art 86 (2) and (3) presumes that one of the parties has concluded the transaction due to his/her extraordinary need, dependence, inexperience or other such situation. This indication of the Supreme Court regarding the need to check the proof of involuntary situation means that regardless the lender's burden of proof the borrower is always expected to prove that he/she was in involuntary situation and entered into the transaction in question due to that. In this light it can be concluded that the *ex officio* application of the provisions of Art 86 towards the borrower is ruled out because courts should always control whether the borrower has proved his/her involuntary situation and therefore it is not possible to make a court decision without involving the borrower. From the borrower's perspective the problem with such approach is mainly related to proving his/her inexperience, should the borrower base his/her objections on this aspect. In practical terms it is very difficult to provide proof of inexperience. However, without such proof it is not possible to identify the invalidity of the transaction.

It is also important to point out that the Supreme Court suggests that:

(i) the contradiction of a transaction to good morals should be denied if there was no involuntary situation of a party although the difference between the values of mutual performance was significant; the reasoning is that in such a

[217] Irene Kull *et al*, *op.cit.* note 87, at 563.

[218] The same ruling states that the more unbalanced the value of the mutual obligations ir or the more disadvantageous the conditions of a transaction are, the less reason there is to believe that a reasonable person would have concluded such a transaction without being in involuntary situation. However, this does not mean that a person whose claim is based on the invalidity of a transaction would be released from the obligation to prove his/her involuntary situation.

case it can be assumed that the value of the transaction was not important for the party;

(ii) inexperience cannot be excluded only on the basis of proper education level or the purpose of a loan.[219]

The first one of these rules again repeats the principles of earlier case law of the Supreme Court which provides that in determining the contradiction to good morals the circumstances such as extremely unfavourable conditions, dependence or taking advantage of the other party must be present.[220] The second rule relates to the concept of inexperience which is a questionable category to prove. In the sample checklist provided in the article "Electronic Retail Lending in Estonia: Legal Limits on the Cost of Credit" such element as "earlier experience with loans" has been suggested to be asked from the borrower in order to be able to learn more about the ability of the borrower to understand the nature of loans and his/her potential inexperience. This should help lenders comply with the obligation of necessary care as the identification of experience of the borrower is regarded.

3) Courts should identify whether a gaining party knew about the extraordinary need, dependence, inexperience or other such situation of the other party.

Here an important aspect is that this provision also includes such situations in which the gaining party does not actively promote the conclusion of a contract taking advantage of the involuntary situation of the other party but nevertheless does not pay attention to the situation of the other party in the conclusion of the contract. Again, as a general rule in the application of Art 86 (2) a party whose claim is based on the invalidity of a transaction needs to prove that the other party knew or had to know about his/her involuntary situation. Art 86 (3) reverses the burden of proof for the advantage of the party whose claim is based on the invalidity of a transaction as regards proving that a gaining party knew or had to know about the involuntary situation of the other party. Thus, the person interested in the validity of a transaction (i.e. the lender) must prove that he did not or could not know about any such situation. Here it is interesting to note that the Supreme Court highlights the expectation of higher care from those lenders who conduct lending transactions as their daily business, indicating that such measures as thoroughness of a credit questionnaire, answers provided by the borrower and individual conversations between parties could be used in determining the sufficient care of lenders in evaluating the potential involuntary situation of the borrower on *ad hoc* basis.[221]

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[219] The Supreme Court 17 June 2011 ruling in civil case 3-2-1-49-11, *op.cit.* note 42, Sec 8-9

[220] *See* the Supreme Court decision in civil case 3-2-1-80-02, *op.cit.* note 44, Sec 11 and the Supreme Court decision in civil case 3-2-1-108-02, *op.cit.* note 44, Sec 11.

[221] The Supreme Court 17 June 2011 ruling in civil case 3-2-1-49-11, *op.cit.* note 42, Sec 10.

With reference to questionnaires and conversations between the parties the Supreme Court provides some guidance as to what type of measures and documents can be considered acceptable by courts in proving the exercise of necessary care on behalf of lenders. Naturally the list is indicative and serves as an example but in any case it provides some clarification to market participants as well as courts in respect of what is expected in terms of lenders' burden of proof and the proper exercise of care towards electronic retail borrowers.

4. CONCLUSIONS

The research contained in this compilation of articles and analysis constituting this dissertation aim at proving that 1) consumer protection is maintained in the provision of loan-linked prepaid card services, 2) the requirements for client identification and limiting the annual percentage rate of charge (APRC) are the major bottlenecks in balancing the protection of consumers and entrepreneurship freedom in the regulation of electronic retail lending in Estonia, 3) respectively, the APRC limit disproportionately restricts the constitutional rights of service providers. In the course of this research I have come to the following conclusions.

1. The provision of electronic retail lending services in combination with prepaid cards does not deteriorate the level of consumer protection because of public law restrictions applicable to the card issuers as supervised regulated entities. The issuer of a loan-linked card meets the criterion of e-money, being subject to licensing, prudential rules and supervision also across borders. An issuer from a member state or an EEA country can provide services in Estonia based on the authorization of its home country, acting via a branch or cross-border services, or establish a separately licensed subsidiary. An issuer from a third non-EU/EEA country can provide services by establishing a branch or rendering cross-border services on the basis of a respective license from the Estonian Financial Supervision Authority, or establish a separately licensed subsidiary in Estonia.

2. Existing requirements for customer identification in electronic retail lending (i.e. face to face identification of all first-time customers), effective from early 2008, is a good step towards more responsible electronic retail lending but it also makes the business less flexible for service providers. The initial conclusion drawn from the research was that the identification rules may somewhat hinder the freedom to provide electronic lending services. The major concern related to these rules was that they first and foremost aim at preventing money laundering. Respectively, the application of these identification rules to electronic retail lenders led to court actions which were initiated on behalf of some electronic retail lenders during the preparation of research. The court actions were mainly based on the justification that the rules pose unreasonable obstacles to the freedom to provide services and are disproportionate because small-scale retail loans contain no potential for money laundering or terrorist financing. The follow-up analysis of the case law showed that the purpose of the identification rules is to avoid the anonymity of transactions which would facilitate the risks of money laundering and terrorist financing. The prevention of such dangerous crimes gives grounds for limiting the rights of persons regardless the nature of their business, including the rights of small-scale electronic

lenders. Respectively, this part of thesis statement cannot be verified and the identification rules in their existing form are justified.

