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New Regulated Credit and Loan Agreements in the New Czech and Hungarian Civil Codes

I Introduction

Credit and loan agreements are types of contracts commonly used by industry. Because of the financial consequences and often long-term binding character, the contract is of great importance for the borrower. Loan agreements existed already in Roman law, and it was a contract with demanding requirements[1] as to its form to allow for the eventually necessary personal enforcement against a defaulting debtor. The recodification of the Hungarian and the Czech Civil Codes has not left their credit and loan laws untouched, even though today we can rather talk of a pre-formulated business. In my paper, I will look into the new codification of credit and loan agreements in Hungary and in the Czech Republic with special reference to the definition and the termination of such agreements.

II Recodification

1 Recodification of Credit and Loan Contracts without Implementation of the European Consumer Credit Law

Both the Czech and the Hungarian legislator intended to include the widest possible field of civil law in the Civil Code; for example, family law is part of both codices. However, with respect to the European Directives, the legislators did not aim for their perfect implementation in the Civil Code. As regards the implementation of the directives, the Czech legislator chose a rather obscure mixed approach - in certain areas such as distance and off-premises selling, he placed almost all European standards into the Civil Code; but they left the law of consumer credit

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[1] At that time for eventually necessary personal enforcement against a defaulting debtor – in addition to the parties – five witnesses and a balance holder were necessary for an effective contract: see Franz Schnauder, 'The credit agreement through the ages *(Der Kreditvertrag im Wandel der Zeit)'* (2014) 17 WM book 783–791, 784.

completely outside the Code.[2] The concept of the Hungarian codification chooses a different path. Whereas recurring definitions, rules on contractual clauses of standard terms and conditions and some special rules for consumer contracts were organically integrated,[3] lengthy provisions of the Directive remained outside the Code. Implementing the Directives in the CC would have exposed the legislator to the risk of a permanent duty of implementation,[4] and placing the European consumer law in the CC could imperil basic principles of private law. Regarding the implementation of the Consumer Credit Directive, separate acts were enacted in these two countries – as in the majority of Member States; this is different in Germany[5] and the Netherlands,[6] where the directive has found a place in the Civil Code in the context of modernising the law of obligations.[7]

2 New Standards for Credit and Loan Agreements

Concerning credit and loan agreements, both legislators wanted to remove from the existing provisions the last traces of their socialist legacies; some types of contracts, such as bank credit, therefore, disappeared from the codes. The number of provisions regulating the law of credit grew in both Civil Codes; however, the increase in the Czech Civil Code was caused by the legislature transferring the old norms of the Commercial Code into the new Civil Code. With the recodification, the Czech legislator ended, with effect of 1st January 2014, the dualism in Czech civil law and made the Civil Code[8] the main Code also for commercial contracts.

As for the rules of crediting, both Civil Codes studied include separate definitions and rules for credit and loan contracts. They are hence structurally similar to the Austrian Civil Code, because many of the newer CC codifications – such as the German, Dutch CC[9] or the Civil Code

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[2] Similarly concerned the majority of the Member States including France, England, Austria, Romania, Malta, Latvia, etc: see http://eur-lex.europa.eu/search.html?instInvStatus=ALL&or0=DN%3D72008L0048*,DN-old%3D72008L0048*&qid=1410295078729&DTS_DOM=NATIONAL_LAW&type=advanced&lang=de&SUBDOM_INIT=MNE&DTS_SUBDOM=MNE&page=2.

[3] Lajos Vékás, 'Proposal for the modernizing of a general rules of contract law' *(Javaslat a szerződések általános szabályainak korszerűsítésére)* (2001) 3 PJK 3–14. <http://ptk2013.hu/polgari-jogi-kodifikacio/vekas-lajos-javaslat-a-szerzodesek-altalanos-szabalyainak-korszerusitesere-pjk-2013-3-14-o/865>.

[4] Because of the ever-changing EU consumer law, the legislator would make the CC to a permanent building lot. See Barbara Dauner-Lieb, Thomas Heidel, Gerhard Ring (eds), *Obligations in Civil Code trends and problem areas two years after the obligation law reform, (BGB Schuldrecht aktuell, Entwicklungstendenzen und Problemschwerpunkte zwei Jahre nach der Schuldrechtsreform)* (German lawyer Verlag 2003, Bonn) 5. See also: Peter Bülow, 'Consumer credit law in the CC *(Verbraucherkreditrecht im BGB)'* [2002] NJW 1145.

