Goodbye freedom to contract! – Are German co-operative banks subject to an obligation to contract? – *Dr. iur. Verena Klappstein M.A., LL.M.*

Abstract

The debate about limiting the autonomy of the banks was rekindled by a decision of the Federal Court of Justice (*BGH*)[1] in January 2013. Whether and how German co-operative banks are subject to an obligation to contract concerning private customers, is the subject of the following article. There are two relevant parameters: a subjective and an objective one. The former concerns the nature of the membership. It will be shown that the co-membership can be an advantage for private clients with regard to the obligation to contract.

The latter is the object of the agreement and the related interests of private clients to conclude a contract. The payment services framework contract (*Zahlungsdiensterahmenvertrag*), the bank giro account contract (*Girovertrag*) and the contract of loan (*Darlehensvertrag*) will be exemplarily studied as possible objects for an obligation to contract.

1 *BGH* judgment of 15.01.2013, XI ZR 22/12, NJW 2013, 1519 et seq.

Content

Goodbye freedom to contract! – Are German co-operative banks subject to an obligation to contract?

1. Introduction

1.1 The problem

The freedom to contract is constitutionally protected under the general freedom of action in Article 2 I German Constitution[2]. According to the above Article, every individual and co-operative banks (as stated in Article 19 III German Constitution[3]) can enter into contracts of any content. The freedom to contract includes both the freedom to form a contract (*Abschlussfreiheit*) and the freedom of the subject matter of contract (*Inhaltsfreiheit*).

Despite the protection by German Constituion, the freedom of contract only exists *in principle*, i.e. not without exceptions. Firstly, the freedom of the subject matter of contract is limited by law under certain circumstances, for instance when the content involves the use of standard business terms §§ 305 et seq. German Civil Code (GCC, *BGB*). Secondly, the freedom to form a contract is also subject to exceptions. Its *positive* aspect is affected when the legal effect is denied for illegal or immoral transactions, §§ 134[4], 138 I[5]GCC. Its *negative* aspect, the freedom that one is not obliged to conclude any contracts can also be limited either by special laws or by the GCC, leading to an obligation to contract. Those special laws are, e.g. §§ 14 I 1 General Railway Act (*AEG*); 48 I Federal Code for the Legal Profession (*Bundesrechtsanwaltsordnung*); 1 I 1 statute of butterfat (*MilchFettG*); 5 II German obligatory car insurance law (*PflVG*); 2 IV Hessian Savings Bank Act (*Hessisches Sparkassengesetz*), the one on the basis of the GCC are §§ 826, 249 or in analogy of 1004, 823 I .[6] Even though an obligor might not be willing to conclude a contract, he must then conclude an account contract with a person that has no account. The question addressed in this article is, to what extent co-operative banks are subject to such an obligation to contract in retail traffic.

2 „*Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.*“ – Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

3 „*Die Grundrechte gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diese anwendbar sind.*“ – The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.

4 „*Ein Rechtsgeschäft, das gegen ein gesetzliches Verbot verstößt, ist nichtig, wenn sich nicht aus dem Gesetz ein anderes ergibt.*“ – A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.

5 „*Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.*“ – A legal transaction which is contrary to public policy is void.

6 See, each with extensive further references of cases and literature: Bork, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., pre §§ 145 et seq. para 20f.; Busche, in: Münchener Kommentar zum BGB, 6. Auflage, München 2012, pre § 145 para 21.

1.2 The course of action

Before starting the actual investigation, the term (2.1), history (2.2), dogmatic basis (2.3), requirements (2.4) and legal consequences (2.5) of the obligation to contract need to be illuminated.

The question of to what extent co-operative banks are in retail traffic subject to an obligation to contract has to be addressed for the purpose of two different groups of potential obligees: those that are already members of a co-operative bank (3.1) and those that are not (3.2). For the former, claims to conclude a contract might arise from the articles of association, the general terms and conditions of the co-operative banks, the law or general civil institution of obligation to contract due to the GCC. For members the three most relevant[7] contracts are investigated here: the payment services framework contract (3.1.1), the giro account contract (3.1.2) and the contract of loan (3.1.3). For the latter, the following questions have to be answerd. First, to what extent there might be an obligation to contract for the above three types of contract in their favor (3.2.1). The second question is whether co-operative banks must accept those non-members as members (3.2.2).

2. The obligation to contract

2.1 The term

Since 1920, the obligation to contract has been understood as follows without basic changes[8]: "The obligation to contract is the *obligation based on a norm of law*, obliging an *entity without its decision* in the *interest of a beneficiary* to complete a contract with *specific contents* or such a content that is to be determined by a non-partisan site."[9] In line with this explication there are five necessities: First, a rule of law must lead to an obligation to contract for the obligor that is secondly its legal consequence. Thirdly the obligor may not have been willing to conclude the contract on its own. Fourth, the object of the obligation to contract must be in the interest of the beneficiary and fifth have a certain content.

2.2 The history

When and why there is an obligation to contract, is not a question of our millennium or the last

7 For this conclusion see European Commission, Spezial Eurobarometer zu Finanzdienstleistungen für Privatkunden vom 17.02.2012, Bericht für Deutschland, p. 22, accessable at: http://ec.europa.eu/internal_market/finservices-retail/docs/policy/eb_special_373/germany-fr_en.pdf, last accessed on 12.06.2013 at 10 p.m.