3. The APRC limit is a major bottleneck among other important consumer protection measures such as extended consumer information, marketing requirements, interest rate presentation and client identification requirements applied in the field of electronic retail lending. On 1st May 2009 the grounds for void transactions became wider and a relative upper limit was set to the APRC, accompanied by the shift in the burden of proof. In case of consumer credit, the unbalanced value of mutual obligations to the extent which is contrary to good morals is assumed if the APRC exceeds 3 times the average cost of consumer credits as provided in the commercial banking statistics of the Bank of Estonia at transaction date. The APRC limit is "soft" in its nature and a lender may choose to exceed it. In such a case the lender may face a situation where the borrower argues that the transaction is contrary to good morals and the lender is obliged to bear the burden of proof in determining that it is not. Different from earlier situation, courts can now evaluate the validity of a loan agreement without the request from a party. One of the starting points for identifying the scope of the lender's burden of proof is basing the interpretation on the principles of reasonableness and effectiveness. The principle of reasonableness refers to the perception of a reasonable man. Respectively, the lender should ensure the understanding and willingness of the consumer with regard to the lending transaction, and be convinced about his/her repayment ability. The principle of effectiveness indicates that the fulfillment of the obligation of proof must not be overly difficult or impossible for a party. Respectively, the lender's burden of proof should at a minimum include the proper identification of a borrower profile, including identification of the purpose of loan, the borrower's earlier experience with loans, education, profession, income, assets, obligations, payment discipline and repayment sources. The undefined wide scope of the obligation of proof is what makes the APRC limit a bottleneck and facilitates the discussion of potential constitutional non-compliance of the APRC limit.

4. The APRC limit in its current legal form does respond to consumer protection needs but it does not contribute to a balanced solution. 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 social state and the fundamental right of entrepreneurship freedom. The idea of a social state is based on the assumption that a state has to seek social balance and protect those who cannot directly influence the proper ensuring of their fundamental rights. Consumer rights are not directly social fundamental rights but consumers are a weaker party in electronic retail lending and therefore deserve attention on behalf of the state to avoid their excessive

dependence on high-rate credit and electronic lenders. However, regardless the principle of social state, the restriction in the form of existing APRC limit is overly restrictive and the following reasons outweigh the consumer protection purposes.

First, the APRC limit is overly intensive because it limits the lawful income level of service providers, thereby decreasing economically reasonable exercise of entrepreneurship freedom. Even if electronic lenders provide consumers with the required information and follow all other legal rules, they may nevertheless fail to prove in court that a transaction is not contrary to good morals, resulting in the entitlement only to legal interest. Without any *ex-ante* analysis of the market or particularities of this type of lending services, including its above-average business cost level, the law assumes that the nature of the lender's business itself is contrary to good morals, decreasing thereby the certainty and business potential related to electronic retail lending. Secondly, through limiting the exercise of entrepreneurship freedom the APRC limit might influence competition on SMS-lending market as well as the flexibility and other parameters of SMS lending service, increasing the potential for less consumer-friendly service. Decreased consumer-friendliness might deteriorate the position and limit the choices of those consumers who are responsible, informed and knowingly want to use this type of services. Thus, indirectly the APRC limit might restrict the contractual freedom of consumers which is a fundamental right of free self-performance.

Finally, the idea of social balancing behind the principle of social state does not assume that a state should bear significant amount of responsibility for the decisions of private individuals in their commercial transactions and redistribute significant portion of risks deriving from these purely commercial decisions of private individuals to service providers when the individuals have active legal capacity and they have been properly informed about the risks and particularities of their transactions. The principle of social state cannot disregard the rationale that a reasonable person usually takes reasonable care of personal transactions and finance. In parallel to responsible lending, responsible borrowing and well-informed consumer decisions should be the core of electronic retail lending, enabling the sufficiently informed consumers to bear full responsibility for their decisions which the legislators have so far ruled out. Naturally, the cases of involuntary situation should continue to form material grounds for identifying a transaction as contrary to good morals and therefore void but this does not exclude the reasonable responsibility of borrowers for their borrowing decisions.

5. Instead of limiting the cost of credit through setting a relative limit by law as it is the case today I much more favour high information, disclosure and prudent marketing requirements which go hand in hand with the idea of

responsible borrowing. Influencing the delivery process and channels is a more appropriate solution than excessively limiting the freedom of entrepreneurship and contract by the means such as the APRC limit. Informed responsible consumers should not be restricted the access to flexible lending only because of inadequate decision-making of other less responsible consumers. The effective advertising rules for SMS lending serve as a well-balanced solution for responsible lending practice.

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116. The Supreme Court 19 December 2007 decision in civil case 3-2-1-122-07, *RT III* (2008) No. 2, 15 (in Estonian);
117. The Supreme Court 7 May 2008 decision in administrative case 3-3-1-86-07, *RT III* (2008) No. 21, 147 (in Estonian);
118. The Supreme Court 21 November 2008 decision in civil case 3-2-1-111-08, *RT III* (2008) No. 47, 325 (in Estonian);
119. The Supreme Court 11 February 2009 decision in administrative case 3-3-1-79-08, *RT III* (2009) No. 8, 52 (in Estonian);
120. The Supreme Court 26 March 2009 decision in constitutional supervision case 3-4-1-16-08, *RT III* (2009) No. 15, 109 (in Estonian);
121. The Supreme Court 27 January 2010 decision in civil case 3-2-1-153-09, *RT III* (2010) No. 6, 42 (in Estonian);
122. The Supreme Court 17 June 2011 ruling in civil case 3-2-1-49-11. Available at http://www.nc.ee/?id=11&tekst=RK/3-2-1-49-11 (28.06.2011) (in Estonian);
123. Tallinn District Court 24 April 2009 decision in administrative case 3-08-1220. Available at http://kola.just.ee/ (10.10.2010) (in Estonian);
124. Tallinn District Court 30 November 2009 decision in administrative case 3-08-1771. Available at http://kola.just.ee/ (11.10.2010) (in Estonian);

Case Law of the European Court of Justice

125. Case 27/76 United Brands Continentaal BV vs. Commission of the European Communities, ECR (1978) 207;
126. Case 106/77 Amministrazione delle Finanze dello Stato vs. Simmenthal SpA, ECR (1978) 629;
127. Case 199/82 Amministrazione delle Finanze dello Stato vs. SpA San Giorgio [1983] ECR 3595;
128. Case C-213/89 The Queen vs. Secretary of State for Transport, ex parte: Factortame Ltd and others, ECR (1990) I-2433;

Other

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SUMMARY IN ESTONIAN

Tarbijate ja teenusepakkujate õiguste tasakaalustamine elektrooniliste tarbijalaenude pakkumisel Eestis

Käesolevasse väitekirja koondatud varem avaldatud rahvusvahelistest publikatsioonidest ja täiendavast analüüsist koosnev uurimus käsitleb finantsteenuste innovatsiooni, tarbijakaitse ning ettevõtlusvabaduse tasakaalustamise peamisi kitsaskohti elektrooniliste tarbijalaenude valdkonnas. Käesoleva väitekirja keskseks hüpoteesiks on, et elektrooniliste tarbijalaenude reguleerimisel Eestis tarbijate kaitsmiseks kohaldatavatest meetmetest on tarbijakaitse ja tehinguvabaduse tasakaalustamise aspektist peamisteks kitsaskohtadeks klientide tuvastamise nõuded ja krediidi kulukuse määrale ülempiiri seadmine, kusjuures viimane riivab ebaproportsionaalselt teenusepakkujate põhiseaduslikke õigusi. Väitekirja eesmärgiks on otsida kinnitust järgmistele alahüpoteesidele: 1) elektrooniliste laenudega seotud ettemaksukaartide pakkumisel säilib tarbijakaitse tase, 2) elektrooniliste tarbijalaenude reguleerimisel Eestis on tarbijakaitse ja ettevõtlusvabaduse tasakaalustamise peamisteks kitsaskohtadeks klientide tuvastamise nõuded ja krediidi kulukuse määrale ülempiiri seadmine, 3) krediidi kulukuse määra piiramine riivab ülemääraselt teenusepakkujate põhiseadusega kaitstud ettevõtlusvabadusõigust.