[5] The German legislator implemented the Consumer Credit Directive in 2002 at the obligation law reform under § 491 et seq. CC. See also Peter Bülow (n 4) 1145.

[6] The Dutch legislator has implemented the EU Consumer Credit Directive 2008/48/EU as a new chapter 7.2A DCC 'credit contracts for consumers' into the NL-CC in May 2011.

[7] The German legislator chose the so-called 'big solution' of integrating many smaller acts, such as the General Terms and Conditions Act, the Off-premises Selling Act, the Distance Selling Act and the Consumer Credit Act in the Civil Code. See Dauner-Lieb, Heidel, Ring (n 4) 5.

[8] Zákon č. 89/2012 Sb. občanský zákoník od 3.2.2012.

[9] It must be added that the Dutch legislator has introduced in May 2011 the implementation of the Consumer Credit Directive as a new chapter in the Code 7.2A. 'credit contracts for consumers.'

of Quebec – lack the definition of a credit agreement. The structural relationship of these contracts is visible in the Hungarian Civil Code.[10] Credit agreements serve as a precontract for further crediting contracts such as loan contracts. Such clarification is missing in the Czech Civil Code, and, surprisingly, the Austrian General Civil Code structurally reversed the relationship between credit and loan agreements. According to § 988 AU-Civil Code (Au-CC), loan contracts about money are called credit agreements. We immediately notice that the demarcation between loan and credit contracts is fraught with difficulties. Some bank lawyers even claim that the distinction between these types of contracts is artificial and alien to the system,[11] because the loan agreement is hardly regarded as a 'real contract' in practice.

III Definition and Termination of Credit and Loan Agreements

1 Credit Agreement

a) Secondary law definition of a credit agreement

The definition of a credit agreement can be found in secondary law. According to Art. 3 II. c. of the Consumer Credit Directive[12] 'credit agreement' means an agreement whereby a creditor grants or promises to grant to consumer credit in the form of a deferred payment, loan or other similar financial accommodation. Excluded are 'agreements for the provision on a continuing basis of services or for the supply of goods of the same kind; here the consumer pays for such services or goods for the duration of their provision by means of instalments'. This definition of the Directive does not necessarily constitute a particular type of contract of the law of obligations, but rather serves – in a more pragmatic way - as a specific expression of a contract, the purpose of which it is to give the consumer some form of financial aid or to promise this. According to Art. 2, para. 2 lit *f)* of the Directive, the provisions of the Directive (shall) apply only to credit agreements provided for a consideration. This may result from a deferral, but certain agency agreements or possibly certain leasing contracts[13] could also be regarded as credit agreements if the other conditions of the directive are fulfilled. From the European perspective, credit agreement is therefore a generic term, the sub-terms of which are loan, deferral payment or other financial aid.

The Dutch Civil Code in Article 7:57 c. adopts the definition of the directive without amendments. The German solution in § 491 para. 1 De-CC dispenses with the concept of a credit

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[10] *2013 évi V. törvény a Polgári Törvénykönyvről* (Act V of 2013, Hungarian Civil Code) 2013. Február 26.

[11] Petr Liska – Štefan Elek, 'Banking contracts in the New Civil Code of the Czech Republic *(Banki szerződések Cseh Köztársaság a új Polgári Törvénykönyvében)*' (2014) 5 Jogtudományi Közlöny, manuscript 12.

[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 OJ 87/102/EEC, [2008] OJ L133/66–92.

[13] Norbert Reich in Norbert Reich, Hans-Wolfgang Micklitz, *European Consumer Law (Europäisches Verbraucherrecht)* (4th edn, Nomos 2003, Baden-Baden) 739.

agreement, and instead uses the word loan in a broad sense, otherwise its scope would be too narrow.[14]

b) Credit agreements as a narrow sub-concept in the Czech Civil Code

Regarding the definition of a credit agreement, the Czech law text almost verbatim reminds us of § 407 on Bank Credit of the Commercial Code of 1991.[15] According to § 2395 CZ-CC the creditor agrees, by the loan agreement, to provide the debtor at their request and for their benefit with financial resources up to a certain limit, and the debtor agrees to repay the financial resources and to pay interest. The scope of the term is relatively limited, according to the Czech Civil Code: fungible goods cannot be the object of a credit agreement.

Why? This can be explained by the history of the old rule. In the period of socialism before 1989, only banks could offer credit to socialist organisations; individuals could only conclude loan agreements.[16] Credit agreements were therefore regulated by the Commercial Code and loan contracts by the Civil Code. When the Czech Civil Code was recodified, the Commercial Code was repealed, and many rules, such as the rules on credit agreements, were relocated in the new Code. With respect to credit agreements, the rules have been doubled, but their terms have not improved.

