Structural Barriers for a European Internal Market in Consumer Credit Information Systems and the European Free Movement Rights: the Case for Institutional Reform

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Abstract

This paper examines the state of affairs of consumer credit information systems in the EU in view of a single retail credit market. It suggests that the industrial organisation and institutional structure in place contravene the fundamental European free movement rights and present structural problems that impede a European dimension to the cross-border exchange of consumer credit data. Ultimately, they constitute a barrier to the creation of the Internal Market. Thus, to the extent that information sharing devices are important for a thriving European market in consumer credit, the EU legislator should start to re-think an institutional reform and a new form of governance.

A. Introduction

Consumer credit reporting has become the instrument most extensively used by lenders to underwrite decisions on borrowings or the supply of goods and/or services to customers. Lenders, in fact, access credit reference databases managed by third party providers (the so-called 'Credit Reference Agencies') in order to evaluate a consumer's credit application and his or her creditworthiness.

Credit Reference Agencies (CRAs) have evolved as organisations providing information sharing devices in the financial system in order to meet the problem of asymmetrical information between borrowers and lenders. By providing rapid access to standardised information on potential borrowers, they represent the response to the demands for such type of data from banks and other financial intermediaries. Nowadays, as a result, CRAs represent a very important tool for the assessment of risk-management at the decision-making stage of granting credit to consumers, thus becoming one decisive element in such process.

At EU level, the creation of an efficient single consumer credit market in an environment in which consumers receive adequate protection is a present concern on top of the agenda for the completion of the Internal Market. To reach this goal, the existing Consumer Credit Directive 87/102/EEC has proved to be ineffective.[1]

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[1] Directive 87/102/EC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit, OJ 1987 L 42/48.

European Journal of Law Reform, Vol. 10, no. 3, pp 297-320.

Thus, after years of intense discussions, the European Commission and the European Parliament have recently approved the text of a new directive on the harmonisation of the laws, regulations and administrative provisions concerning credit for consumers.[2] Among its provisions, Article 8(1) provides that

> Member States shall ensure that, before the conclusion of the credit agreement, the creditor shall assess the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, *on the basis of a consultation of the relevant database*. Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement (emphasis added).[3]

In light of the above, this work aims at presenting the state of the art of what the new legislation calls "the relevant database" within the Community, that is to say consumer credit information systems. It thus investigates whether and to what extent, with the present arrangements, there is or could be a European dimension in view to a forthcoming completion of a single retail credit market.

As well as offering an insight of the credit information sector and capturing the major differences between the national systems, the ultimate purpose of this investigation is to establish whether the present industrial organisation and institutional structure complies with the fundamental European free movement rights and may allow an European system of cross-border exchange of information to boost a single market in consumer credit. In so doing, it will attempt to put forward the proposition that the present arrangements rather constitute a barrier for the internal market, motivating the EU to re-think a more appropriate form of governance.

Clearly, as many personal data of consumers are involved in such systems, there may be concerns over the protection of the informational privacy of European residents. Indeed, Article 9 of the new consumer credit directive makes clear that database access "shall be without prejudice to the application of Directive 95/46/EC."[4] This, however, raises complex legal issues about the effective respect of European data protection legislation that deserve separate attention and that have been analysed elsewhere.[5] Privacy concerns, therefore, will not be dealt with in this paper.

In an attempt to address the questions that it aims to answer and support its propositions, this paper at first describes the activities of CRAs and explains their role and functions. Following, once briefly recalled the current poor level of integration of EC credit markets, it endeavours to identify those elements that are unique to the consumer credit reporting market and the information distribution industry – both in terms of industrial organisation and institutional structure – and to look at the extent to which there exists a European dimension for the cross-

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[2] Consumer Credit Directive 2008 (Adopted by the Council on 7 April 2008). The text has been taken from the website of the European Parliament in May 2008. This is the final text. At the time of writing, the Commission has yet to publish the official version and give it a number and reference.

[3] *Id.*, Art. 8(1).

[4] *Id.*, Art. 9(4).

[5] *See* F. Ferretti, The Law and Consumer Credit Information in the European Community (2008).

border exchange of information and, prospectively, its possible evolution. Then, such an investigation will be put in context with the fundamental European free movement rights granted by the EC Treaty to verify how these arrangements comply with them and the goals that they aim to achieve.

By putting together and analysing all such elements, it finally attempts to suggest an answer to the question that constitutes its source of inspiration, making an assessment of the fitness for purpose of the existing consumer credit information systems vis-à-vis their adequacy and suitability to either shape or support an European single market in consumer credit.

B. Credit Reference Agencies and Their Role

CRAs are private companies that are deemed to represent an institutional response at the service of the credit industry to the problem of asymmetric information in financial markets. They maintain a full data sharing mechanism based on the collection of data from the various lenders of information about their customers and, at the same time, provide those same lenders with consumer credit reports along with other information services and decision making tools, making consumers' personal data and reputations accessible to other (potential) creditors.[6]

Economic theory has long stressed the importance of information in credit markets. Theorists have devoted a large body of analytical studies aimed at demonstrating that asymmetric information between borrowers and lenders poses problems of bad debts, moral hazard and adverse selection. They suggest that the lack of information on borrowers can prevent the efficient allocation of credit in a market and that one way that lenders can improve their knowledge of borrowers is through their observation of clients over time.[7]

As the theory goes on, CRAs play a pivotal role as a borrower discipline device as he or she would know that a default in re-payment compromises his or her reputation with all the other potential lenders on the market, cutting him or her off from credit or obtaining it at more costly terms. Information sharing would make it easier to predict with a certain degree of confidence the future payment behaviour of applicants allowing lenders to attract good borrowers and offering them better terms and conditions, thus promoting market competition that could ultimately result in benefit to consumers.[8]

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[6] CRAs usually integrate their databases with data from other public sources, such as, for example, electoral rolls, Court judgements, bankruptcies and voluntary arrangements, and other private information provided by other organisations which compile additional information referring to an individual thus forming a single file. Such files are then made available in the form of a Credit Report which is provided to the (potential) lenders for a fee paid to the one or more CRAs which they have decided to interrogate each time someone applies for credit or hire purchase.

[7] J. E. Stiglitz & A. Weiss, *Credit Rationing in Markets with Imperfect Information*, 71(3) American Economic Review 393 (1981); A. N. Berger & G. F. Udell, *Relationship Lending and Lines of Credit in Small Firm Finance*, 68 Journal of Business 351 (1995).