Käesoleva väitekirja koostamisel on kasutatud võrdlevat, süstemaatilist ja teleoloogilist õigusteaduslikku meetodit, kusjuures põhirõhk on võrdleval ja teleoloogilisel uurimismeetodil. Võrdlev meetod on käesoleva uurimuse keskseks töövahendiks olukorras, kus omakeelset originaalset õiguskirjandust eksisteerib mõnevõrra piiratud mahus. Lisaks võimaldab see meetod kaasa rääkida ka teisi riike hõlmavas õiguslikus debatis, arvestades asjaolu, et käesoleva väitekirja uurimisvaldkond on tähtis teistegi Euroopa Liidu (EL) riikide jaoks. Võrdleva metoodika kasutamisel on peaasjalikult kõrvutatud Eesti õigusakte mõnede teiste liikmesriikide ning EL õigusega. Lisaks EL direktiividele, Eesti ja liikmesriikide seadustele on käesoleva väitekirja koostamisel kasutatud ka erialakirjandusest ja akadeemilistest publikatsioonidest saadud teavet. Kasutatud on ka rahvusvaheliste ja riiklike institutsioonide ning erialaühingute juhiseid ja töödokumente. Teleoloogilist lähenemist on uurimistöös kasutatud teatud uurimisaspektide, nt õigusaktide sätete, tähenduse tuvastamiseks nende kehtestamise eesmärgi ja autorite kavatsuste selgitamise kaudu. Selles kontektsis on käesolevas väitekirjas oluliste uurimisallikatena kasutatud mitmeid seadus-eelnõude seletuskirju. Valitud uurimisvaldkond võimaldab ühendada õiguslikud küsimused ja majanduslikud kaalutlused, selgitades õiguslikke probleeme elektrooniliste tarbijalaenude pakkumise igapäevases äritegevuses tõusetunud tegelike probleemide põhjal ning analüüsides Riigikohtu poolt võetud vastavaid seisukohti. Uurimuse praktilised aspektid tuginevad Eesti Riigikohtu lahendite ning erinevate teenusepakkujate ja pankade koduleheküljedel esitatud statistika ning info analüüsile.

Valitud uurimisvaldkonda on seni uuritud piiratud mahus, sest tegemise on uudse ja kiiresti areneva valdkonnaga. Eestis on elektrooniliste tarbijalaenude spetsiifilist temaatikat uurinud vähesed autorid, peamisteks selle valdkonnaga tegelejateks on olnud Kalev Saare, Karin Sein ja Mari Ann Simovart. Nende hiljutiste publikatsioonide seas on ka rahvusvahelises väljaandes *European Review of Private Law* avaldatud ühisartikkel, mis käsitleb SMS-laenude ning tarbijakaitse küsimusi. Teiste riikide autorite kirjutatud artiklitest seoses elektrooniliste tarbijalaenudega käsitleb suurem osa liigkasuvõtjaliku praktika, vastutustundliku laenamise ja tarbijalaenude intressimäärade piiramise temaatikat, hõlmates sageli õigusliku külje kõrval ka majanduslikke aspekte. Kuigi sellised käsitlused (nt Reifner *et al* 2010, Reichner & Knobloch 2009, jne) ei ole puhtalt juriidilised, lisavad nad kindlasti väärtust selle valdkonna uurimistööle, sest elektrooniliste tarbijalaenude regulatsiooni eripäraks on õiguslike ja majanduslike kaalutluste tihe omavaheline seos. Rahvusvahelisi artikleid on avaldatud ka elektronkaubanduse ning ettemaksukaartide valdkonnas (nt Janson 2003, Lanskoy 2000, jne). Samas on laenamise ning elektrooniliste maksevahendite teemasid üldisemalt kajastanud mitmed artiklid nii Eesti kui rahvusvahelistes õigusajakirjades. Tehingute tühisuse ja liigkasuvõtjaliku praktika osas on Eesti õiguskirjanduses ilmunud piisavalt käsitlusi, sealhulgas annavad suuniseid võlaõigusseaduse (VÕS) ja tsiviilseadustiku üldosa seaduse (TSÜS) kommenteeritud väljaanded.

Akadeemilises plaanis on käesoleva uurimuse tulemused originaalsed, sest vaid mõningaid käsitletud uurimisküsimusi on teiste autorite poolt uuritud piiratud ulatuses. Õiguslike lahenduste ning tulevaste arengute mõistmine on oluline ka teiste distsipliinide jaoks, et hinnata teatud finantsteenuste atraktiivsust ning turgude ja teenuste globaliseerumisega seotud riske.

Käesoleva väitekirja tulemusel võib teha alljärgnevad järeldused.

1. Elektrooniliste laenude muutmine veelgi innovaatilisemaks nende kombineerimise kaudu ettemaksukaartidega ühtseks tootelahenduseks kätkeb endas täiendavaid riske, kuid kuna sellega kaasnevad ka täiendavad avalik-õiguslikud piirangud kaardi väljastajatele kui reguleeritud ja järelevalvele alluvatele ettevõtjatele, siis tarbijakaitse tase ei halvene. Elektroonilise laenuga seotud ettemaksukaardi väljastamine vastab e-raha tingimustele, sest selline finantseerimislahendus ei ole seotud kaardi valdaja (laenusaaja) kontoga. Seega kohaldatakse selliste kaartide väljastajate suhtes kõiki e-raha asutustele kehtivaid tegevusloa, kapitali- ja järelevalvenõudeid, sh ka piiriülese tegevuse puhul. Kaarte väljastav asutus, mis on EL või Euroopa Majanduspiirkonna (EMP) liikmesriigi päritolu, võib Eestis teenuseid osutada oma päritoluriigi tegevusloa alusel, kui ta tegutseb filiaali kaudu või osutab piiriüleseid teenuseid, või asutada eraldi tegevusloaga tütarettevõtte. Kaarte väljastav asutus, mis ei ole pärit EL või EMP liikmesriigist, vaid pärineb mõnest kolmandast riigist, võib Eestis teenuseid osutada filiaali kaudu või piiriüleseid teenuseid osutades, kuid peab Finantsinspektsioonilt taotlema

tegevusloa mistahes tegevusvormi jaoks. Kolmanda riigi päritolu kaardi väljastaja võib ka Eestis asutada eraldi tütarettevõtte, taotledes sellele tegevusloa.