Due to the uncritical adoption of the former Commercial Code provisions[17] the new rules avoid extending the credit definition. They do not provide for a gratuitous contract. They are silent about the extraordinary termination rights of the creditor, and do not deal with the problems of loss in value of the security provided. Only the general causes on termination (§ 1998 et seq. Cz-CC) and on withdrawal (§ 2001 et seq. Cz-CC) might help, but these require that the parties have agreed upon rights of withdrawal and termination in the contract. Only for loans with a specified purpose does the old-new rule from the former Commercial Code[18] provide for extraordinary termination. If the credit is used for a different purpose than the one specified, the code guarantees an immediate right of withdrawal for the creditor (§ 2400 Cz-CC). The explanatory memorandum devotes little attention to this type of agreement. The legislator deals with the explanation of the rules in less than four phrases.[19]

c) Credit Agreement as a generic term in the new Hungarian Civil Code

The new Hungarian Civil Code (Hu-CC) regulates the credit agreement in more detail, because the old Civil Code of 1959 contained only a single paragraph on the bank credit agreement. Similar to the old Czech settlement, before the reforms only a financial institution could provide credit. The old contract type already structurally fulfilled the function of the Directive's

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[14] This would led to lack of implementation BT-Dr 14/6040, S 252, see also Peter Bülow (n 4) 1146.

[15] Zákon č. 513/1991 Sb., Obchodní zákoník od 5.11.1991 *(Commercial Code).*

[16] Liska–Elek (n 11) 12.

[17] Liska–Elek (n 11) 12.

[18] See. § 501 para. 2 CZ-Commercial Code

[19] K § 2395–2400, Petr Nečas, Jiri Pospisil, *Důvodová zpráva k NOZ v Praze dne 02.03.2012 516.* Available: http://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze. pdf.

concept of credit. The new codification only extended the contractual constructions to be granted and the circle of potential creditors. The creditor need no longer be a bank or a financial institution. The new definition in Section 6:382 Hu-CC: Credit agreements reads as follows: (1) Under a credit agreement the creditor undertakes to ensure the availability of a specific credit limit, and to conclude a loan agreement, contract of suretyship, guarantee contract or conduct another loan operations up to the said credit limit, and the debtor undertakes to pay the fee agreed upon.

The new regulation emphasises that the credit agreement is a separate type of contract, which has certain similarities with the precontract,[20] for example, the obligation to conclude a contract, upon fulfilment of certain conditions. Other than the precontract, the credit agreement has specific legal effects: the creditor must maintain the credit limit for which the debtor pays fees. Unlike the old rules, the new norms do not dictate a mandatory written form.[21] In addition, the new rules regulate in more detail the rights of the debtor to terminate the contract.[22] Generally speaking, the creditor must call on the debtor to provide adequate guarantees in the first place; without this he may terminate the contract only exceptionally in accordance with Section 6:382, para. Section 5 Hu-CC which provides: '[t]he creditor shall be entitled to terminate the credit agreement without requesting the debtor to provide adequate guarantees, if it is evident that the debtor is unable to provide adequate guarantees'. With this two-step termination mechanism and with extraordinary termination for the obviously non-performing credits, the Code provides for an appropriate balance of interests between the parties.

2 Loan Agreement

a) International examples

Loan agreements are not defined in secondary law. The 'DCFR' (Draft Common Frame of Reference),[23] which was prepared by the Study Group on a European Civil Code, attempted to define the loan agreement, in Book IV, part F, as a specific contract, but the scope of application of this contract is very limited. Neither consumer loans nor mortgage-secured real estate contracts are included in that definition of the loan contract.

Loan contracts IV.F. -1: 101: Scope reads:

(2) A loan contract is a contract by which one party, the lender, is obliged to provide the other party, the borrower, with credit of any amount for a definite or indefinite period (the loan period), in the form of a monetary loan or of an overdraft facility and by which the borrower is obliged

[20] XIII. Chapter § 6:37 Hu-CC.

[21] See § 522 para. 2 old Hu-CC from 1959.

[22] Preamble LII. Chapter Credit contract, § 6:382 Hu-CC.

[23] Christian von Bar, Eric Clive, Hans Schulte-Nölke (eds), prepared by the Study Group on European Civil Code and the Research group on EC Europe Private Law (Acquis Group), *Principles, Definitions and Model rules of European Private Law Draft Common Frame of reference (DCFR)* (outline edition, Sellier 2009, Munich).

to repay the money obtained under the credit, whether or not the borrower is obliged to pay interest or any other kind of remuneration the parties have agreed upon.