8 Cf., for evaluation of the literature back to the 19th century: Bydlinski, AcP 180 (1980), 1 (3); Grüneklee, Der Kontrahierungszwang für Girokonten bei Banken und Sparkassen, Dissertation, Baden-Baden 2001, p. 25 et seq.; Grunewald, AcP 182 (1982), 181 et seq.; Kilian, AcP 180 (1980), 47 et seq.; Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 68 et seq.

9 Nipperdey, Kontrahierungszwang und diktierter Vertrag, Habilitationsschrift, Jena 1920, p. 7: „*Kontrahierungszwang ist die* auf Grund einer Norm der Rechtsordnung *einem Rechtssubjekt* ohne seine Willensbildung im Interesse eines Begünstigten *auferlegte* Verpflichtung*, mit diesem einen Vertrag bestimmten oder von unparteiischer Seite zu bestimmenden Inhalts* abzuschließen." – citations omitted.

centuries. It is a topic dating back to the Middle Ages[10], e.g. in the carriage of pilgrims to the Holy Land or the services of the common calling doctrine for common carriers and inn keepers in Common law[11]. With the creation of a market for goods and services and the associated increased demand, which meant that the provider could choose its own contractors, there was also an option to reject potential contractual partners. "Power without responsibility [...] the prerogative of the harlot throughout the ages,"[12] shall be restricted so that the free will and freedom of contract of the prospective contractee could be protected. Restricting the obligor's freedom of contract realizes thus in certain cases the contractual freedom of the obligee – or providing for more responsibility. This is why the legal institution of the obligation to contract was called into action. Nowadays, the obligation to contract is of course part of nowadays German case law.[13]. It, as in special law, can be found in the German legal system, not only in Article 151 of the Weimar Constitution[14] and the special crisis laws of World War I and II[15], but also in the case law of Supreme Court of the German Reich (*Reichsgericht*)[16]. As illustrated above, the obligation to contract can be located in different special rules,[17] and hence it is still a prevailing institute and problem today. It is of course part of nowadays German case law.[18]

2.3 The dogmatic foundation

The dogmatic foundation of a general civil obligation to contract, is not only relevant for its

10 Bydlinski, AcP 180 (1980), 1 (3).

11 Adler, 28 Harv. L. R. 135 (149–151); Arterburn, 75 U. Pa. L. Rev. 411 (421); Blackstone, Commentaries on the Laws of England, Volume II, Philadelphia 1860, p. 165; Halsbury's Laws of England, 5th edition, London 2008, 7, § 2 para 3; Halsbury's Laws of England, 5th edition, London 2008, 67, § 186; Simpson, A history of the common law of contract, Oxford 1975, p. 229 et seq.

12 Bewdley, The Kipling Journal 1971, 4 (7): „When Aitken acquired the Daily Express his political views seemed to Kipling to become more and more inconsistent, and one day Kipling asked him what he was really up to. Aitken is supposed to have replied: „What I want is power. Kiss 'em one day and kick 'em the next"; and so on. „I see", said Kipling, „Power without responsibility: the prerogative of the harlot throughout the ages".

13 Cf. for the last time: *BGH* judgment of 07.07.1994, III ZR 137/93, NVwZ 1994, 1240 (1241) with further references.

14 „*Die Ordnung des Wirtschaftslebens muß den Grundsätzen der Gerechtigkeit mit dem* Ziele der Gewährleistung eines menschenwürdigen Daseins für alle *entsprechen. In diesen Grenzen ist die* wirtschaftliche Freiheit des Einzelnen zu sichern. *Gesetzlicher Zwang ist nur zulässig zur Verwirklichung bedrohter Rechte oder im Dienst überragender Forderungen des Gemeinwohlpp. Die Freiheit des Handels und Gewerbes wird nach Maßgabe der Reichsgesetze gewährleistet.*" – The order of economic life must conform to the principles of justice, with the goal *of ensuring a dignified existence for all*. Within these limits, the *economic freedom of the individual is to be secured*. Legal obligation is only allowed to achieving threatened rights or claims of superior service in the public interest. Freedom of trade and industry is ensured in accordance with the laws of the Empire. – citations omitted.

15 Cf. Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 69.

16 *RG* judgment of 11.04.1901, VI 443/00, RGZ 48, 114 (127), cf. Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 75.

17 §§ 14 I 1 General Railway Act (*AEG*); 48 I Federal Code for the Legal Profession (*Bundesrechtsanwaltsordnung*); 1 I 1 statute of butterfat (*MilchFettG*); 5 II German obligatory car insurance law (*PflVG*); 2 IV Hessian Savings Bank Act (*Hessisches Sparkassengesetz*); for further examples cf.: Bork, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., pre §§ 145 et seq. para Bork, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., pre §§ 145 et seq. para 17; Kilian, AcP 180 (1980), 47 (53f.).

18 Cf. for the last time: *BGH* judgment of 07.07.1994, III ZR 137/93, NVwZ 1994, 1240 (1241) with further references.

enforceability[19], but also fundamentally for its existence. Depending on its basis, the underlying basic understandings of the obligation to contract itself can be different. As a dogmatic basis for a common civil obligation to contract (CCOtC), case law and literature favor different models, such as: an analogy to the special legal regulations,[20] a fault-based claim for damages under §§ 826, 249 GCC[21] or a strict quasi negating injunctive relief (*quasinegatorischer Unterlassungsanspruch*) in analogy to §§ 1004, 823 I GCC[22].[23] Each and every of these principles has advantages on one hand and disadvantages on the other hand. But they were always corrected in deviation of the otherwise prevailing dogmatic foundations for the claims with regard to the requirements imposed by the courts.