[8] D. W. Diamond, *Monitoring and Reputation: The Choice between Bank Loans and Directly Placed Debt*, 99(4) Journal of Political Economy 689 (1991); A. A. Admati & P. C. Pfleiderer,

Another reason for the industry's interest in CRAs is that through an extensive detailed collection and sharing of personal data they are considered to provide useful services in the fight against the growth of over-indebtedness of a borrowing individual. This would confer to the credit industry the tools for responsible lending policies, protecting individuals from running up significant borrowings beyond their means.[9]

It should be noted, however, that CRAs take decisive advantage of their ability to provide first-hand information and knowledge by offering additional services to the industry that involve the use of consumer credit data as the basis for their provision. Such additional services include, among the others, credit scoring, consulting, application processing, small business information reports, market and consumer research, debt collection, marketing, fraud prevention, identity verification of credit applicants (including identity theft detection and verification for money laundering), and other private transactions, such as, for example, commercial transactions, property rentals, telecom subscriptions, insurance contracts, and employment screening.[10]

C. European Consumer Credit Reporting Markets

Extensive literature and reports show that European credit markets are far from being integrated and remain fragmented. Such a conclusion is derived from the existence of a number of legal barriers among the Member States, as well as several integration indicators such as real price and interest differentials, absence of cross-border lending, poor market penetration by foreign lenders, the existence of large differences from country to country in the extension of consumer loans, differentials in demand, business models, language, and consumers' cultural and psychological factors in the use of credit. Likewise, natural and legal hindrances have been shown to be a major reason for the diversity of credit market structures across Europe.[11]

Forcing Firms to Talk: Financial Disclosure Regulation and Externalities, 13 Review of Financial Studies 479 (2000); T. Jappelli & M. Pagano, *Information Sharing, Lending and Defaults: Cross-Country Evidence*, 26(10) Journal of Banking and Finance 2017 (2002).

[9] For example in the UK *see* House of Commons Treasury Committee, *Credit Card Charges and Marketing*, Second Report of Session 2004-05 (2005).

[10] *See, for example*, Experian official website available via http://www.experian.co.uk; Equifax official website available via http://www.equifax.co.uk; CallCredit official website available via http://www.callcredit.co.uk.

[11] *See, for example*, M. O. Wyman, *Consumer Credit in Europe: Riding the Wave*, Research Report European Credit Research Institute (2005); A. San José Riestra, *Credit Bureaus in Today's Credit Markets*, ECRI Research Report No. 4 (2002), at 5; N. Jentzsch & A. San José Riestra, *Information Sharing and Its Implications for Consumer Credit Markets: United States vs. Europe*, Working Paper, European University Institute Workshop *The Economics of Consumer Credit: European Experience and Lessons from the U.S.*, (Florence, May 2003), at 8, also published as *Consumer Credit Markets in the United States and Europe, in* G. Bertola, R. Disney & C. Grant (Eds.), The Economics of Consumer Credit 27 (2006); L. Weill, *Efficiency of Consumer Credit Companies in the European Union – A Cross-Country Frontier Analysis*, ECRI Research Report No. 7 (2004), at 3-6; L. Weill, *Le rôle de la relation de clientèle comme barrière à l'entrée sur les marchés*

As a result from such a fragmentation of the European credit markets, so far not only consumer credit has developed differently from one member state to another, but it has also done so at a different pace with different organisational structures.

Overall, therefore, it is not surprising that these differences are reflected noticeably in the consumer credit reporting sector, which has mirrored the development of credit markets and has concentrated on national markets.

Alongside the uneven development of consumer credit, however, the information industry seems to present peculiarities of its own in relation to either the typology of the industrial organisation of national markets or their institutional structure. Interestingly, such characteristics may be strictly intertwined in some countries, while the same cannot be said in others.

The factors discussed below could be identified as the most significant ones for describing the sector, giving an idea about the present state of affairs in Europe.

I. Industrial Organisation

As far as the industrial organisation is concerned, while most countries have just one large credit registry dominating the market, some member states have two or (exceptionally) three companies competing on the same national market.

It should be observed at this stage of the discussion that a common trait shared by credit information systems is that, in economic terms, they are natural monopolies in that the extension of a system's coverage itself enhances its effectiveness.[12]

Although historically credit registries emerged (in the US in the early decades of the 20th century) to serve local business communities, thus being numerous and spread over a nation's territory, the need to achieve economies of scale with nationwide coverage to serve the market was the main reason behind the concentration process that occurred at a later stage.[13]

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bancaires, 53(2) Revue Economique 201 (2002); J. Crook, *The Demand and Supply of Household Debt: A Cross-Country Comparison*, Working Paper, European University Institute Workshop *The Economics of Consumer Credit: European Experience and Lessons from the U.S.* (Florence, May 2003); L. Guiso, *Consumer Credit and Household Loan Markets Across Italian Regions*, Working Paper, European University Institute Workshop *The Economics of Consumer Credit: European Experience and Lessons from the U.S.* (Florence, May 2003); S. Lea, P. Webley & C. M. Walker, *Psychological Factors in Consumer Debt: Money Management, Economic Socialisation, and Credit Use*, 16(4) Journal of Economic Psychology 681 (1995); N. Diez Guardia, *Consumer Credit in the European Union*, ECRI Research Report No. 1 (2002), at 7; K. Lanoo & A. de la Mata Muñoz, *Integration of the EU Consumer Credit Market – Proposal for a More Efficient Regulatory Model*, Centre for European Policy Studies Working Document No. 213 (2004), at 3-4; C. M. Buch, *Information or Regulation: What is Driving the International Activities of Commercial Banks?*, Kiel Working Paper No. 1011 (2000).

[12] M. Pagano & T. Jappelli, *Information Sharing in Credit Markets*, 48(5) The Journal of Finance 1693 (1993).

[13] M. Furletti, *An Overview and History of Credit Reporting*, Discussion Paper, Payment Cards Center, Federal Reserve Bank of Philadelphia (2002); R. Olegario, *Credit Reporting Agencies: A Historical Perspective, in* M. J. Miller (Ed.), Reporting Systems and the International Economy 115

Arguably, credit information markets differ from traditional markets in several ways. The most relevant one seems to be that they are dependent on network structures within which information is traded, where the participants that share the information constitute such a network.

Economic research describes networks as a form of industrial organisation and market governance. Jentzsch extensively explains its functioning:

> The architecture of the network is constituted of the number of participants as well as the symmetry (or asymmetry) of data flows between them and the system of information flows. (...) Information diffusion and its efficiency are influenced by the network architecture and the channels; hence architecture influences economic outcomes. In this context, information is at the same time integrated in vertical networks (as part of the value chain) as well as in horizontal networks (exchanges among different firms of the same industry).
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> (...) In credit reporting markets, the information flows among agencies, information suppliers and consumers constitute such a network of information which reveals strong feedback effects: its value increases as more creditors are connected to it. An increasing number of data sources produces a more detailed profile of the data subject and in turn enhances the risk prediction capabilities of the interconnected participants. The contributions of an increasing number of data sources will almost inevitably (...) increase the flow of information among the agents. (...) [T]he more the network of one agency increases, the more attractive it will be for potential participants leading to considerable bandwagon effects and network externalities.[14]

As the author ultimately clarifies, thus, "scale and scope effects also affect coverage, which has the propensity to universality. The more sources are connected to the network, the more detailed becomes the credit report and the more precise may become the risk prediction."[15]

In sum, the very nature of the credit reporting business demands that the success of the system depends on its extension, being of no or little use otherwise.

This, however, does not necessarily imply that competition in the sector is absent.

Certainly, for the reasons just explained, the credit reporting sector is a peculiar one and in the majority of countries only one system is in place. However, some other countries are experiencing competition. A precondition for this to happen, of course, is that the business must be left to private sector forces, although this does not guarantee *per se* a competitive market.