2. Kliendi isiku tuvastamise nõuete osas on 2008. aasta algusest kehtiv kohustus tuvastada esmakordselt ärisuhte loomisel kliendi isik viibides kliendiga samas kohas küll suur samm vastutustundliku elektronlaenutegevuse suunas, kuid samas vähendab see elektrooniliste tarbijalaenude paindlikkust. Uurimistöö käigus kujunes esialgu arvamus, et selline tuvastamiskohustus võib mõnevõrra takistada elektronlaenude teenuste osutamise vabadust. Nende reeglitega seotud peamiseks õiguslikuks probleemiks oli see, et need on kehtestatud eeskätt rahapesu tõkestamise eesmärgil. Vastavalt vaidlustasid mõned elektrooniliste tarbijalaenude pakkujad näost-näkku tuvastamise kohustuse kohtus. Vaidlustamist põhjendati peamiselt sellega, et vahetu tuvastamise reeglid seavad ebamõistlikke takistusi teenuste pakkumise vabadusele ning on ebaproportsionaalsed, kuna väikesemahulised tarbijalaenud ei ole rahapesu- või terrorismi rahastamise riskiga tehingud. Kohtupraktika jätkuanalüüs näitas aga, et vahetu tuvastamise reeglite eesmärgiks on muuhulgas vältida tehingute anonüümsust, mis tooks kaasa võimalikke rahapesu ja terrorismi rahastamise riske. Neid kuritegusid peetakse üldsusele väga ohtlikeks ning sellest lähtuvalt annab kaasnev suur avalik huvi kindla aluse äritegevuse iseloomust sõltumatult isikute õiguste piiramiseks, sh väikesemahuliste elektronlaenude pakkujate õiguste piiramiseks. Seega, kliendi isiku tuvastamise nõudeid käsitlev alahüpotees ei leidnud kinnitust. Vahetu isikutuvastamise nõude kohaldamine elektrooniliste laenude pakkujate suhtes on õigustatud ja seda ei saa pidada tarbijakaitse ja ettevõtlusvabaduse tasakaalustamise kitsaskohaks elektrooniliste tarbijalaenude valdkonnas.
3. Elektrooniliste tarbijalaenude valdkonnas kohaldatavatest olulisematest tarbijakaitsemeetmetest nagu krediidi kulukuse piirang, tarbijate ulatuslikum teavitamiskohustus, reklaaminõuded, intresside esitamise vorm ja klientide vahetu tuvastamise nõue on krediidi kulukuse määra piiramine tarbijakaitse ja ettevõtlusvabaduse tasakaalustamise peamiseks kitsaskohaks. Alates 1. maist 2009 laienesid tehingu tühisuse alused ja krediidi kulukuse määrale kehtestati suhteline ülempiir, millega kaasnes ka tõendamiskoormuse ümberpööramine. Kui poolte vastastikuste kohustuste väärtus on heade kommete vastaselt ebamõistlikult tasakaalust väljas, siis eeldatakse, et tehingust kasu saav pool teadis või pidi teadma teise poole raskest olukorrast. Tarbijakrediidilepingute puhul eeldatakse, et vastastikuste kohustuste väärtus on heade kommete vastaselt tasakaalust väljas, kui krediidi kulukuse määr tehingu tegemise ajal ületab Eesti Panga viimati avaldatud keskmist krediidiasutuste poolt eraisikutele antud tarbimislaenude kulukuse määra enam kui kolm korda. Krediidi kulukuse määra ülempiir on oma iseloomult ”pehme”, mis tähendab seda, et laenuandja võib otsustada pakkuda laenu kõrgema krediidi kulukuse määraga kui etteantud ülempiir. Sellisel juhul peab ta aga arvestama tagajärgedega, mis tulenevad sellest, et laenusaaja võib tehingu

vaidlustada ning laenuandja peab kandma ümberpööratud tõendamiskoormust ja tõendama, et tehing ei ole sõlmitud vastuolus heade kommetega ega seetõttu tühine.

Üheks lähtekohaks laenuandja tõendamiskoormuse ulatuse määratlemisel võiks olla tõlgenduse tuginemine mõistlikkuse ning tõhususe põhimõtetele. Mõistlikkuse põhimõte tugineb mõistliku inimese arusaamale ja toimimisele tavapärases olukorras. Vastavalt võiks laenuandjalt mõistlikult oodata seda, et ta selgitaks välja tarbija arusaamise ja tahte laenutehingu tegemiseks ning veenduks tarbija maksevõimes. Tõhususe põhimõtte kohaselt ei tohi tõendamiskohustuse täitmine olla poolele ülemäära koormav ega võimatu. Vastavalt peaks laenuandja tõendamiskoormus sisaldama vähemalt laenusaaja profiili tuvastamist, rakendades selleks vajalikul määral hoolt, ja tuvastama peaks vähemalt laenu eesmärgi, laenusaaja varasema laenukogemuse, hariduse, töökogemuse, sissetuleku, varad, kohustused, maksedistsipliini ja tagasimakseallikad. Krediidi kulukuse määra piirang ongi kitsaskohaks eeskätt teenusepakkujale seatud ulatusliku, aga selgelt määratlemata tõendamiskoormuse tõttu, mis põhjustab diskussiooni krediidi kulukuse piirangu võimalikust vastuolust põhiseadusega.

4. Krediidi kulukuse määra piiramine oma praegusel õiguslikul kujul vastab küll tarbijakaitse vajadustele, kuid ei loo tasakaalustatud lahendust. Eestis on elektrooniliste tarbijalaenude osas tarbijate kaitseks kohaldatavad meetmed tarbijakaitse ja ettevõtlusvabaduse tasakaalustamise aspektist teenusepakkujatele ülemääraselt koormavad, sest krediidi kulukuse määra piiramine riivab ebaproportsionaalselt teenusepakkujate põhiseadusega kaitstud ettevõtlusvabadusõigust. Riive proportsionaalsuse kaalumisel on oluliseks aspektiks kollisioon sotsiaalriigi põhimõtte ja ettevõtlusvabaduse põhiõiguse vahel. Sotsiaalriigi idee lähtub eeldusest, et riigi eesmärgiks on sotsiaalse tasakaalu otsimine ning nende isikute kaitse tagamine, kes ise ei saa oma põhiõiguste kaitse tagamist vajalikul määral otseselt mõjutada. Tarbijaõigused ei ole küll otseselt sotsiaalsed põhiõigused, kuid tarbijad on elektrooniliste tarbijalaenude tehingutes nõrgemaks pooleks ning väärivad riigi tähelepanu, et vältida nende ülemäärast sõltuvust kõrge intressimääraga krediidist ja elektrooniliste laenude pakkujatest. Siiski, vaatamata sotsiaalriigi põhimõttele, on laenupakkujate ettevõtlusvabadusõiguse riive krediidi kulukuse määra piiramise vormis oma praegusel kujul ülemäära piirav ning järgmisi põhjuseid võib pidada tarbijakaitse eesmärkidest kaalukamateks.