2.4 The requirements

Despite different dogmatic foundations, the requirements of a CCOtC can be structured as follows: First, a potential contractual partner has to pursue a legally protected interest, and so he must depend on the goods. Secondly, the obligee must be in general willing to contract and be able to provide the goods in the specific case. Thirdly, the obligor must depend on the obligee, such that there are no reasonable alternatives open to him in the first place. Fourthly there must not be any factual reasons which would justify the obligee's refusal.[24]

2.5 The legal consequences

For the contract to be concluded the obligee must first submit a competitive offer, which may then be accepted by the obligor.[25] However, if the obligor does not accept the offer, the obligee can sue for the proposal's acceptance; an allowing judgment replaces the obligor's acceptance pursuant to

19 Proclaiming only this: Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 71.

20 Grunewald, AcP 182 (1982), 181 (191); Larenz, Schuldrecht, Band I, Allgemeiner Teil, 14. Auflage, München 1987, § 4 Ia, p. 48.

21 *RG* judgment of 24.03.1931, VII 322/30, RGZ 132, 273 (276); *BGH* judgment of 07.07.1994, III ZR 137/93, NVwZ 1994, 1240 (1241); Breucker, JR 2005, 133 (136); Ellenberger, in: Palandt, 71. Auflage, München 2012, pre § 145 GCC para 9; Medicus/Lorenz, Schuldrecht, Allgemeiner Teil, 20. Auflage, München 2012, para 85; Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 73; Nipperdey, Kontrahierungszwang und diktierter Vertrag, Habilitationsschrift, Jena 1920, p. 54; Otto, Personale Freiheit und soziale Bindung, München 1978, p. 34; Schiemann, in: Erman, 13. Auflage, Köln 2011, § 826 para 56.

22 *BGH* judgment of 25.02.1959, KZR 2/58, *BGHZ* 29, 344 (351 f.); *OLG Karlsruhe* judgment of 08.11.1978, 6 U 192/77 Kart, WRP 1979, 61 (67): injunctive relief according to § 35 I 1 ARC; *LG Dortmund* judgment of 10.05.1973, 8 O 87/73 Kart, NJW 1973, 2212 et seq.; Birk, JZ 1972, 343 (349); Bork, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., pre §§ 145 et seq. para 22; Busche, Privatautonomie und Kontrahierungszwang, Habilitationsschrift, Tübingen 1999, p. 230 et seq.; Kilian, AcP 180 (1980), 47 (82); Nicklisch, JZ 1984, 105 (107); Schmidt, DRiZ 1977, 97 (98).

23 Cf. Bork, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., pre §§ 145 et seq. para 15–28 with further references; Busche, in: Münchener Kommentar zum BGB, 6. Auflage, München 2012, pre § 145 para 21.

24 Busche, in: Münchener Kommentar zum BGB, 6. Auflage, München 2012, pre § 145 para 22; Busche, Privatautonomie und Kontrahierungszwang, Habilitationsschrift, Tübingen 1999, p. 127 et seq.; Bork, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., pre §§ 145 et seq. para 22.

25 Bork, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., pre §§ 145 et seq. Para 29 et seq.

§ 894 I Code of Civil Procedure (*ZPO*).[26] If a contract has already been closed, which should have been closed due to an obligation to contract, the legal consequence is a general continuation of the duty as well as the prohibition of any notice of cancellation: However a cancelation might be allowed due to extraordinary reasons or to adapt the contract.[27]

3. To which extent are co-operative banks subject to an obligation to contract?

The answer to the question as to what extent co-operative banks are subject to an obligation to contract depends on the criterium of whether the obligee of the obligation to contract is a member (3.1) or a non-member (3.2).

3.1 The obligation to contract in favor for members – obligation to conclude a contract according to the corporate purpose

It is quite likely that a member would be interested in one of the agreement categories proposed by the co-operative bank. The three most relevant of which are the payment services framework contract (3.1.1), the giro account contract (3.1.2) and the contract of loan (3.1.3). For each of these agreement categories, one should pay special attention to the following three attributes. First of all, the dogmatic foundation of an obligation to contract might be found in the self-imposed by-laws, the law and the CCOtC. Secondly, one should look atas the dogmatic foundation, the requirements and the co-operative bank's possible defenses. Lastly, it is important to elicit the legal consequences that might arise due to an obligation to contract.

3.1.1 The payment services framework contract

§ 675f II GCC legally defines the payment services framework agreement. It is a continuing obligation of respective obligations for payment service providers and users. Whereas the service provider at least has the obligation to carry out payment transactions, the user has to pay the amount agreed upon, § 675f IV GCC.[28] Such a framework contract is necessary for certain services of payment, e.g. direct debit cashing in on a payment account of the payer or payment authentication tools.[29] In addition to the need to execute the payment transactions the payment services framework contract might lead to a greater number and a wider variety of obligations. These might be the operation of a payment account or the supplemental agreements to check or to an overdraft

26 *OLG Karlsruhe* judgment of 25.05.1977, 6 U 105/76 (Kart), BB 1977, 1112 et seq.; Busche, in: Münchener Kommentar zum BGB, 6. Auflage, München 2012, pre § 145 para 23; Bork, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., pre §§ 145 et seq. para 33.

27 Busche, in: Münchener Kommentar zum BGB, 6. Auflage, München 2012, pre § 145 para 23; Bork, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., pre §§ 145 et seq. para 32.

28 Omlor, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., § 675f para 9.

29 Omlor, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., § 675f para 8.

privilege.[30]

3.1.1.1 The dogmatic foundation

The dogmatic foundation of the obligation to contract might be found in the self-imposed articles of association, the German Co-operative Act (GCA, *GenG*) or the CCOtC according to the GCC.