In the described type of market, with such a homogeneous product and service, the way in which CRAs may compete would be limited to prices, coverage rates, and data quality.[16]

(2003); M. E. Staten & F. H. Cate, *Does the Fair Credit Reporting Act Promote Accurate Credit Reporting?*, Working Paper Series, Joint Center for Housing Studies, Harvard University (2004); R. M. Hunt, *A Century of Consumer Credit Reporting in America*, Working Paper 05-13, Federal Reserve Bank of Philadelphia (2005).

[14] N. Jentzsch, *The Regulation of Financial Privacy: The United States vs Europe*, ECRI Research Report No. 5 (2003), at 30-31.

[15] *Id.* at 36.

[16] *See* T. Jappelli & M. Pagano, *Information Sharing in Credit Markets: The European Experience*, CSEF Working Paper n. 35, University of Salerno (2000).

The real ground for competition, therefore, seems to shift from the core activity of distributing consumer information to the additional services that they offer nowadays, such as, for example, credit scoring and marketing. As a result, experimentation and development of new products and/or services play a very important competitive role.

Indeed, due to the specialist know-how and experience involved, nowadays the battlefields for competition among CRAs (whether alone or in partnership with local players, these latter ones being usually very helpful for the commercial relations necessary for gaining the widest participation in the system) appear to be those international markets where credit reporting is not present or is at embryonic stage (mainly the emerging economies).

In the end, therefore, from the observation of the industry it may be argued that the unequal development of consumer credit from country to country, coupled with the peculiar competitive structure of the industry, has resulted in the establishment of national markets that rely on monopolies or, in fewer occasions, *de facto* oligopolies.

II. Institutional Structure

At the same time, from an institutional point of view, the main differentiating factor on how credit registries operate in Europe may be grouped under two main categories based on ownership. These are: (i) privately owned CRAs; and (ii) Public Credit Registries (PCR) generally managed by central banks or other domestic supervisory authorities.

As it is shown in Table 1 below, the picture in the EU appears a mixed one: while in certain markets only PCRs operate, in the majority of them the consumer credit reporting business has been left to free market forces. In some countries, however, PCRs and CRAs coexist.

The little literature available rightfully concentrates on this distinction about the ownership of the organisation managing the databases to explain the uneven development of consumer credit information systems in Europe.

For a detail of the EC Commission's policy and the position of the European Court of Justice on information exchanges among competitors *see* Commission Decision, UK Agricultural Tractor Exchange, OJ 1992 L 68/19; *Case T-35/92, J. Deere v. Commission*, [1994] ECR II-957 and *Case T-34/92, Fiatagri and New Holland Ford v. Commission*, [1994] ECR II-905; *Case C-7/95 P, J. Deere v. Commission* [1998] ECR I-3111 and *Case C-8/95 P, New Holland Ford v. Commission*, [1998] ECR I-3175. The EC Commission, after a series of decisions on individual cases, concluded that there is no per se approach to information exchanges but that a case-by-case approach is necessary for the assessment of whether information exchange systems are restrictive of competition. *See* Commission Decision, Cobelpa/VNP, OJ 1977 L 242/10; Commission Decision, Vegetable Parchment, OJ 1978 L 70/54; *Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, Suiker Unie and others v. Commission*, [1975] ECR 1663.

1. Private CRAs

The role and activities of CRAs have been already described above. In this section, therefore, only those features that are relevant to compare the two type of organisations serving the market will be taken into account.

Consumer credit information systems in the EU consumer credit markets are in most cases privately owned, normally in the form of independent for-profit companies with no restrictions on the type of shareholders, that may be either banks or other financial firms, as well as any other third party market players with no limitation of the sort. After all, in such circumstances CRAs are profit-seeking incorporated private companies that are subject to the same rules and regulations as every incorporated company doing business in the marketplace.

On limited occasions, however, the databases are managed by associations owned either by professional unions of credit providers or by a pool of credit providers themselves. In such cases, third party entry in the business is prevented and the activity is normally carried out not for profit.

Typically, CRAs have a broad range of client members, from banks to non-bank lenders including a wide array of businesses and agencies.

Of utmost importance, consultation by lenders of CRAs databases is not mandatory by law prior to the underwriting of credit and relies on a voluntary basis.

As participation by lenders in a privately owned consumer credit information system is not compulsory, the rules relating to the functioning of the system itself are not imposed by law or regulation but are contracted in a typical supplier-client relationship. The negotiating power of a lender changes from country to country depending on a number of factors, including for example competition in that market or maturity of the system (i.e. whether the CRA is a start-up activity with no or little client members or a well established one with wide market participation, as well as other conceivable situations in the between), or even both of them.

Private CRAs also provide to their clients related additional services and today commonly use statistical models to produce and sell credit scoring services by which they rate borrowers according to their credit history and their believed profile derived from the processing of information from different data sources. Where a wide range of data is available, the models are now intensively and increasingly used for other purposes other than the assessment of borrowers' creditworthiness, for example scoring customers to promote financial products, price loans, manage credit limits, etc.[17]

As it happens in every private sector market economy, where companies are driven by the need to make profits and prevail over competitors, CRAs are continuously persuaded to study, develop and commercialise new products or services to retain their existing clients and/or acquire new ones, thus using data mining techniques on credit reference data and other data sources at their disposal (personal data are, after all, their core business and asset).

[17] *See also* Jappelli & Pagano, *supra* note 16.

2. PCRs

The picture illustrated above changes in those countries where public authorities have taken an active role in the management of credit registries.

The Committee of Governors of the European Central Bank defines PCRs as information systems "designed to provide commercial banks, central banks, and other regulatory bodies with information about the indebtedness of firms and individuals vis-à-vis the whole banking system."[18]

PCRs are institutions typical of continental Europe, where they first originated and developed with the objective of providing an information system for supervisors to analyse financial institutions' (banks!) portfolios. Reportedly, Germany established the first PCR in 1934, followed by France in 1946, Italy and Spain in 1962, and Belgium in 1967.[19]

From the definition provided hitherto, it appears clear that the information collected by PCRs serves mainly two purposes: (i) to conduct the prudential supervision of banks, monitoring the health and soundness of the overall financial system of a country; and (ii) to assess and monitor the indebtedness of borrowers, both legal and natural persons.

The first purpose means that PCRs exercise a public function by furthering the general stability of the banking and payment system. As such, only banks participate in the system and are subject to the underlying rules, unlike CRAs that also take in non-bank lenders as client members. This public function is alien to the information sharing systems of CRAs that are designed to provide services in the interest of the profitability of a larger variety of lenders that includes, but is not limited to, banks. In this respect, CRAs databases are accessible by an indefinite number of potential client members, as they are conceived as open systems with the additional incentive of bringing an increasing number of subscribers into play to respond to competition pressures.

PCRs, by contrast, respond to the need of safeguarding the financial stability of the national system, which requires the monitoring of the safety and soundness of banks. It is also referred as 'prudential supervision' to emphasise the 'prudence' needed to manage banks, because – in very simple terms – banks collect and hold peoples' savings/deposits, are a vital source of credit for businesses, and manage the payments system.

