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Editorial*

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I.

The relationship between non-professional sureties and professional lenders is characterised by a structural inequality of bargaining power which is no less intense than the one underlying consumer contracts. Sometimes the sureties' substantive freedom of contract can be even more heavily restricted than the one of consumers, such as in case of suretyships of close family members or employees of the main debtor.[1]

Until now, sureties have not been subject to specific EC consumer law. This, however, will change soon. The proposal for a new Consumer Credit Directive dating from 11 September 2002[2] as amended on 28 October 2004[3] raises a whole range of questions with regard to suretyships:

A first category of issues concern the efficacy of the proposed regulation within its scope of applicability. Would the new Directive provide for adequate consumer surety protection? Would it have a positive or negative impact on the consumer credit market? Would the maximum harmonisation approach pursued by the proposed Directive force some Member States to reduce their existing levels of surety protection?

A second category of issues refers to vulnerable surety agreements not covered by the proposed Directive. Is it reasonable to exclude non-professional sureties guaranteeing business loans from the notion of consumer sureties? Do national contract laws award the former sufficient protection? Could national consumer bankruptcy laws help vulnerable sureties to avoid life-long indebtedness? Does the availability of effective consumer bankruptcy instruments affect the need for contract law remedies focusing on the substantive fairness of surety agreements?

The latter points raise then a third category of issues, focused on the tension between diversity and convergence in the laws of the Member States. Are there any common European principles in the national suretyship laws? To what extent do different legal systems achieve similar results in similar suretyship cases, despite the differences between the legal instruments formally applied? If the levels of protection

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1 *Cf.* the article by A. COLOMBI CIACCHI (chapters 7 and 11) in this issue.

2 COM(2002) 443 final.

3 COM(2004) 747 final.

of non-professional sureties in the Member States varied notably, would this be compatible with a European Constitution granting equal rights to Union citizens, and banning discriminations on the ground of nationality? Is harmonisation in this field desirable?

Ultimately, all these issues raise further and more general questions, such as the effect of the European Constitution on private law (including the constitutional boundaries of contract law harmonisation), and the socio-economic impact of laws protecting weaker parties (including the problem of judicial decision-making amidst the uncertainty concerning these empirical factors).

II.

The questions mentioned above form the subject of a research project run by the Centre of European Law and Politics at the University of Bremen (ZERP) in co-operation with the University of Oxford, and funded by the European Community.[4] The results of the first stage of this project were presented and discussed in Bremen on 30 November 2004, at the Round Table 'Protection from Unfair Suretyships in the European Union: Constitutional Dimension and Empirical Framework'. Six papers were presented at this conference, which are published in this special issue.

The Round Table was structured in three panels: (1) EC legislation and common principles of European private law; (2) European Constitution, and (3) Empirical framework.

In his opening speech, Prof. Dr. Peter Rott (University of Bremen) performed a critical analysis of the provisions of the proposed new Consumer Credit Directive concerning personal guarantees. In the second presentation, Prof. Dr. Sjef van Erp (University of Maastricht and Marie Curie Fellow at ZERP, Bremen) explored the EC law both in force and in preparation, and some national private law regimes, to demonstrate that the principle of accessority of the suretyship is a common principle of European contract law.

The second panel dealt with the impact of the European Constitution on contract law harmonisation and suretyship law. Prof. Stephen Weatherill (University of Oxford) warned against pursuing contract law harmonisation by neglecting the core question of competence. I defended instead the need for judicial harmonisation of contract (and suretyships) law via horizontal effect of European constitutional norms.

Within the third panel, Dr. Rebecca Parry (University of Leicester and Marie Curie Fellow at ZERP, Bremen) examined the mutual correlations between five categories of surety protection instruments: general social welfare policy, procedural

4 Marie Curie Host Fellowship for the Transfer of Knowledge (TOK) Development Scheme: "Protection from Unfair Suretyships in the European Union", co-ordinated by Gert Brüggemeier, Aurelia Colombi Ciacchi and Stephen Weatherill. For more information about this project see <http://www.unfairsuretyships.uni-bremen.de>.

protection, private law provisions concerning the giving of consent to a contract, regulation of the content of contracts, and consumer bankruptcy. Finally, Dr. Lorenz Kähler (University of Göttingen) explored the problem of judicial decision-making under uncertainty about the socio-economic consequences of rules protecting sureties, and came to the conclusion that in this situation an under-protective rule would be better than an over-protective one.

III.

To approach the same legal problem, that of the protection of non-professional sureties, from six different perspectives and to exchange highly differing ideas and policy arguments in a comprehensive discussion, has proven to be very enjoyable and fruitful. We hope that this special issue will concretely contribute not only to the academic debate, but also to the development of legislation (with particular regard to the new Consumer Credit Directive) and Court practice, both at national and at European level.