3.1.1.1.1 The articles of association and German Co-operative Act

The relationship of co-operative bank and a member is primarily determined by the articles of association, § 18 I GCA. Exemplarily the articles of association of the co-operative bank of Hesse were looked at.[31] They do not provide for an explicit obligation to contract for its members' benefit. There are only hints with regard to the funding objective (*Förderzweck*) that can be found in § 2 I (economic members' promotion and support[32]) and the corporate purpose in § 2 II (the implementation of standard bank and additional services[33]) of the articles of the association. The payment services framework agreement is a standard bank service. Complementary services are typical for co-operative banks.[34] Nevertheless, these examples founded on the articles of association do not contain an explicit obligation to contract. Due to the far-reaching legal consequences, this needs to be stated expressly.

Neither the GCA contains a rule with an explicit obligation to contract for the benefit of the members.[35] However, the exemplary §§ 2 I & II of the Co-operative Bank of Hesse substantiate the duty to support (*Förderauftrag*) of § 1 I GCA. The duty to support in unison with the principle of equal treatment[36] leads to the right of the members, to conclude with the co-operative association those contracts that are usually support transactions (*Fördergeschäfte*).[37] Conversely, it is therefore

30 Schürmann, in: Die zivilrechtliche Umsetzung der Zahlungsdiensterichtlinie, Berlin 2010, p. 11 (23).

31 Assocation articles of the co-operative bank of Hesse *(Volksbank Mittelhessen*) of August 2011, accessable at : http://www.vb-mittelhessen.de/mb669/Satzung-08-2011.pdf, last accessed on 12.06.2013 at 10 p.m.

32 Assocation articles of the co-operative bank of Hesse *(Volksbank Mittelhessen*) of August 2011, accessable at : http://www.vb-mittelhessen.de/mb669/Satzung-08-2011.pdf, last accessed on 12.06.2013 at 10 p.m.: „*wirtschaftliche Förderung und Betreuung der Mitglieder*".

33 Assocation articles of the co-operative bank of Hesse *(Volksbank Mittelhessen*) of August 2011, accessable at : http://www.vb-mittelhessen.de/mb669/Satzung-08-2011.pdf, last accessed on 12.06.2013 at 10 p.m.: „*Durchführung von banküblichen und ergänzenden Geschäften*".

34 Michel, Die Fördergeschäftsbeziehung zwischen Genossenschaft und Mitglied, Dissertation, Göttingen 1987, p. 16.

35 Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 114.

36 Schulte, in: Lang/Weidmüller, 37. Auflage, Berlin 2011, § 18 para 16–21 with further references.

37 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23; Fandrich, in: Pöhlmann/Fandrich/Bloehs, 4. Auflage, München 2012, § 1 para 7; Schulte, in: Lang/Weidmüller, 37. Auflage, Berlin 2011, § 1 para 30; Müller, Kommentar zum Genossenschaftsgesetz, 2. Auflage, Bielefeld 1991 ff., § 18 para 29; Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 114–116; Terbrack, EWiR 2003, 1031 (1032); different view: *OLG Köln* judgment of 07.08.2002, 13 U 149/01, WM 2003, 2138: obligation to contract for a loan unless expressly named in the articles of association, the general purposes are not enough to limit the negative freedom of contract; Pöhlmann, in: Pöhlmann/Fandrich/Bloehs, 4. Auflage, München 2012, § 18 para 26: obligation to contract only if this is explicitly stated in the articles of association, however it should be sufficient for such an obligation, if the service is one that is needed with regard to the support purpose, unless there are justifying reasons for a rejection.

the co-operative's duty to propose the conclusion of those support transactions to all members equally.[38]

But can the membership related right to conclude and the corresponding co-operative's duty to offer make a restriction of the co-operative bank's freedom to contract legitimate?[39] According to the explication stated above[40] an obligation to contract must firstly be based on a rule of law, secondly establish a duty as legal consequence, thirdly act in accordance with the obligor's will, fourthly be in the interest of the obligee ,and fifthly aiming at a specific contract.

The first requirement (a rule of law) is to be seen in § 1 I GCA with the co-operative's duty to support arising therefrom. The co-operative principle of equal treatment, which is based on the nature of the co-operative as an association to support its members (*Fördergemeinschaft*)[41], together with the mutual loyalty of the members[42], lead to an obligation to contract on behalf of the members.[43]

Admittedly, this legal consequence cannot be found explicitly in § 1 I GCA, but is only implicitly derived from it via interpretation. This is due to the fact that the funding objective – and thus the degree of funding transactions – are essentially necessary for the legal form of a co-operative; any membership without them is condemned as being meaningless.[44] The important principles, namely the funding objective and the principle of equal treatment, lead to a duty of the co-operative bank to enter into a payment services framework agreement with a member.