Of course, prudential regulation, as any public intervention in the market, has costs. The collapse of a bank, however, is very likely to have negative effects on other banks because of the knock-on effect that the failure to meet its obligation has on the complex chains of transactions of the banking system (a phenomenon known as 'systemic risk'). The failure of a bank or parts of the banking system, then, is liable to have devastating effects on the economy at large and the lives of people. Failure of one bank may also affect the confidence of other financial

[18] T. Jappelli & M. Pagano, *Public Credit Information: A European Perspective*, *in* M. J. Miller (Ed.), Reporting Systems and the International Economy 81 (2003).

[19] M. J. Miller, *Credit Reporting Systems around the Globe: the State of the Art in Public Credit Registries and Private Credit Reporting Firms*, *in* M. J. Miller (Ed.), Reporting Systems and the International Economy 25 (2003).

intermediaries even if they are not directly implicated. Moreover, depositors may lose their money. They also need protection because at the time of banking they do not have the information that would enable them to assess the solvency and viability of a bank for their savings/deposits to be safe. Thus, traditionally the benefits for the safety and soundness of the system are perceived to outweigh the costs for banks of abiding to the authorities' prudential regulations.[20]

The supervision of the financial system encompasses a number of complex issues and elements that are far beyond the scope of this work. What is relevant for this discussion is that among the elements to achieve it there is the need for the authorities in charge of such a public function to have adequate and timely information about the behaviour, leverage, and condition of banks vis-à-vis the whole system. Among the many types of information needed by the authorities – such as asset quality, capital adequacy, liquidity, internal systems of control and security, income and dividends, foreign operations, and so on – it is included the regular reporting on past due loans and non-performing loans. This allows not only supervisors to be in control and have the information on the condition and performance of the supervisees to intervene timely in case of problems, but it also constitutes an instrument to promote transparency to favour greater reliance on market discipline. As far as this latter component is concerned, banks benefit from supervision in that they are provided with the instruments to control the quality of their loans. To favour this, PCRs provide banks and supervisors with information about the indebtedness of borrowers vis-à-vis the system.[21]

The described different function of PCRs from CRAs offers an account of the form that the former take, as well as the design of the information system.

In fact, although PCRs operate in many respects like the privately owned CRAs, substantial differences exist between the two.

As in the case of private CRAs, there is a two-way flow of customers' credit data between the credit grantors and the PCR. However, the key difference between PCRs and CRAs is that, as anticipated, the former are generally managed by central banks or other states' regulatory authorities. Essentially, financial institutions that are under the supervision of a country's central bank or supervisory authority are required to report certain credit data on a regular basis to the PCR by law or other regulation. Thus, as participation in a PCR is compulsory, its rules are imposed by law or regulation, not under contract as occurs with CRAs. This compulsory nature also means that PCRs have the complete coverage of the financial institutions of a country, and no bank lenders are left out as it may happen when parties are free to negotiate whether to take part in a system or not, or which system to be part of if more than one exists (as it happens in those countries where more than one CRA exist).[22]

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[20] R. A. Brealey, *et al.*, Financial Stability and Central Banks (2001), Ch. 2; R. M. Lastra, Central Banking and Banking Regulation (1996), Ch. 2; P. Cartwright, Banks, Consumers and Regulation 31-34 (2004).

[21] *Id.*

[22] Jappelli & Pagano, *supra* note 16; T. Jappelli & M. Pagano, *Role and Effects of Credit Information Sharing*, CSEF Working Paper No. 136, University of Salerno, (2005), also published *in* G. Bertola, R. Disney & C. Grant (Eds.), The Economics of Consumer Credit 347 (2006).

Equally, PCRs have a legal basis for demanding that reporting lenders remedy possible inaccuracies or make available missing data. Failure to comply results in sanctions that, by law, PCRs may impose (generally, penalty fees followed by supervisory actions).[23]

Indeed, such mandatory reporting and rules of participation represent a fundamental difference between a PCR and a CRA and have a decisive impact on the legal standing of consumer credit information systems.

In a different way, the assessment and monitoring of the indebtedness of borrowers (the element marked as (ii) in the above definition of PCRs) leads to another important difference between PCRs and CRAs, namely, that PCRs have universal coverage of all loans above a threshold amount determined by law or regulation (such threshold varies from country to country), and the information consists of credit data disseminated in a consolidated form. This means that, unlike CRAs, lenders have access to the total loan exposure of each borrower, there is no detail on individual loans, and no merger with other personal data or data mining occurs. Another important feature is that PCRs operate under strict confidentiality for participating banks. Participants not only are assured that the data that they provide are disseminated in aggregate form, but also that they are passed only to other banks and for the sole purpose of credit granting. No secondary uses, data mining, or data manipulation are attached to the system. Of course, the data provided by the banks can always be accessed in detail by the supervisor in charge of the system in pursuance of its line of duty for the purpose of banking surveillance.[24]

In essence, thus, the two ways flow involving PCRs can be summarised as follows: the first flow is from the participating institutions to the PCR. The latter, in turn, consolidates the data on the loans granted to the same borrower by each bank in order to obtain the total indebtedness, thus reporting the aggregate indebtedness. PCRs, therefore, do not report histories of individual loans but the borrower's aggregate position with respect to the entire banking system.[25]

This type of design of the system marks a significant difference with that of CRAs.

As anticipated, legislators did not consider information about credit operations below a certain threshold (i.e. small loans and other credit that constitute what today is referred to as 'consumer credit') either a threat for the prudential supervision of a sound national financial system or a concern in relation to indebtedness, "since small loans have little impact on system solvency or risk."[26] In reality, the number of incidents where retail loan defaults have had serious consequences for a lender and, consequently, the financial system, is trivial. If ever, this may occur if a lender is over-exposed in one area of large sum lending such as mortgages and market circumstances are so peculiar that property prices collapse at the same time as interest rates rise.[27]

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[23] Miller, *supra* note 19.

[24] Jappelli & Pagano, *supra* note 16.

[25] *Id.*

[26] Miller, *supra* note 19, at 39.

[27] S. Hefferman, Modern Banking (2005), Ch. 3.6. It should be noted, in addition, that even in the

In those countries where PCRs and CRAs coexist, the threshold also demarcates the market segment below which CRAs operate without the lenders having the opportunity to turn to PCRs, while the same cannot be said as far as it concerns the provision of information above such a threshold.[28] This segmentation, in fact, also enables CRAs to collect and store information about operations above the threshold (in detail, rather than in the consolidated form as PCRs). This is possible because the law, which makes their communication compulsory to the competent PCR, says nothing about their collection by others, i.e. it is not forbidden. Distinctively, in this upper market segment, CRAs are able to collect and provide their member clients with information with a precise degree of detail (for example, particulars of each line of credit a borrower has with reporting lenders) as opposed to the consolidated form that PCRs provide by rule of law or regulation. Again, this advantage is possible, as CRAs are not bound by the same rules that fix the functioning of PCRs.[29]

All the differences between CRAs and PCRs outlined above have induced some to argue that rather than being simple substitutes, the two seem to be complimentary parts of a country's whole credit reporting system.[30]

It seems undisputable from all the features discussed above that, as the situation stands, PCRs and CRAs cannot be substitutes to the extent that the formers exercise functions in the public interest that the latter are not entitled to perform. PCRs, however, can substitute CRAs to the extent that the lenders' debt provisioning remains tightly controlled and the amount of overdue or defaulted debt is controlled. When a borrower that deals with a bank is already indebted, the PCR sends to the concerned lender the borrower's aggregate position vis-à-vis the entire banking system.