Concerning other recent international codifications of civil law, it should be noted that they nearly always distinguish a loan for use and a simple loan or loan for consumption[24] as in the Dutch Civil Code. German law distinguishes a loan of money and loan of objects.[25] Whereas a loan for use and also a simple loan or loan for consumption – unless otherwise agreed – are gratuitous, the CC of Quebec presumes them to be non-gratuitous.[26] In German law, both types of loan are usually non-gratuitous. According to the Dutch Civil Code, loan for interest contracts must be in writing, but the sum of interest is not a compulsory part of the contract.

b) Loan agreements in the Hungarian and Czech Civil Code

The rules on the loan agreement in the Hungarian and the Czech Civil Code show many differences. Even the placement of the rules shows a structural difference. While the Hungarian legislator regulated the loan requirements after the provisions on credit contracts, the Czech legislator - similar to the Austrian – has done that the other way round. The typical case of loan contracts, according to the Czech Civil Code, concerns fungibles and is gratuitous,[27] whereas the Hungarian rules provide for a non-gratuitous loan of a sum of money.[28] The gratuitous loan of money and a loan contract on fungible goods are regulated only as special types. In both countries the rules are applicable both to loans on securities and to loans of goods, which are traded on the stock exchange to apply (§ 6:389 para 1 Hu-CC, and § 2390 Cz-CC). The Hungarian rules make it clear (§ 6:389 para 2 Hu-CC) that they also apply to credit on goods, hire instalment purchasing and to all those non-gratuitous contracts which stipulate the advance performance of a service by one party.

The rules of these two countries differ furthermore in that the Hungarian borrower is not required to actually borrow the loans provided (praestare services) and that the options of the lender to terminate the contract have been specified in more detail in Hungary. The Hungarian Civil Code even allows for the refusal of the disbursement of the promised loan amount under the conditions of § 6:384 Hu-CC.

In addition to a limited right to extraordinarily terminate defaulting loans according to § 6:387 para 2 Hu-CC, the Hungarian legislature has provided for an ordinary right of the lender to terminate the contract. In addition to the termination rights of a creditor, the lender can terminate the contract according to § 6:387 para. 1 Hu-CC also in the event of delayed repayment, if the borrower does not provide additional security to compensate for a loss in value of the original security, if the borrower interferes with the examination measures of the lender, practically as a punitive measure, for example, when testing the solvency or concerning loans with a specified purpose. Here we notice a difference to the Czech law: while the Czech Civil Code punishes the

[24] See 7A: 14 at Book 7A Particular Contract NL CC.
[25] See §§ 488 and §§ 607 De-CC.
[26] See 2314 – (88) Quebec CC.
[27] See § 2390 Cz-CC.
[28] See § 6. 383 Hu-CC.

misappropriated use of credit only for credit agreements, but with a right of extraordinary termination, Hungarian law allows for this in the context of a loan agreement, but only in the form of ordinary termination.

Although both codifications deserve praise for adjusting the rules and making them more detailed and especially the Hungarian legislator for differentiating the termination rights of the lender, they deserve criticism for their silence on the right of the borrower to terminate the contract. It is a little surprising that they did not even attempt to solve in detail the problem of the continuing obligations – at least in the general provisions of the law of contract. Even though the parties might agree on a right of the borrower to terminate the contract, and the early repayment of a loan was already made possible by the old Consumer Credit Directive of 1987[29] – but only for non-mortgage secured loan agreements – we should look at this problem.

c) Termination of a loan agreement by the borrower

When reforming the German law of obligations in 2002, the legislator codified the case law developed since 1997,[30] which gave the borrower an extraordinary right to terminate the contract if he had a legitimate interest in doing so. Hence, for instance in the event of a divorce, relocation or a so-called scrap property, the borrower has the right to terminate a mortgage-secured fixed-rate loan,[31] but he must pay a so-called early repayment penalty *(Vorfälligkeitsentschädigung).* The early repayment penalty is a compensation for damages, and a complicated clearing method[32] between the parties. With this norm, the German legislator intended to strengthen the internal justice of the contract, with the liberalization of pacta sunt servanda, the principle under fairness considerations to restore the equality between the parties. The Austrian Civil Code also recognises the extraordinary right of both parties to terminate the loan agreement, if its perpetuation is unreasonable for important reasons (§ 987 Au-CC).