This must take place entirely without the will of the service provider. In situations that might lead to an obligation to contract, the obligee can regularly influence the object of his *invitatio ad offerendum*. In general, the obligor can rarely influence the selection of the potential contractors, though he might be able to preselect due to his own choice of location. It is not the same case for co-operative banks. If the obligation to contract is derived from § 1 I GCA and the principle of equal treatment, the obligor can influence the *invitatio ad offerendum* via the corporate purpose. Since the obligees so far can only be members and the co-operative as corporate enterprise decides which members it will have according to § 15 GCA, it can select in advance their potential contractual partners, and thus the obligees. Hence, though the contract is concluded against the will

38 Müller, Kommentar zum Genossenschaftsgesetz, 2. Auflage, Bielefeld 1991 ff., § 1 para 31a.
39 Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 116.
40 Vide supra: 2.1, p. 5.
41 *Gemeinschaft* does not mean the co-ownership by defined shares according to §§ 741 et seq. GCC.
42 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23.
43 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23: general obligation to contract; different opinion without further reasoning: Fandrich, in: Pöhlmann/Fandrich/Bloehs, 4. Auflage, München 2012, § 1 para 7; Schulte, in: Lang/Weidmüller, 37. Auflage, Berlin 2011, § 1 para 30: no obligation to contract.
44 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23.

of the obligor, his will still plays a crucial role in the selection of the contract partner. This pre-selection justifies the restriction of a co-operative bank's negative freedom of contract. Nevertheless, this situation differs from that of a preliminary contract that leads to a contractual obligation to contract. A preliminary contract refers to specific and individualized contractors, while the co-operative banks can only create a *pool* of potential contractors via selecting its members. Despite the mitigation through the selection of potential contractors by the banks, the situation is so similar that it is justified to speak of an obligation to contract. The fourth requirement (the obligee's necessary interest) and the fifth requirement (the predetermined contractual subject) are to be looked at for each and every subject.

3.1.1.1.2 The common civil obligation to contract

There is no room for a payment services framework agreement for a CCOtC on whatever basis because the subject of the contract must be of particular interest for the individual or the general public.[45] In other words, the obligee must follow a legally protected interest. He has to rely on the payment services framework agreement. However, such a contract only provides a legal framework for more specific agreements, which are yet to be completed. It is, as such, not particularly beneficial for the individuals or the general public, as such a contract can still be concluded through the institute of the CCOtC.

3.1.1.2 The requirements for an obligation to contract founded on § 1 I GCA

The first requirement of an obligation to contract to enter into a payment services framework agreement founded on § 1 I GCA is an existing membership. Exceptions must not exist, save for specific cases, e.g. presence of reasons to doubt the member's solvency or willingness to pay, or if the limits of the co-operative bank's capacity to serve are reached.[46]

The co-operative bank is allowed to defend. It must offer benefits in terms of a duty and willingness to support.[47] Meanwhile, the exploitation of the economic contingent on payment services framework contracts is a legitimate reason to reject a contract[48] as well as to differentiate due to different premises according to objective criteria.[49] The contract can then be adapted accordingly. Thus, the obligor's and obligee's freedom to contract are fairly balanced.

3.1.1.3 The legal consequences of an obligation to contract founded on § 1 I GCA

45 *BGH* judgment of 07.07.1994, III ZR 137/93, NVwZ 1994, 1240 (1241).
46 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23.
47 Schulte, in: Lang/Weidmüller, 37. Auflage, Berlin 2011, § 1 para 30.
48 Terbrack, EWiR 2003, 1031 (1032).
49 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23; Kern, in: Berliner Kommentar zum Genossenschaftsgesetz, Berlin 2001, § 18 para 18; Schulte, in: Lang/Weidmüller, 37. Auflage, Berlin 2011, § 18 para 16–21; Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 116.

The legal consequence of a § 1 I GCA based obligation to contract is the conclusion of a payment services framework contract between co-operative bank and a member according to the otherwise conventional conditions. This commands the co-operative principle of equal treatment. For in particular the obligor shall not modify the conditions in such a way that the contract is no longer acceptable to the obligee. Otherwise, this would turn the legal consequence of the obligation to contract upside down.

In fact, the member has to propose an offer that is acceptable to the co-operative bank. If the latter does not accept the offer, the member shall first exhaust the possible internal claim to be heard founded on the co-operative duty of loyalty, then he should proceed to any other existing co-operative internal legal actions.[50] Not until then he may sue for acceptance, which would be replaced by judgment, § 894 I Code of Civil Procedure (*ZPO*).[51]

3.1.2 The giro account contract – a special payment services framework contract

In order to deposit and use money in a bank account, one needs to have a giro account. With the implementation of the Directive 2007/64/EC on payment services in the internal market on 01.11.2009, the giro account contract is no longer regulated by the old version of § 676f GCC. It is now a typical payment services framework agreement in accordance with § 675f II GCC.[52] Yet is the two are not identical.[53] That is why an obligation to contract needs to be examined separately. The subject of a giro account contract is to run a current account according to § 355 German Commercial Code, and to provide for non-cash payments by credit and debit as a result of withdrawals, cheque deposits, etc.[54]

3.1.2.1 The dogmatic foundation

3.1.2.1.1 The banks' voluntarily negotiated agreement following the recommendation of the Central Credit Committee (CCC, ZKA*)*

Since 1991, a statutory right to a giro account had been asked for in the Lower House of German Parliament (*Bundestag*) along the lines of the obligation to contract for motor vehicle liability

50 Becker-Eberhard, in: Münchener Kommentar zur ZPO, 4. Auflage, München 2013, pre §§ 253 et seq. para 11 et seq.; Beuthien, in: Beuthien, 15. Auflage, München 2011, § 68 para 20 m. w. N.

51 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23; Glenk, Genossenschaftsrecht, 2. Auflage, München 2013, para 211; Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 116.

52 *Entwurf eines Gesetzes zur Umsetzung der Verbraucherkreditrichtlinie, des zivilrechtlichen Teils der Zahlungsdiensterichtlinie sowie zur Neuordnung der Vorschriften über das Widerrufs- und Rückgaberecht vom* 21.01.2009, BT-Drucks 16/11643, p. 102; Einsele, Bank- und Kapitalmarktrecht, 2. Auflage, Tübingen 2010, § 6 para 113; Grundmann, WM 2009, 1109 (1113); Schürmann, in: Die zivilrechtliche Umsetzung der Zahlungsdiensterichtlinie, Berlin 2010, p. 11 (23); Nobbe, WM 2011, 961 (962); Omlor, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., § 675f para 8 & 12.