   Esiteks, krediidi kulukuse piirangut võib pidada ülemäära intensiivseks, sest see piirab teenusepakkujate legaalse sissetuleku taset, vähendades seeläbi ettevõtlusvabadusõiguse majanduslikult mõistliku teostamise võimalust. Isegi kui elektrooniliste tarbijalaenude pakkuja annab tarbijale piisavalt nõuetekohast informatsiooni ja järgib kõiki muid seaduse nõudeid (sh kliendi isiku tuvastamise nõudeid), võib tal siiski ebaõnnestuda tõendamine, et vastav laenutehing ei ole vastuolus heade kommetega ja seetõttu tühine, mille tulemuseks on õigus saada laenu kasutada andmise eest üksnes

seadusjärgset intressi laenulepingus kokku lepitud intressi asemel. Kuna läbi ei ole viidud mõjude analüüsi, siis riigil puudub tegelikult ülevaade sellise õigusliku meetme majanduslikust mõjust ja proportsionaalsusest. Ilma eelnevalt turgu ja seda tüüpi laenutoodete eripärasid, sh selle sektori keskmisest kõrgemat tüüpilist ärikulude taset analüüsimata loob seadus eelduse, et teenusepakkuja äritegevuse iseloom kui selline on igal juhul vastuolus heade kommetega, vähendades seeläbi elektrooniliste tarbijalaenude pakkumise kindlust ning äripotentsiaali.

Teiseks võib krediidi kulukuse piirang ettevõtlusvabadusõiguse teostamise piiramise kaudu mõjutada nii konkurentsi SMS-laenude turul kui ka SMS-laenude teenuse paindlikkust ja muid parameetreid, suurendades potentsiaali vähem tarbijasõbraliku teenuse kujunemiseks. Vähenenud tarbijasõbralikkus võib piirata nende tarbijate valikuid, kes on teadlikud ja täiesti vastutustundlikult tahavad seda tüüpi teenust kasutada. Seega võib krediidi kulukuse piirang kaudselt piirata tarbijate lepinguvabadust, mis on vaba enesteostuse põhiõiguse üks vorme.

Viimaseks, sotsiaalriigi põhimõtte aluseks olev sotsiaalse tasakaalustatuse idee ei eelda siiski seda, et riik peaks võtma märkimisväärse vastutuse eraisikute poolt nende majandustehingute käigus tehtavate otsuste eest ja jaotama suure osa sellistest puhtalt majandusliku iseloomuga otsustest tulenevatest eraisikute riskidest ümber teenusepakkujatele, kui need eraisikud on teovõimelised ja neid on tehinguga seotud riskidest ning eripäradest kohaselt teavitatud. Sotsiaalriigi põhimõtte juures ei saa täielikult kõrvale jätta ühte iga normaalse ühiskonna toimimise aluseks olevat asjaolu, et mõistlik inimene näitab tavaolukorras üles mõistlikku hoolt oma personaalsete tehingute ja rahaasjade suhtes. Kui laenupakkuja annab laenu vastava turumääraga ning täidab kõiki seadusest tulenevaid teavitamiskohustusi, sh kohustust teavitada tarbijat pakutava laenu kulukusest, on tarbija poolt nõusolek laenutehingu tegemiseks tema teadvustatud vastutus. Vastutustundliku laenuandmise põhimõtte kõrval peaks elektrooniliste tarbijalaenude kesksetеks põhimõteteks olema ka vastutustundlik laenuvõtmine ja teadlikud tarbijaotsused, mis võimaldavad piisavalt informeeritud tarbijatel kanda täit vastutust oma otsuste eest, mille seadusandja on praegu krediidi kulukuse piiranguga välistanud. Loomulikult peavad tarbija (või mis tahes lepingupoole) sundolukorra juhtumid jätkuvalt jääma oluliseks põhjuseks, et tunnistada tehing heade kommete vastaseks ja seega tühiseks, kuid see ei välista tarbijate mõistlikku vastutust oma laenuvõtmise otsuste eest.

5. Selle asemel, et piirata krediidi kulukust seaduse alusel ülempiiri kehtestamisega, nagu seda on Eestis täna tehtud, võiks õigusliku tasakaalu saavutamiseks pigem pooldada kõrgeid tarbijate teavitamise, olulise info avalikustamise ning vastutustundliku reklaami nõudeid, mis samas loovad eelduse vastutustundliku laenuvõtmise realiseerumiseks. Laenude turustamisprotsessi ja -kanalite mõjutamine on sobivam lahendus kui ettevõtlus-ja lepinguvabaduse liigne piiramine selliste meetmete abil nagu krediidi

kulukuse määrale ülempiiri seadmine. Teadlike ja vastutustundlike tarbijate võimalust paindlike laenutoodete kasutamiseks ei tohiks piirata mõningate teiste vähem vastutustundlike tarbijate halbade tarbimisotsuste tõttu. Täna SMS-laenude reklaami suhtes kehtivaid nõudeid võib pidada mõistlikult tasakaalustatud lahenduseks vastutustundliku laenupakkumise tagamiseks elektroonilise tarbijakrediidi valdkonnas.

PUBLICATIONS

CURRICULUM VITAE

I. General Information

1. First name and surname: Ingrid Ulst
2. Date and place of birth: 26.03.1977, Tartu
3. Citizenship: Estonian
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5. Contact details: Ringtee 31a Tõrvandi 61715 Tartumaa; ph. 50 29 724; e-mail: ingrid26@yahoo.com
6. Current place of employment: AS Swedbank (Key Account Manager) and MTÜ Arheopolis (Member of Management Board)
7. Education:
   - 2009 … University of Tartu, pursuing MA (*History)*
   - 2006 … University of Tartu, pursuing PhD (*Law)*
   - 2006–2009 University of Tartu, (*BA History, cum laude)*
   - 2002–2003 J.W.Goethe-Universität, Institute for Law and Finance (*LL.M. Finance)*
   - 1997–2001 Estonian Business School (*BBA International Business Administration)*
   - 1997–2000 University of Tartu, (*BA Law)*
8. Language skills: Estonian – mother tongue; English – fluent; Norwegian – good; French and Russian – pre-intermediate
9. Work experience:
   - 2011–... AS Swedbank. Position: Key Account Manager
   - 2011–... MTÜ Arheopolis. Position: Member of Management Board
   - 2009–2011 IOM Tallinn. Position: Project Manager
   - 2008 European Investment Bank, Directorate Lending Operations Europe. Position: Business Project Manager
   - 2006–2008 Danske Bank A/S Branch in Estonia, Business Banking Division. Position: Key Account Manager
   - 2005–2006 European Investment Bank, Directorate Lending Operations Europe. Position: Loan Officer
   - 2004–2005 Ministry of Finance of Estonia. Position: Senior Expert
   - 2000–2003 Eesti Krediidipank AS. Position: Legal Adviser
   - 1999 Tartu County Court. Position: Trainee-Consultant

II. Research and Academic Activities

1. Major fields of research: banking and financial law; lending transactions and consumer credit, incl legal problems in relation to electronic retail lending; the regulation of financial services, incl the principles of the EU law in respect of financial institutions and services.