However, whether CRAs can legitimately be complimentary to PCRs remains open to debate. This question raises difficult questions and complex legal issues such as, for example, the relevance, adequacy, and compliance of the existing legal framework with the arrangements and mechanisms in place or the design of CRAs systems to address the functions that they aim to perform. Similarly, they raise concerns over the privacy and right to non-discrimination of individuals, the powerful and arbitrary positioning of privately owned companies such as CRAs in the modern society, the real connection between credit reporting and the predictability of human behaviour, etc. Debates of the like are critical and have been analysed elsewhere.[31]

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unlikely event of such an occurrence, banks minimise exposure and the risk of failure through asset securitisation and/or the use of credit derivatives, complex financial operations where third parties – usually market investors – assume responsibility for the credit risk of the securitised assets. *See id.*, ch. 2.

[28] This, of course, unless a specific law prevents them to do so.

[29] *See* Jappelli and Pagano, *supra* note 16.

[30] *Id. See also* N. Jentzsch, *Best World Practices in Credit Reporting and Data Protection: Lessons from China*, Paper prepared for the International Workshop on Household Credit, Peking University and University of Virginia (2005).

[31] *See* Ferretti, *supra* note 5.

Leaving such debate aside on this occasion, thus, what is noteworthy for the present discussion is that the absence of market integration in consumer credit, coupled with differences in cultures, traditions, organisation, institutions, and laws (where PCRs exist) have contributed markedly to the uneven development and multi-layered segmentation of consumer credit reporting systems within the EC, surveyed in Table 1 below.

Also, an important feature that may be observed from such a fragmented picture concerns the differences in the type of information collected from country to country.

Table 1 below shows that the majority of credit registries (CRAs and PCRs) in the various member states collect and disseminate both positive and negative information; by contrast, a fewer, but still significant, number of them limit the collection and dissemination to only the negative information.[32]

Table 1: Consumer credit information systems in the EC

Country	*CRA or Consortium of credit providers and associations*	*PCR (Consumer data)*
Austria	X* Positive & Negative	X°
Belgium	X*	X* Positive & Negative
Bulgaria	X** Positive and Negative	X** Positive & Negative
Cyprus***	None	Bad-check list only°°
Czech Republic	X** Positive & Negative	
Denmark	X* Negative	
Estonia	X**	
Finland		X*† Negative
France		X* Negative
Germany	X* Positive & Negative	X°
Greece	X†† Negative	X

[32] An important distinction to be drawn when referring to the type of data collected and distributed by CRAs is the one between negative and positive consumer data. Negative data refer to information about defaults on payments, delays, delinquencies, bankruptcies etc. That is, information with a negative connotation on the payment history and the financial behaviour of the data subject. Positive consumer data, by contrast, refer to information about the financial standing, payments and other details which do not indicate a default or a late payment.

Hungary	X[••] Positive & Negative	
Ireland	X[•] Positive & Negative	
Italy	X[•] Positive & Negative	X
Latvia		X[••]
Lithuania		X[••]
Luxembourg[°°°]	None	None
Malta	X[•••] Positive & Negative	
Poland	X[••] Positive & Negative	
Portugal	X[•] Positive & Negative	X[•] Positive & Negative
Romania	X** Negative	X[••]
Slovakia		X[••]
Slovenia		X[••]
Spain	X[•] Positive & Negative	X[•] Positive & Negative
Sweden	X[•] Positive & Negative	
The Netherlands	X[•] Positive & Negative	
United Kingdom	X[•] Positive & Negative	

Sources and notes:

° Jappelli & Pagano, *supra* note 18.
°° Miller, *supra* note 19.
°°° Wyman, *supra* note 11, at 22.
• San José Riestra, *supra* note 11.
•• Data obtained by the author directly from the World Bank/IFC.
••• CreditInfo Group, http://www.creditinfo.com/.
† In Finland the operation of the public credit registry has been contracted out to a private company.
†† Tiresias, http://www.tiresias.gr/.

D. The European Cross-Border Exchange of Information

Arguably, the fragmented market structure in consumer credit reporting pictured so far has played an important part in the poor exchange of information among European consumer credit registries. At present, in fact, this occurs only at an

embryonic and marginal level between a handful of countries. This leads to the consideration that to date Europe still has an underdeveloped consumer credit information structure.

Although the EU has clearly expressed the political desire and drive for maximum harmonisation in the consumer credit sector, it is difficult to predict whether, when, or to what degree there will be a truly integrated European single market.[33]

Nevertheless, at present it is already apparent that for years an increasing number of people from the member states is circulating within the EU and more are likely to follow, either in the exercise of their right of freedom of movement or freedom of establishment in another member state.[34]

Such mobility of nationals of the member states within the EU – together with the recent introduction of the Euro currency that has started to remove at least a barrier to a more open credit market among the participating member states – has enhanced a limited tendency in cross-border data exchanges. In the analysis of such phenomenon, however, once again CRAs and PCRs need to be kept separated as no interaction between the two can occur for the legal reasons first above explained.

I. CRAs

As far as it regards CRAs, in some cases such tendency has resulted in the development of bilateral alliances between some of them operating in few member states, exchanging consumer data by virtue of a two way flow of information between each other that rely on private contracts between private parties.

In other cases, by contrast, few major multinational Anglo-Saxon CRAs have opted for a country-by-country market penetration strategy and are extending their operation by setting up subsidiaries (or else) abroad or through mergers and acquisitions of existing compatible entities, thus being able to pool information across company groups.

Also, it is worth of mention that the Association of Consumer Credit Information Suppliers (ACCIS) is working for the establishment of a network of CRAs across Europe under a project of difficult realisation called 'Key Factor System' that would ideally provide lenders with access to cross-border records through their national CRA.[35]

The outcome of the project would be a solution by which lenders merely require one connection to their national CRA. The system would grant financial institutions with access to cross-border records about a foreign consumer and input the data about the new credit line in their domestic CRA. Thus, the newly

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[33] *See* the Consumer Credit Directive, *supra* note 2.

[34] Workers – Article 39 TEU (ex Article 48), 42 TEU (ex Article 51). Right of Establishment – Articles 43-48 TEU (ex Article 52-58).

[35] *See* http://www.accis.org/. ACCIS is a member association that brings together 26 CRAs in 19 European countries. Its key functions are to promote, protect, and preserve the common interest of its members, including in particular the representation and advocacy of member interests vis-à-vis governments, the public, and other third parties.

generated credit data would always be maintained in the home country of the credit provider and the relevant national CRA. The national CRA in question, then, would inform the corresponding foreign CRA which would incorporate the data entry also in its database.[36]

II. PCRs

As far as it concerns PCRs, so far their function has been considered almost exclusively a domestic public policy issue, even though an inclination towards international cooperation is slowly starting to take place in what remains an area with an underdeveloped cross-border date exchange.

To date, however, this nascent form of data exchange by no means involves consumer credit information.