53 Grundmann, WM 2009, 1109 (1113); Omlor, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., § 675f para 12; Werner, in: Bank- und Kapitalmarktrecht, 4. Auflage, Köln 2011 para 7.134.

54 Omlor, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., § 675f para 12.

insurance in § 5 German obligatory car insurance law (*PflVG*).[55] However, in 1995, the Central Credit Committee (CCC) recommended the formation of an alliance with five national associations of the German banking industry (including the Federal Association of German Co-operative banks and *Raiffeisen Banken eV*) its members to provide "any citizen in their respective business area on request with a giro account".[56] The CCC estimates that in practice such a legal obligation to contract is not required.[57] This estimation corresponds to the Euro barometer of the European Commission of 2012, according to which 95% of all Germans have a giro account.[58] Only 3% of which with no giro account said that the bank refused to contract. Other reasons for not having a giro account included the absence of wants of needs (24%), being too young to contract (18%) and the practice of using another one's giro account (9%).[59] Nevertheless the question arises as to what extent there is an obligation to contract for a giro contract and to what extent this obligation might impair the obligor's negative freedom of contract.

The banks' voluntary commitment following the CCC's recommendation cannot form a legal standard due to the lack of legislative competence. Therefore, it cannot legally bind all credit institutions with an obligation to contract.[60] At most the members of the CCC – and then relayed to the represented credit institutions – such liability could be created. Even if this was affirmed,[61] there

55 See for a detailed description of the political history: Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 58–67.

56 *ZKA*, Empfehlung der Deutschen Kreditwirtschaft zum „Girokonto für jedermann“, accessable at: http://www.die-deutsche-kreditwirtschaft.de/die-deutsche-kreditwirtschaft/kontofuehrung/konto-fuer-jedermann/empfehlung.html, last accessed on 12.06.2013 at 10 p.m.

57 *ZKA*, Hohe Akzeptanz der ZKA-Empfehlung zum „Girokonto für jedermann“, accessable at: http://www.die-deutsche-kreditwirtschaft.de/dk/pressemitteilungen/volltext/backpid/29/article/hohe-akzeptanz-der-zka-empfehlung-zum-girokonto-fuer-jedermann.html?tx_ttnews%5BpS%5D=1199142000&tx_ttnews%5BpL%5D=31622399&tx_ttnews%5Barc%5D=1&cHash=2ce3eaf0de06d4a0f89289ed0d47d4a0, last accessed on 12.06.2013 at 10 p.m.

58 *Europäische Kommission*, Spezial Eurobarometer zu Finanzdienstleistungen für Privatkunden vom 17.02.2012, Bericht für Deutschland, p. 22, accessable at: http://ec.europa.eu/internal_market/finservices-retail/docs/policy/eb_special_373/germany-fr_en.pdf, last accessed on 12.06.2013 at 10 p.m.

59 *Europäische Kommission*, Spezial Eurobarometer zu Finanzdienstleistungen für Privatkunden vom 17.02.2012, Bericht für Deutschland, p. 44, accessable at: http://ec.europa.eu/internal_market/finservices-retail/docs/policy/eb_special_373/germany-fr_en.pdf, last accessed on 12.06.2013 at 10 p.m.

60 *OLG Bremen* judgment of 22.12.2005, 2 U 67/05, BKR 2006, 294 (295): Präsenz auf der Webpage ist bloße Werbung; AG Stuttgart judgment of 22.06.2005, 14 C 2988/05, WM 2005, 2139; Berresheim, ZBB 2005, 420 (424); Geschwandtner/Bornemann, NJW 2007, 1253 (1254); Koch, WM 2006, 2242 (2245); Oechsler, NJW 2006, 1399 (1403); Segna, BKR 2006, 274 (276 et seq.); Omlor, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., § 675f para 13.

61 Like this: *LG Bremen* judgment of 16.06.2005, 2 O 408/05, WM 2005, 2137 (without legal capacity): the recommendation of the CCC was to all banks, which were merged into the federation, binding and was an abstract promise (*abstraktes Schuldversprechen*) of debt to third partiepp. The reason given for that is that the CCC's aim was to avoid a legal obligation to contract; Bachmann, ZBB 2006, 257 (261 et seq.); Derleder, EWiR 2006, 9; Derleder, EWiR 2003, 963 (964); Kohte, VuR 2006, 163 (164); Kohte, in: FS Derleder, Baden-Baden 2005, p. 405 (419); different view: *OLG Bremen* judgment of 22.12.2005, 2 U 67/05, ZIP 2006, 798 et seq.: no legally binding declaration; *LG Berlin* judgment of 08.05.2008, 21 S 1/08, ZIP 2009, 119 et seq.: no legally binding declaration for other credit institutions; *LG Berlin* judgment of 12.08.2008, 10 S 4/08: CCC's recommendation is neither an abstract promise of debt according to §§ 780, 328 GCC nor an offer of the credit institution according to § 145 GCC and there is no legal binding will of the CCC (wording: recommendation; history: defense of a legal

might still be no legal obligation to contract, but only at most a representation via the attributable rules. This protects the constitutionally guaranteed freedom of contract and does not diminish it. The mere publication of the CCC's recommendation on the internet presence of the bank was an offer *ad incertas personas* to conclude a giro contract only, which is far more distant to being a legal obligation.[62] As remote is the opinion that any similar recommendation, which is made to the Senate, was sufficient to form an obligation to contract.[63] This as well does not limit but puts the freedom to contract and the free will of the credit institutions into action.