2. Publications:
   2.1. Ulst, I. (2010). Electronic Retail Lending in Estonia: Legal Limits on the Cost of Credit. 3 Review of Central and East European Law 35, 157–191. 1.1.
   2.2. Ulst, I. (2010). The Problems of "Black Archaeology" in Estonia. 2 Estonian Journal of Archaeology 14, 153–169. 1.2.
   2.3. Ulst, I. (2010). Enhancing the protection of archaeological heritage in the light of the problems of "black archaeology". Muinsuskaitse 2009. (*in Estonian*)
   2.4. Ulst, I. (2009). Legal Problems with Electronic Retail Loans: Balancing the Freedom of Contract and the Protection of Consumers – The Case of Estonia. 2 Journal of Eurasian Law 2, 23–50. 1.2.
   2.5. Ulst, I. (2009). Connecting Prepaid Cards and Retail Loans: Innovative Practical Solution or Confusing Legal Combination? Implications of the EU Financial Services Law from the Perspective of Estonia. 2 Review of Central and East European Law 34, 173–191. 1.1.
   2.6. Ulst, I. (2008). Legal problems with SMS loans: how to balance the freedom of choice and the protection of consumers? MaksuMaksja No. 10, 31–34. 1.3. (*in Estonian*)
   2.7. Ulst, I. (2005). Relationship banking facilitates advantageous lending. Äripäev, 19 December. *(in Estonian*)
   2.8. Ulst, I. (2005). Public-Private Partnerships show increasing trend in Europe. Äripäev, 17 October. *(in Estonian*)
   2.9. Ulst, I. (2005). The model for a European Company and its implementation by companies in the financial sector. Juridica No. 7, 466–474. 1.3. *(in Estonian*)
   2.10. Ulst, I. (2005). Companies can assess their debt capacities. Äripäev, 19 September. *(in Estonian*)
   2.11. Ulst, I. (2005). Linkages of Financial Groups in the European Union: Financial Conglomeration Developments in the Old and New Member States. Central European University Press, 150 p. 2.1.
   2.12. Ulst, I. (2003). Risks related to financial conglomerates and regulatory security system. Juridica No 10, 708–716. 1.3. *(in Estonian*)
   2.13. Ulst, I. (2003). Money laundering and financing of terrorism: regulatory aspects and protection of the financial system. Juridica No 7, 501–508. 1.3. *(in Estonian*)
   2.14. Ulst, I. & Raa, R. (2003). Basel II and lending to SMEs: what lies ahead? EBS Review No 16, 62–74. 1.3.
3. Research awards and grants:
   3.1. "Requirements Set for the Governance of Credit Institutions in the Light of Recent Bank Bankruptcies in Estonia". First award of the Student Spring Conference of the Estonian Business School, spring 2001.
   3.2. "Financial Conglomeration Linkages between the European Union and Accession Countries: A Study on Developments and Implications of Financial Conglomeration." First award of the Estonian Academy of Sciences. Annual student research contest, October 2004.
   3.3. World Estonian Council grant 2007–2008 for supporting doctorate studies at the Faculty of Law, the University of Tartu.
   3.4. "Legal Problems with SMS Loans in Estonia: Balancing the Freedom of Choice and the Protection of Consumers." Third award of annual student

research contest of the Ministry of Education and Science and SA Archimedes, November 2008.

3.5. "The Protection of Archaeological Heritage and the Problems of "Black Archaeology" in Estonia". First award of annual student research contest of the Ministry of Education and Science and SA Archimedes, November 2009.

4. Other academic activities: research assistance to the paper of Frank Diercik "The Supervision of Mixed Financial Services Groups in Europe", European Central Bank Occasional Paper No. 20, August 2004.

III. Supplementary Training

2005	EIB Credit Risk Training Program: Credit Analysis Module and Credit Risk Analysis Corporates
2004	University of Minnesota Duluth, Labovitz School of Business and Economics (USA), Rotary International Business Internship Program
2003	Center for Financial Studies (Frankfurt am Main) Colloquia: 1) Financial Industry Under Pressure – "Too Complex to Fail? International Financial Conglomerates and the Design of National Insolvency Regimes.", Prof. R.Herring (Wharton School) 2) Globalisation of Financial Markets – Risks and Opportunities "Towards Integration: Evolution of the Financial System of Accession Countries and their Integration with the EU Financial System.", L.Balcerowicz (The Central Bank of Poland)
2003	ILF and Deutsches Aktieninstitut seminar "Hedge Funds: Risks and Regulation"
2003	European Central Bank (Frankfurt am Main), Traineeship at the Directorate of Financial Stability and Supervision
2002	Preismann K. OÜ The Law of Obligations Act: factoring, leasing, franchise, consumer credit contracts, sales contracts, payments and settlements, stocks.
2001–2002	Estonian Banking Association: Credit Management I, II
2001	SpareBank 1 SR-Bank (Stavanger), The Nordic Council of Ministers banking internship programme

IV. Social activities

Member of Kanepi Amateur Theatre since February 2011
Founder and voluntary coordinator of MTÜ Arheopolis since February 2011
Member of J.W.Goethe-Universität Frankfurt, Institute for Law and Finance Alumni Association since July 2003
Member of Rotary IBIP Alumni since 2004
Member of Estonian Defence League Womens Corps (Tartu district) since April 2006