A recent research paper reports that PCRs in Europe have started to work together in the so-called Working Group on Credit Registers (WGCR). The Group – that is part of the Banking Supervision Committee of the European System of Central Banks – has finalised a plan for a pan-European data exchange among the PCRs of Belgium, Germany, France, Italy, Austria, Portugal, and Spain as well as representatives of the European Central Bank. As reported, the plan consists in the creation of

> a reporting system that allows data exchange on a regular basis. The credit register of country A will then receive information from the register in other countries on borrowers who also have debt in other European countries. (...) National financial institutions, on the other hand, are supposed to gain access to borrower information of other countries via their own credit registry.[37]

Although this undoubtedly represents an embryonic form of cross-border exchange of information on loans, however for the time being it has no relevance of any kind for the consumer credit sector, once again denoting a frequent confusion or lack of distinction that occurs in the literature of the subject about the essential difference between business and consumer credit reporting. The cross-border data exchange, in fact, is intended to provide information to financial institutions across Europe about the indebtedness of only their corporate customers as stored in other PCRs.

As explicitly documented by the Deutsche Bundesbank (the Central Bank chairing the WGCR), in fact,

> data on the total amount of loans taken up will be available for each of the participating countries as well as on an aggregated basis. The data will also provide a breakdown into asset items and off balance-sheet transactions. *There will be no cross-border exchange of information on loans to individuals* (emphasis added).[38]

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[36] European Credit Research Institute, ECRI Consumer Credit Newsletter, n. 5, 2002, at 6-7, available at http://www.ecri.be/HTM/newsletters/newsletters.htm.

[37] Jentzsch & San José Riestra, *supra* note 11, at 22-23. *Also in* Jentzsch, *supra* note 14, at 45.

[38] Deutsche Bundesbank, *EU Central Banks Open their Registers for the Cross-border Exchange of Information on Loans to Enterprises*, Press Release (7 June 2005) available at http://www.bundesbank.de/download/presse/pressenotizen/2005/20050607bbk1_en.pdf.

The major problems behind the creation of interfaces among the consumer credit information systems of the existing PCRs seem to be the different designs regarding coverage, reporting thresholds, type of information reported, and privacy protection clauses.[39]

Why then would PCRs limit their cross-border data exchange on the ground of privacy legislation while CRAs seem to operate undisturbed is hardly explicable and should represent a matter of separate discussion and debate for public consideration.[40]

Supposedly, in any event, these substantive problems are said to be compounded by the inertia that is often typical of public organisations which operate under low budget constraints and lack the competitive pressure of the private sector, an argument that suffers from the prejudice attached to public management as if central banks and other regulatory authorities were inefficient by definition.[41]

E. Structural Impediments for a European Single Market

Existing studies identify the need for a European single market in consumer credit and the creation of cross-border credit opportunities as the main factors for the need of the cross-border exchange of information among information systems. According to these studies, however, the cross-border exchange of information remains hampered by an alleged reduced mobility of retail borrowers outside their own country. Therefore, banks and other financial institutions still would not have sufficient incentive to further implement such exchange. In short, supply-demand restraints would explain the existing underdeveloped information structure in Europe.[42]

This analysis, however, seems to neglect/omit a number of other deeper reasons behind the marginal interconnection of existing consumer credit reporting systems.

It is not the scope of this work to investigate or discuss whether the scale of mobility of individuals within the Community is still too small or, rather, it is increasing to significant numbers stimulating the demand side of the business.

What by contrast seems evident for this discussion is that the described absence of market integration, coupled with the diversity in national market structures, industrial organisation, and institutional aspects make it difficult to exchange information between the various institutions serving the national markets.

While on the one hand PCRs and CRAs remain separate for structural and legal reasons, making the exchange of information impracticable between them and, therefore, among certain countries (i.e. those with only a PCR and those with only one or more CRAs), on the other hand also the private sector alone structurally reveals limits of its own.

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[39] Jappelli & Pagano, *supra* note 16.

[40] Ferretti, *supra* note 5.

[41] Jappelli & Pagano, *supra* note 16.

[42] San José Riestra, *supra* note 11; Jentzsch & San José Ristra, *supra* note 11; Jentzsch, *supra* note 14.

The mentioned Key Factor System shows that not all CRAs in Europe participate in the project. Equally, bilateral agreements between CRAs in different countries are limited in number and are subject to alliances responding to market competition logics.

Understandably, with exclusive reference to those markets where CRAs exist, it would be hard to conceive private competing companies such as CRAs cooperating one with the other in partnership in the exchange of information with competitors. The databases are undeniably each company's exclusive know-how and asset to be guarded from competitors (this would be particularly true in those countries where more than one CRAs operate).

As in every private sector, in fact, competition is – or at least should be – the rule of a free market economy. For example, a CRA in a country such as Italy where it operates in regime of competition with the subsidiary of the CRA operating in the UK will most probably avoid to do business with the same UK parent/controlling company, bearing also in mind that the same two companies may be competing in another foreign market (whether European or not).

In any event, a market whose players would form partnership agreements setting a single network system between them, as well as influencing their commercial strategies accordingly, would probably pose concerns about competition and the establishment of cartels in the consumer data distribution market.

Moreover, agreements of the like, whose object is the cross-border exchange of personal data between private companies that in turn disseminate the same information nationwide, would imply too many communications of personal data to an indefinite number of data controllers over a very vast territory, thus posing concerns and threats as regards the informational privacy of EC nationals, as well as major doubts about compliance with the existing data protection legislation. In any event, as the established fundamental rights of individuals would be at stake, this should be a matter for previous public debate, and policy making should follow a democratic process.[43]

As the situation stands, therefore, it could be argued that consumer credit reporting still remains structurally a national business with little prospects of growing European, at least within the framework of the existing legal and institutional framework.

All the same, if this remains the state of affairs across the EU, how could possibly be established a European system of cross-border exchange of information to boost a single market in consumer credit? And, more generally, how could the Internal Market be achieved if there are barriers of the like to the free movement of persons and freedom of establishment between member states?

Looking ahead, in fact, the free movement of people and effective mobility of Europeans from a member state to another, coupled with issues of non-discrimination based on nationality, will require harmonisation in the sector. How is a lender from a given member state supposed to behave when faced by the credit application of an EU foreign national who has changed residency to

[43] For a discussion on this types of problems *see* Ferretti, *supra* note 5.

that member state? EU nationals should not face barriers caused by the lack of information provided by CRAs (or the result of different national practices and cultures) or different selection criteria used in the hosting Member State. This would equate to discrimination based on nationality.

In all likelihood, the *prima facie* response to all the above questions that could be inferred so far from this study is that the present market structure and institutional architecture are not appropriate and a system of governance in a framework of legality should be re-thought for the sector. This view is reinforced if one considers the fundamental free movement rights embedded in the EC Treaty and the goals that they aim to achieve.