Therefore, an obligation to contract to form a giro contract cannot be derived from the CCC's recommendation.

3.1.2.1.2 The articles of association and the GCA

For the savings banks, there is a special rule, such as in § 2 IV Savings Bank Act Hessen[64] providing for a legal obligation to a giro contract. Co-operative banks lack such a special rule, but one can derive such an obligation to contract from § 1 II GCA together with the by-laws and the principle of equal treatment.[65] Of course, the same requirements have to be met as mentioned above. The general terms and conditions of the co-operative banks[66] cannot form a foundation for a general obligation to contract, as they have to be implemented beforehand.[67] Even if the general terms and conditions were implemented due to a payment services framework contract, No. 7 I of the co-operative banks' general terms and conditions do not have as a legal consequence a giro contract's conclusion.

3.1.2.1.3 The common civil obligation to contract

Regardless of its own legal foundation[68], the CCOtC might lead to a duty to conclude a giro

obligation to contract); *LG Berlin* judgment of 08.05.2008, 21 S 1/08, ZIP 2009, 119 et seq.; AG Stuttgart judgment of 22.06.2005, 14 C 2988/05, WM 2005, 2139: typical for a recommendation is that it is non-binding; Berresheim, ZBB 2005, 420 (424 et seq.); Koch, WM 2006, 2242 (2245); Mülbert, WuB I C 1 Kontoführung 1.06; Oechsler, NJW 2006, 1399 (1403).

62 So with questionable endorsement of a binding will: Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 166–171: Actually wording, systematics and *telos* of the CCC's recommendation argue against a binding will of a bank publishing it. This is particularly true in the context that in the normal case – as Niekiel in another context admits (p. 47) – the customer offers the giro contract not the bank.

63 *LG Berlin* judgment of 24.04.2003, 21 S 1/03, WM 2003, 1895 et seq.: the Senate Department for Economics, Labour and Women's voluntary agreements directly leads to an obligation to contract.

64 „(4) *Die Sparkassen sollen nach Maßgabe der Mustersatzung jeder Einwohnerin und jedem Einwohner im Gebiet ihres Trägers auf Verlangen ein Girokonto auf Guthabenbasis einrichten*".

65 Different view: Kober, Tagungsband der IGT 2012, Wien 2013, p. 243 (247), who is of the opinion that such a co-operative obligation to contract does not exist at all.

66 *Bankenverband*, Muster der Allgemeinen Geschäftsbedingungen (AGB) der privaten Banken (Stand: Mai 2012) zwischen Kunde und Bank, accessable at: http://bankenverband.de/downloads/072012/agb-banken-deutsch-ab-05-2012.pdf, last accessed on 12.06.2013 at 10 p.m.

67 Like this though: Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 118 only with the argument the general terms and conditions would not hold an obligation to contract.

68 Vide supra: 2.3, p. 6; different view: Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 172–209, who sees the only legal foundation in § 826 GCC. As the requirements are the same, this is not of relevance.

contract.[69]

3.1.2.2 The requirements

3.1.2.2.1 For a claim based on the articles of association and on GCA

In addition to the membership the second requirement for a claim based on § 1 I GCA is, that the conclusion of a giro contract must a special support transaction that concretizes the co-operative bank's duty to support as stated in the articles of association. The giro contract does not have to be explicitly listed for that. It is sufficientif the articles of association include a provision which states that the giro contract can be subsumed as a support transaction. It suffices if "the implementation of standard bank and additional services" is listed as the description of the corporate purpose.[70]

The third (but negative) requirement is that there should be no reason to exclusion legitimizing the conclusion's refusal.[71] For this purpose one cannot only resort to general objective reasons,[72] but also to the special list of reasons of unacceptability as developed by the CCC.[73] Although CCC's recommendation is non-binding, it indicates the potential existence of reasons justifying exclusion.[74] Such reasons might be: an abuse of the co-operative bank's benefits, a member's misrepresentation, the nuisance or endangering of the bank's employees, any non-compliance of other agreements, an expected contract infidelity or account garnishment.[75] Mere economic disadvantages that arise due to low monthly input is not sufficient, precisely because there is no entitlement to a *free* giro account, but the bank is allowed to cover the costs with a basic charge.[76] Notably the bank is not allowed to select its members, excluding illiquid members entirely and *per se* of any support transactions, as this would thwart the exclusion as posted by § 68 GCA.[77]

The fear that co-operative banks could be thrown under the bus is not justified, because the members themselves stated the purpose to support, that was as well its founding purpose. The risk exposure of the co-operative bank is limited, since its duty exists only for its members. Non-members, on the other hand, can claim the conclusion only if other and harder requirements are

69 Vide: *LG Berlin* judgment of 08.05.2008, 21 S 1/08, ZIP 2009, 119 et seq.; Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 172–209; see in general: Busche, in: Münchener Kommentar zum BGB, 6. Auflage, München 2012, pre § 145 para 22 and Fn. 132, though rejecting it due to the existence of reasonable alternatives.

70 Like this § 2 II of the articles of association of the co-operative bank of Hesse, August 2011, accessable at: http://www.vb-mittelhessen.de/mb669/Satzung-08-2011.pdf, last accessed on 12.06.2013 at 10 p.m.

71 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23.