V. Hobbies

Travelling, archaeology, amateur theatre, sports, music

CURRICULUM VITAE

I. Üldandmed

1. Ees- ja perekonnanimi: Ingrid Ulst
2. Sünniaeg ja koht: 26.03.1977, Tartu
3. Kodakondsus: eesti
4. Perekonnaseis: vallaline
5. Aadress, telefon, e-post: Ringtee 31a Tõrvandi 61715 Tartumaa; tel. 50 29 724; e-post: ingrid26@yahoo.com
6. Praegune töökoht, amet: AS Swedbank (suurkliendihaldur) ja MTÜ Arheopolis (juhatuse liige)
7. Haridus (lõpetatud õppeasutused, lõpetamise aastad, omandatud kraadid, kvalifikatsioonid):
   - 2009 … Tartu Ülikool, magistrant (*MA ajalugu)*
   - 2006 … Tartu Ülikool, doktorant (*PhD õigusteadus)*
   - 2006–2009 Tartu Ülikool (*BA ajalugu, cum laude)*
   - 2002–2003 J.W.Goethe-Universität, Institute for Law and Finance (*LL.M. Finance)*
   - 1997–2001 Estonian Business School (*BBA International Business Administration)*
   - 1997–2000 Tartu Ülikool (*BA õigusteadus)*
8. Keelteoskus:eesti keel – emakeel, inglise keel – valdan vabalt, norra keel – hea, prantsuse ja vene keel – nõrgem kesktase
9. Töökogemus (teenistuskäik):
   - 2011–... AS Swedbank. Amet: suurkliendihaldur
   - 2011–... MTÜ Arheopolis. Amet: juhatuse liige
   - 2009–2011 IOM Tallinn. Amet: projektijuht
   - 2008 Euroopa Investeerimispank, Euroopa laenuoperatsioonide direktoraat. Amet: äriprotsesside projektijuht
   - 2006–2008 Danske Bank A/S filiaal Eestis, äripanganduse divisjon. Amet: ärikliendi suhtehaldur
   - 2005–2006 Euroopa Investeerimispank, Euroopa laenuoperatsioonide direktoraat. Amet: laenuspetsialist
   - 2004–2005 EV Rahandusministeerium. Amet: peaspetsialist
   - 2000–2003 Eesti Krediidipank AS. Amet: jurist
   - 1999 Tartu Maakohus. Amet: praktikant / konsultant

II. Teaduslik ja arendustegevus

1. Peamised uurimisvaldkonnad: pangandus- ja finantsõigus. Laenutehingud ja tarbijakrediidi regulatsioon, sh. elektrooniliste tarbijalaenudega seotud õiguslikud probleemid. Finantsteenuste regulatsioon, sh. EL õiguse põhimõtted finantsasutuste ja -teenuste osas.

2. Publikatsioonide loetelu:
    2.1. Ulst, I. (2010). Electronic Retail Lending in Estonia: Legal Limits on the Cost of Credit. 3 Review of Central and East European Law 35, 157–191. 1.1.
    2.2. Ulst, I. (2010). The Problems of “Black Archaeology“ in Estonia. 2 Estonian Journal of Archaeology 14, 153–169. 1.2.
    2.3. Ulst, I. (2010). Arheoloogiapärandi kaitse tõhustamine "musta" arheoloogia probleemide valguses. Muinsuskaitse 2009. Muinsuskaitseamet, Tallinna Kultuuriväärtuste Amet ja Eesti Kunstiakadeemia restaureerimise osakond.
    2.4. Ulst, I. (2009). Legal Problems with Electronic Retail Loans: Balancing the Freedom of Contract and the Protection of Consumers – The Case of Estonia. 2 Journal of Eurasian Law 2, 23–50. 1.2.
    2.5. Ulst, I. (2009). Connecting Prepaid Cards and Retail Loans: Innovative Practical Solution or Confusing Legal Combination? Implications of the EU Financial Services Law from the Perspective of Estonia. 2 Review of Central and East European Law 34, 173–191. 1.1.
    2.6. Ulst, I. (2008). SMS-laenudega seotud õiguslikud probleemid Eestis: kuidas tasakaalustada tarbijaotsuseid ja tarbijakaitset? MaksuMaksja nr. 10, 31–34. 1.3.
    2.7. Ulst, I. (2005). Suhtepangandus aitab paremini laenata. Äripäev, 19. detsember.
    2.8. Ulst, I. (2005). Avaliku ja erasektori ühisprojektid on Euroopas tõusev trend. Äripäev, 17. oktoober.
    2.9. Ulst, I. (2005). Euroopa äriühingu mudel ja selle rakendamine finantssektori äriühingute poolt. Juridica nr. 7, 466–474. 1.3.
    2.10. Ulst, I. (2005). Oma firma laenuvõimet saab ettevõtja ise hinnata. Äripäev, 19. september.
    2.11. Ulst, I. (2005). Linkages of Financial Groups in the European Union: Financial Conglomeration Developments in the Old and New Member States. Central European University Press, 150 lk. 2.1.
    2.12. Ulst, I. (2003). Finantskonglomeraatidega seotud riskid ja regulatiivne turvasüsteem. Juridica nr 10, 708–716. 1.3.
    2.13. Ulst, I. (2003). Rahapesu ja terrorismi finantseerimine: regulatiivsed aspektid ja finantssüsteemi kaitsmine. Juridica nr 7, 501–508. 1.3.
    2.14. Ulst, I. & Raa, R. (2003). Basel II and lending to SMEs: what lies ahead? EBS Review No 16, 62–74. 1.3.
3. Saadud uurimistoetused ja stipendiumid:
    3.1. Eesti Kõrgema Kommertskooli üliõpilaste kevadkonverentsi I preemia uurimistöö eest “Krediidiasutuste juhtidele esitatavad nõuded lähimineviku pangapankrottide taustal”, kevad 2001.
    3.2. Eesti Teaduste Akadeemia I preemia üliõpilaste teadustööde konkursil magistritöö eest “Euroopa Liidu finantskonglomeraadid kandidaatriikides: finantskonglomeraatide arengute ja mõju uuring”, oktoober 2004.
    3.3. Ülemaailmse Eesti Kesknõukogu (ÜEKN) stipendium 2007–2008 doktoriõpinguteks Tartu Ülikooli õigusteaduskonnas.
    3.4. Haridus- ja Teadusministeeriumi ning SA Archimedes poolt välja kuulutatud üliõpilaste teadustööde 2008. aasta konkursi III preemia ühiskonnateaduste ja kultuuri valdkonnas doktoriõppe astmes konkursitöö ”SMS-laenudega seotud õiguslikud probleemid Eestis: kuidas tasakaalustada tarbijaotsuseid ja tarbijakaitset?” eest.

3.5. Haridus- ja Teadusministeeriumi ning SA Archimedes poolt välja kuulutatud üliõpilaste teadustööde 2009. aasta konkursi I preemia ühiskonnateaduste ja kultuuri valdkonnas bakalaureuseõppe astmes konkursitöö "Arheoloogilise leiuainese õiguslik kaitse ja "musta arheoloogia" probleemid Eestis" eest.

4. Muu teaduslik organisatsiooniline ja erialane tegevus (konverentside ettekanded, osalemine erialastes seltsides, seadusloome jms.): osalus uurimistöös, Dierick, F. (2004). The Supervision of Mixed Financial Services Groups in Europe, European Central Bank Occasional Paper No. 20.