F. The European Free Movement Rights

There would be at least four main interrelated reasons to put forward the case for the need of a harmonised Community legal framework and the Community's competence in the area of consumer credit reporting:

i) The creation of a single market in consumer credit, as discussed earlier.

ii) The freedom of movement of people and of establishment within the EC. The free movement of people within the EC is one of the four freedoms forming the foundations of the Common Market. At first, this freedom was limited to workers and entailed the right to move to another Member State and to live there as a prerequisite to access the job market. A number of social and ancillary rights were the natural corollary to remove the barriers and disadvantages to the worker arising from the exercise of the right of free movement in order to ensure that the migrant and his/her family members integrate into the host Member State.[44] The freedoms of movement and residence granted under Article 39 (ex 48), together with the related social and other ancillary rights, were also granted to the self-employed and entrepreneurs in the exercise of the right of establishment and to provide services within the EC, and any

[44] Art. 39 (ex 48) of the EC Treaty.

As required under Art. 39(3)(d) (ex 43(3)(d)) and Art. 40 (ex 49), secondary legislation was introduced to give substance to the free movement of workers. Principal interventions include Directive 68/360/EEC, OJ 1968 L 257/13, governing rights of entry and residence; Regulation 1612/68, OJ 1968 L 257/2, governing access to, and conditions of, employment; Regulation 1251/70 OJ 1970 L 142/24, governing rights to remain in the territory of a Member State after having been employed there; Directive 64/221/EEC OJ 1964 L 56/850, governing Member States' right to derogate from the free movement provisions on the grounds of public policy, public security, or public health. Such measures were later repealed or updated by the so-called Citizenship Directive 2004/38/EC, *infra* note 46. The term 'worker' has been broadly construed by the following jurisprudence of the European Court of Justice. *See Case C-75/63, Hoekstra v, BBDA*, [1964] ECR 177; *Case C-53/81, Levin v, Staatssecretaris van Justitie*, [1982] ECR 1035; *Case C-139/85, Kempf v Staatssecretaris van Justitie*, [1986] EC 1741. For the free movement of students *see Case C-197/86, Brown v. Secretary of State for Scotland*, [1988]; *Case C-39/86, Lair v. Universitat Hannover*, [1989] ECR 3161. *See also* Directive 93/96/EEC OJ 1993 L 317/59 now replaced by the Citizenship Directive 2004/38/EC, *infra* note 46.

restrictions on such freedoms have been abolished accordingly.[45] Until recently, the EC free movement rights focused on the movement of those economically active. Finally, however, the EC has moved away from this position and expanded the right of free movement in an internal market that allows the free movement of all persons. Thus, not only the economically active ones but all nationals and the lawfully migrant residents of the Member States now benefit from such a right. In particular, Article 18 (ex 8a) of the EC Treaty provides that every citizen of the Community shall have the right to move and reside freely within the territory of the Member States. Secondary legislation gives effect to said free movement and residence of persons: Directive 2004/38/EC, also known as the Citizenship Directive, drawing on early Community legislation as well as the relevant jurisprudence and wide interpretations of the European Court of Justice, has renewed and integrated the earlier framework. Importantly, as said, it applies to all European citizens and legitimate third-country nationals irrespective of any test of economic sufficiency, removing restrictions on the movement and residence of natural persons within the Community.[46] Consequently, the rights contained in the citizenship provisions extend the network of protection offered to all European citizens who now enjoy the same related social and ancillary rights as the nationals of the host Member State.[47]

iii) The freedom to provide and receive services within the EC.
Article 49 (ex 59) of the EC Treaty provides that restrictions on freedom to provide services within the Community are prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.[48] And, without prejudice to the right of establishment, the person providing a service may temporarily pursue his/her activity in the State where the service is provided under the same conditions imposed by that State on its own nationals.[49] However, the scope of Article 49 does not simply refer to a temporary form of establishment where people move to provide services, or to services provided cross-border without physical movements. In fact, it also includes the situation where people move and remain in another Member State to receive the services.[50]

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[45] Art. 43-48 (ex 52-58) of the EC Treaty provide for the right of establishment. Art. 49-55 (ex 59-66) establish the right to provide services.

[46] Directive 2004/38/EC OJ 2004 L 158/77. Grounds for derogation are public security, public health, and public policy.

[47] *Case C-413/99, Baumbast v. R*, [2002] ECR I-7091; *Case C-85/96, Martinez Sala v. Freistaat Bayern*, [1998] ECR I-2691; *Case C-138/02, Collins v. Secretary of State of Work and Pensions*, [2004] ECR I-2703; *Case C-456/02, Trojani v. Le Centre Public d'Aide Sociale de Bruxelles*, [2003] C-144/13.

[48] Art. 49 (ex 59) of the EC Treaty.

[49] Art. 50(3) of the EC Treaty.

[50] *Case C-118/75, Watson v. Belmann*, [1976] ECR 1185; *Case C-286/82, Luisi v. Ministero del Tesoro*, [1984] ECR 377; *Case C-68/89, Commission v. Netherlands*, [1991] ECR I-2637. Note that the impact of citizenship rights may be also felt in this area of EC Law. *See* Case C-60/00, Mary Carpenter v. Secretary of State for the Home Department, [2002] ECR I-6279.

iv) The respect for the Community principle of non-discrimination according to nationality.

The EC Treaty expressly makes discrimination on the grounds of nationality illegal.[51] A common requisite in the free movement provisions and the achievement of the Common Market (including a single market in consumer credit) is the prohibition of all form of discrimination on the grounds of nationality, both direct and indirect. Such a prohibition has been central to the interpretation and development of the law throughout the years. At first, non-discrimination rights referred to those economically active and their family.[52] From the start, the European Court of Justice has adopted a very broad approach to the issue, including the challenge to rules which were not unequivocally discriminatory but which still had an adverse impact on people's ability to exercise their free movement rights. The prohibition of discrimination, in fact, applies to any rules which, although expressed to operate without distinction, constitute a barrier to the free movement rights.[53] It has a twofold purpose: it concerns both professional and personal rights. Together with the former rights, in fact, the law covers all social advantages whether or not attached to contracts of employment.[54] By contrast, in the case of a provider of a service under Articles 49 and 50(3) of the EC Treaty, the matter is less clear as far as it concerns the right to claim full equality other than access to, and conditions of, work in the host Member State. The related freedom to receive services, however, imposes an equal treatment also of personal rights, at least as far as it concerns rights apt to provide/receive in the host Member State those services on a temporary basis free from discrimination on the grounds of nationality.[55] At any rate, the Citizenship Directive now clarifies any doubt. It extends the provisions of equality of treatment and related jurisprudential interpretations

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[51] Art. 12 (ex 6) of the EC Treaty.

[52] Art. 39(2) (ex 48), 43 (ex 52) and 49 (ex 59) of the EC Treaty all provide that the freedoms granted to the migrant workers shall entail the abolition of any discrimination based on nationality between workers of the Member States.

[53] *Case C-415/93, Union Royale Belge des Sociétés de Football Association v. Bosman*, [1995] ECR I-4921.

[54] *Case C-207/78, Ministère Public v. Even*, [1979] ECR 2019.

Of particular interest for the subject matter of this work is *Case C-65/81, Reina v. Landeskreditbank Baden-Wurttemberg*, [1982] ECR 33. An Italian couple living in Germany claimed a special State-financed childbirth loan from a bank, which was however payable only to German nationals living in Germany. The bank claimed that the loan was not a social benefit as it was not granted as a social right and in any event was granted as every other loan on a discretionary basis (arguing that the difference in treatment was justified on account of the practical difficulties of recovering loans from workers later returning to their home country). The ECJ held that the loan should have been granted by reason of the claimant's objective status and that social advantages covered not only benefits granted as of right but also those granted on a discretionary basis.