The German legislator armed the borrower with other ordinary rights of termination, depending on whether the contract provides for a fixed or a variable interest rate (according to § 489 De-CC). With these rules, the German legislator intended to counteract the General Conditions of the banks which provided for the affiliation of interest. Further clues for the solution of conflicts of interest in the context of the performance of continuing obligations are provided by the general law of obligations (§§ 312-313 De-CC) if the circumstances of the original basis of the contract for the performance of continuing obligations have severely altered and the perpetuation of the contract is unreasonable (§ 490 para. 3 in conjunction with § 313 and 314 De-CC).

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[29] Art. 8 of the Council of 22 December 1986 on the approximation of laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ Directive 87/102/EEC, [1987] L042/0048-0053, in the new Consumer Credit Directive 2008/48/EC of the provision is in Article 10, paragraph 2 *r)* agreements.

[30] BGHZ 136, 161, 164 et seq.

[31] Klaus Peter Berger in Franz Jürgen Säcker, Roland Rixecker, *Münchener Kommentar* (5th edn, CH Beck 2010, München) Obligation law, special part to § 490 para. 2 et seq. p 827; see also Stephan Grundmann, 'Loan and credit law after the reform of the obligation law *(Darlehens- und Kreditrecht nach dem Schuldrechtsmodernisierungsgesetz)'* [2001] BKR 66–72, 70.

[32] The legislator willfully adhered to any method of settlement. In practice there are several methods to be avoided. See K. P. Berger (n 31) 838.

Neither the Hungarian nor the Czech credit law was inspired by these credit management prescriptions. The general rules of the law of obligations allow for a change in the contract at any time; however, considering the bargaining power of the parties, that will often be unrealistic. In instances of a grossly disproportionate agreement, the parties have right to renegotiate the contract (deviation from clausula rebus sic standibus) and if these negotiations fail, the court can help.

The right to compensation of the lender remains. As defined in § 2399 para. 2 Cz-CC, the borrower has to pay interest only until repayment of the principal, but which other claims the lender may make for early repayment of the loan remains unclear. The Hungarian legislator recognises at least the problem and explains in the explanatory memorandum on the early settlement of monetary debts that the claims of creditors must be recognised.[33] However, the rules in § 6:36 Hu-CC only states that the debtor bears the additional fees caused by the early redemption without further clarifying what this includes and up to which amount. The definition of the additional costs remains the task of jurisdiction or further legislation. With regard to consumer contracts, the legislature limits the amount of additional fees to be paid according to § 6:131 Hu-CC, to the costs *directly* caused by early redemption.

It is too early to see whether such detailed rules solve the problem in practice. However, if it is recognised that in 2002 the German banks adopted the termination rights immediately in the so-called General terms and conditions of the banking industry,[34] one might wonder whether a clear provision in the Hungarian and Czech Civil Codes might not also contribute to legal certainty or to a better balance of interests.

IV Summary

Concerning the credit and loan agreements, both legislators wanted to remove from the existing provisions the last traces of their socialist legacies. Both Civil Codes include separate definitions and rules for credit and loan contracts. Regarding the Czech rules on credit agreements, the legislator adopted – uncritically – the former Commercial Code provisions and the new rules avoid extend the definition of credit, are silent about the extraordinary termination rights of the creditor, and do not deal with the problems of loss in value of the security provided. The new Hungarian regulation emphasises that a credit agreement is a separate type of contract, which has certain similarities with a precontract. The new rules regulate in more detail the rights of the debtor to terminate the contract; the rules provide for an appropriate balance of interests between the parties.

[33] T/7971 sz. *Törvényjavaslat a Polgári törvénykönyvről,* 555 et seq.

[34] Arne Wittig, 'Critical and non-performing loan management – changes due to the obligation law reform *(Kritische und notleidende Kreditmanagements – Änderungen auf Grund der Schuldrechtsreform)'* [2002] NZI 635 et seq.

The norms on the loan agreement in the Hungarian and the Czech CC show many differences. Even the placement of the rules shows a structural difference, but in both, rules are applicable to loans on securities and to loans of goods which are traded on the stock exchange Regarding termination, we notice also differences: while the Czech Civil Code punishes the misappropriated use of credit only for credit agreements but with a right of extraordinary termination, the Hungarian law allows for this in the context of a loan agreement, but only in the form of ordinary termination. Although both codifications deserve praise for adjusting the rules and making them more detailed and especially the Hungarian legislator for differentiating the termination rights of the lender, they deserve criticism for their silence on the right of the borrower to terminate the contract.