III. Erialane enesetäiendus

2005	EIB Credit Risk Training Program: Credit Analysis Module ja Credit Risk Analysis Corporates
2004	University of Minnesota Duluth, Labovitz School of Business and Economics (USA), Rotary International Business Internship Program
2003	Center for Financial Studies (Frankfurt am Main) kollokviumid: 1) Financial Industry Under Pressure – "Too Complex to Fail? International Financial Conglomerates and the Design of National Insolvency Regimes.", Prof. R.Herring (Wharton School) 2) Globalisation of Financial Markets – Risks and Opportunities "Towards Integration: Evolution of the Financial System of Accession Countries and their Integration with the EU Financial System." , L.Balcerowicz (Poola Keskpank)
2003	ILF ja Deutsches Aktieninstitut seminar "Hedge Funds: Risks and Regulation"
2003	Euroopa Keskpank (Frankfurt am Main), finantstabiilsuse ja järelevalve direktoraadi praktikant
2002	Preismann K. OÜ Võlaõigusseadus: faktooring, liising, frantsiising, tarbijakrediidilepingud, müügilepingud, arveldused ja maksekäsund, väärtpaberid.
2001–2002	Eesti Pangaliit, kaugkoolitus: Laenujuhtimine I, II
2001	SpareBank 1 SR-Bank (Stavanger), Põhjamaade Ministrite Nõukogu panganduspraktika stipendiumiprogramm

IV. Ühiskondlik tegevus

Kanepi harrastusteatri liige alates veebruar 2011
MTÜ Arheopolis asutaja ja vabatahtlik koordinaator alates veebruar 2011
J.W.Goethe-Universität Frankfurt, Institute for Law and Finance Alumni Association tegevliige alates juuli 2003
Rotary IBIP Alumni liige alates 2004
Eesti Kaitseliit, Naiskodukaitse (Tartu ringkond) tegevliige alates aprill 2006

V. Huvialad

Reisimine, arheoloogia, ujumine, suusatamine, klaver ja muusika, amatöörteater

DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS

1. **Херберт Линдмяэ.** Управление проведением судебных экспертиз и его эффективность в уголовном судопроизводстве. Тарту, 1991.
2. **Peep Pruks.** Strafprozesse: Wissenschaftliche "Lügendetektion". (Instrumentaldiagnostik der emotionalen Spannung und ihre Anwendungsmöglichkeiten in Strafprozess). Tartu, 1991.
3 **Marju Luts.** Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus. Tartu, 2000.
4. **Gaabriel Tavits.** Tööõiguse rakendusala määratlemine töötaja, tööandja ja töölepingu mõistete abil. Tartu, 2001.
5. **Merle Muda.** Töötajate õiguste kaitse tööandja tegevuse ümberkorraldamisel. Tartu, 2001.
6. **Margus Kingisepp.** Kahjuhüvitis postmodernses deliktiõiguses. Tartu, 2002.
7. **Vallo Olle.** Kohaliku omavalitsuse teostamine vahetu demokraatia vormis: kohalik rahvaalgatus ja rahvahääletus. Tartu, 2002.
8. **Irene Kull.** Hea usu põhimõte kaasaegses lepinguõiguses. Tartu, 2002.
9. **Jüri Saar.** Õigusvastane käitumine alaealisena ja kriminaalsed karjäärid (Eesti 1985–1999 longituuduurimuse andmetel). Tartu, 2003.
10. **Julia Laffranque.** Kohtuniku eriarvamus. Selle võimalikkus ja vajalikkus Eesti Vabariigi Riigikohtus ja Euroopa Kohtus. Tartu, 2003.
11. **Hannes Veinla.** Ettevaatusprintsiip keskkonnaõiguses. Tartu, 2004.
12. **Kalev Saare.** Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine. Tartu, 2004.
13. **Meris Sillaots.** Kokkuleppemenetlus kriminaalmenetluses. Tartu, 2004.
14. **Mario Rosentau.** Õiguse olemus: sotsiaalse käitumise funktsionaalne programm. Tartu, 2004.
15. **Ants Nõmper.** Open consent – a new form of informed consent for population genetic databases. Tartu, 2005.
16. **Janno Lahe.** Süü deliktiõiguses. Tartu, 2005.
17. **Priit Pikamäe.** Tahtluse struktuur. Tahtlus kui koosseisupäraste asjaolude teadmine. Tartu, 2006.
18. **Ivo Pilving.** Haldusakti siduvus. Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel. Tartu, 2006.
19. **Karin Sein.** Ettenähtavus ja rikutud kohustuse eesmärk kui lepingulise kahjuhüvitise piiramise alused. Tartu, 2007.
20. **Mart Susi.** Õigus tõhusale menetlusele enda kaitseks – Euroopa Inimõiguste ja Põhivabaduste Kaitse Konventsiooni artikkel 13 Euroopa Inimõiguste Kohtu dünaamilises käsitluses. Tartu, 2008.
21. **Carri Ginter.** Application of principles of European Law in the supreme court of Estonia. Tartu, 2008.
22. **Villu Kõve.** Varaliste tehingute süsteem Eestis. Tartu, 2009.

23. **Katri Paas.** Implications of Smallness of an Economy on Merger Control. Tartu, 2009.
24. **Anneli Alekand.** Proportsionaalsuse printsiip põhiõiguste riive mõõdupuuna täitemenetluses. Tartu, 2009.
25. **Aleksei Kelli.** Developments of the Estonian Intellectual Property System to Meet the Challenges of the Knowledge-based Economy. Tartu, 2009.
26. **Merike Ristikivi**. Latin terms in the Estonian legal language: form, meaning and influences. Tartu, 2009.
27. **Mari Ann Simovart.** Lepinguvabaduse piirid riigihankes: Euroopa Liidu hankeõiguse mõju Eesti eraõigusele. Tartu, 2010.
28. **Priidu Pärna.** Korteriomanike ühisus: piiritlemine, õigusvõime, vastutus**.** Tartu, 2010.
29. **René Värk.** Riikide enesekaitse ja kollektiivse julgeolekusüsteemi võimalikkusest mitteriiklike terroristlike rühmituste kontekstis. Tartu, 2011.
30. **Paavo Randma.** Organisatsiooniline teovalitsemine – *täideviija täideviija taga* kontseptsioon teoorias ja selle rakendamine praktikas. Tartu, 2011.
31. **Urmas Volens.** Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid. Tartu, 2011.
32. **Margit Vutt.** Aktsionäri derivatiivnõue kui õiguskaitsevahend ja ühingujuhtimise abinõu. Tartu, 2011.
33. **Hesi Siimets-Gross.** Das „Liv-, Est- und Curlaendische Privatrecht" (1864/65) und das römische Recht im Baltikum. Tartu, 2011.
34. **Andres Vutt.** Legal capital rules as a measure for creditor and shareholder protection. Tartu, 2011.
35. **Eneken Tikk.** Comprehensive legal approach to cyber security. Tartu, 2011.
36. **Silvia Kaugia.** Õigusteadvuse olemus ja arengudeterminandid. Tartu, 2011.
37. **Kadri Siibak.** Pangandussüsteemi usaldusväärsuse tagamine ja teabekohustuste määratlemine finantsteenuste lepingutes. Tartu, 2011.
38. **Signe Viimsalu**. The meaning and functioning of secondary insolvency proceedings. Tartu, 2011.