Similarly, *see Case C-63/86, Commission v. Italy*, [1986] ECR 29 where it was held that a discounted mortgage facility available to Italian nationals was in breach of then Art. 7 EEC, now Art. 12 (ex 6), and therefore should have been made available on a basis of equality to all residing EC nationals in Italy.

[55] *Case C-293/83, Gravier v. City of Liège*, [1985] ECR 593; *Luisi v. Ministero del Tesoro, supra* note 50.

> to all Community citizens and third-country nationals lawfully residing, as well as providing or receiving services, in the territory of the host Member State.[56] In conclusion, thus, the impact of the concept of citizenship can be observed in full on the prohibition of discrimination based on nationality, enabling those who move and reside within the EC to enjoy the same treatment in law irrespective of their nationality, where direct or indirect barriers to such free movement provisions shall be removed.[57]

Importantly, no law or regulation provides for the right to credit, either in terms of straight professional or personal right.

Arguably, nevertheless, access to credit constitutes a precondition for the equality of treatment among EC citizens and lawful third-country nationals to fully enjoy the rights granted by the Community freedoms. At the very least, when a national or resident of a Member State applies for credit to a lender in another Member State, whether in the exercise of the freedom of movement right or the right to receive services, he/she should benefit from exactly the same treatment that nationals of the host Member State enjoy. For example, a consumer lawfully resident in another Member State should be able to buy goods at the same terms and conditions as anyone else, including the possibility of taking advantage of the credit/instalment purchase facilities on offer. It would be discriminatory to offer better deals to people only on the basis of nationality, especially if one considers that a number of expensive goods on many occasions may be purchased only on credit terms. Any direct or indirect barrier to achieve equality, therefore, should be removed.

Indeed, the problem with consumer credit reporting is that it seems to represent a barrier in the access to credit for foreign nationals, thus an indirect form of discrimination based on nationality that undermines the full enjoyment of the basic Community freedoms and their corollaries.

Moreover, it should not be forgotten that communication between certain countries is at present impossible for structural and institutional reasons (for example, every time a French resident is involved), as systems are very different from country to country, access to them responds to different rules or practices, and there is no uniform standardisation of the type of information involved.

Leaving apart on this occasion any possible violations of data protection legislation, the inconsistency appears to be that there is no credit history of a migrant the first time he/she accesses a Member State's credit market. Should this circumstance constitute a barrier, turning down the application or providing credit at a more expensive rate, then the discrimination based on nationality would be blatant. In the opposite case, by contrast, it would be hard to accept credit reporting as an effective tool for credit risk management, and its use would be

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[56] Directive 2004/38/EC, *supra* note 46. Such extension has some limitations applying to those who are not economically active (excluding family members of economically active ones) as far as it concerns social assistance during the first three months of residence or while seeking work.

[57] Maybe the most interesting cases on the repercussions of citizenship can be observed in *Case C-184/99, Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193; *Collins v. Secretary of State of Work and Pensions*, *supra* note 42; *Case C-258/04, Office national de l'emploi v. Ioannis Ioannidis*, [2005] ECR I-8275.

hardly justifiable – it would be like saying that in truth no importance is attached to consumers' credit history, raising questions over the reasons for the existence and use of these systems by the credit industry.

Moreover, in the worrying scenario – at present far from existing – that all countries permitted CRAs to operate in their market and that the latter decided to form a European network, probably the legal obstacle for such a dissemination to exist, apart from the respect for data protection rights, would be that of a concerted cartel in the EC information distribution market. Further thoughts and debates would be necessary should such a presently distant possibility one day materialise.

As the situation stands, therefore, the EC dimension and its fundamental free movement rights seem to constitute an important legal obstacle for the sharing of information, as it indirectly discriminates against individuals based on their nationality.

At the same time, this condition could possibly act as a disadvantage also for lenders which risk losing out on the market of consumer migrants, or which may grant credit to individuals who have a bad credit history and/or are over-indebted in another Member State.[58] This, at least, seems to be the present scenario, unless lenders contradictorily recognise that they do not attach all that much importance to consumer credit reporting.

In the end, therefore, the European dimension suggests that there are important legal problems attached to the present consumer information sharing practice. It also seems to stress that, to the extent that consumer credit reporting is considered important for an efficient and thriving consumer credit market, an institutional re-organisation of the sector appears necessary.

Most probably, as the situation stands, even a European harmonisation and Community's competence would prove difficult for the identified institutional problems.

G. Conclusions

An overview of consumer credit information systems in Europe suggests that their reference markets are fragmented and still remain a national affair.

Certainly, this is the result of the negative picture provided by the integration indicators of the credit markets themselves, as well as natural and legal barriers alike.

In addition, however, the industrial organisation and institutional structure of the credit information industry present features of their own that contribute markedly to an uneven development of the sector from country to country, leaving Community market integration an objective far from achievement.

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[58] It could also be the case, for example, of nationals of the same Member State of the lender who have a bad credit history or are over-indebted in another Member States where in the past they have been resident in their exercise of the right of free movement.

Although in recent years it has started to emerge a trend for an increasing number of EU nationals circulating and establishing in other member states, and despite the EU political desire for maximum harmonisation in retail credit markets, Europe does not seem to have adequate instruments in place to provide an European cross-border exchange of information, jeopardising every effort towards market integration.

In short, the picture that comes out from the above survey is that of a fragmented Europe with its own national information sharing systems in place, each one different from the others and responding exclusively to domestic needs. After all, as the situation stands, the structural problems of the credit information distribution industry, together with issues of competition and legal concerns, leave little ground for a European dimension.

This may also constitute a barrier to the Internal Market, creating discriminations among Europeans affecting importantly the basic freedoms of movement of workers and establishment.

As the state of affairs of consumer credit reporting seems to represent an obstacle to free movement, freedom to provide/receive services, and market integration, Article 95 of the EC Treaty could form the basis for Community competence in adopting those measures that have the objective of establishing the Internal Market as well as measures relating to its functioning.[59] However, as this analysis has attempted to point out, for this to be done the EC should start to question and re-think the institutional arrangements in place as the foundation from where to build an integrated credit market where consumers receive adequate protection.

For all these reasons, it may be argued that Europe should start to re-think the industrial organisation and institutional governance of the sector, insofar as the need for an European single market in consumer credit and the creation of cross-border credit opportunities represent the main drive for the need of the cross-border exchange of information among information systems.

There should be ground, therefore, for Community legislative intervention to remedy such a distortion to the operation of the internal market. Provided, of course, that consumer credit information is really the answer to responsible lending practices in an efficient and thriving European consumer credit market. This circumstance, however, should be still demonstrated – either by way of conclusive evidence of a relation of cause and effect or, at least, empirically – and, in any event, the underlying policy considerations and concerns over informational privacy and civil liberties threats should be studied cautiously beforehand.

[59] Art. 95 of the EC Treaty assigns Community's competence for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the Internal Market.