72 Vide supra: 3.1.1.2, p. 11.

73 *LG Berlin* judgment of 08.05.2008, 21 S 1/08, ZIP 2009, 119 (121); Kohte, VuR 2006, 163 (165).

74 Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 192 et seq.: according to the common civil obligation to contract such a "strict linkage" is not appropriate.

75 Bachmann, ZBB 2006, 257 (263).

76 *LG Berlin* judgment of 08.05.2008, 21 S 1/08, ZIP 2009, 119 (121).

77 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23.

fulfilled[78] and the co-operative bank is allowed to decline if justified reasons exist. Another issue, though being political, is of course, how the co-operative idea justifies the support of illiquid members via providing for better conditions in terms of the basic charge compared to that offered to non-members.

3.1.2.2.2 For a claim based on the common civil obligation to contract

A claim based upon the common civil law initially requires the obligee to pursue a legally protected interest. In other words, he must rely on the specific giro contract. To participate in the economic life without having access to book money – hence without a giro account – is now virtually impossible.[79] This is because most payments, especially salary, rent, utilities, insurance premiums, and also online purchases can be made without using cash. Instead, a giro contract is required. This also confirms the high prevalence of a giro account in the German population of 95% in 2012.[80] The required dependence on a bank giro account is reflected here.

The obligee must be dependent on the given contract, he must not have any *reasonable* alternatives. Such dependence does not exist, if there are objective alternatives that perform the same function as the contract does. In addition to this objective requirement, a subjective limb needs to be met as well, namely that the obligee must prove that he cannot contract with anyone else. It is sufficient if the obligee has asked an adequate number of banks, but not necessarily consulting all banks. Other local presence banks might pose such an objective alternative. Furthermore the obligee might need to ask non-local banks that offer online or phone banking.[81] To decide, which and how many banks the obligee has to ask, one has to bear in mind the following: in order to use the obtained payroll as book money, it must be cashed. Cashing money is rather difficult and would lead to increased costs, if non-local banks offer online or phone banking only. Hence, it is doubted whether those banks can perform the same function.[82] The question of reasonableness is also influenced by the saving banks' obligation to a giro contract as stated in the special law. If the obligee has access to such a savings bank, he has a reasonable alternative.[83] Apart from this case, however, the obligee's efforts to prove

78 Vide infra: 3.1.2.2.2, p. 15.

79 *LG Berlin* judgment of 08.05.2008, 21 S 1/08, ZIP 2009, 119 (120 et seq.); *LG Berlin* judgment of 12.08.2008, 10 S 4/08; *LG Stuttgart* judgment of 06.09.1996, 27 O 343/96, NJW 1996, 3347 (3348); Kohte, in: FS Derleder, Baden-Baden 2005, p. 405; Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 181 et seq.

80 *Europäische Kommission*, Spezial Eurobarometer zu Finanzdienstleistungen für Privatkunden vom 17.02.2012, Bericht für Deutschland, p. 22, accessable at: http://ec.europa.eu/internal_market/finservices-retail/docs/policy/eb_special_373/germany-fr_en.pdf, last accessed on 12.06.2013 at 10 p.m.

81 Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 186.

82 Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 187; different view: Busche, in: Münchener Kommentar zum BGB, 6. Auflage, München 2012, pre § 145 para 22 further references in Fn. 132: no dependence at all of the obligee of a special offeror.

83 *LG Stuttgart* judgment of 06.09.1996, 27 O 343/96, NJW 1996, 3347 (3349); Grüneklee, Der Kontrahierungszwang für Girokonten bei Banken und Sparkassen, Dissertation, Baden-Baden 2001, p. 188 et seq.

the absence of reasonable alternatives cannot be concretized.[84] Thus, one has to ask: how many banks does the obligee have to ask? To consider the reasonableness, however, one always has to look at the specific circumstances of each and every case.[85] Being a co-operative member, the obligee has a special position. As a member, he has acquired the right to participate support transactions in general. The support transactions are non-members motivator to join a co-operative.[86] For the laity, a giro contract is the most important contract he can conclude with a bank. For any member, the co-operative bank is practically the first priority to be the contract partner. The obligee's interest to contract with the co-operative bank is greater, as he pays for the share in advance. This is why the reasonableness requirements for any co-operative members have to be reduced. It must inquire neither presence nor other supra-local banks.

The obligor needs to be inclined to contract in general, which can also be assumed that he is capable to serve.

At last, there should not be any justification to refuse. Concerning the content, one can look again at those objective reasons that lead to an exclusion for a claim of the articles of associations or the GCA as mentioned above.[87]

3.1.2.3 The legal consequences of a claim based on § 1 I GCA or the common civil obligation to contract

The legal consequences are the same as those of the obligation to conclude a payment services framework contract[88] as well as those of the CCOtC[89].

3.1.3 The contract of loan

According to a contract of loan pursuant to § 488 GCC the lender lends a sum of money to the borrower. The borrower agrees to repay and usually pays in addition a fee for the provision of capital at an agreed interest rate (which is not mandatory, § 488 I 2 GCC). However, the bank can not freely decide with whom it wants to enter into a loan agreement. It has to be abide not only by criminal, civil and company law regulations such as §§ 266 I German Criminal Code; 488 et seq. and 280 I, 249 et seq. GCC, but also rules of bank supervision such as §§ 18, 25a Banking Act (*KWG*).[90]

84 Vide: Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 184–191.
85 Bork, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., pre §§ 145 et seq. para 22 a. E.
86 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23.
87 Vide supra: 3.1.2.2.1, p. 15.
88 Vide supra: 3.1.1.3, p. 11.
89 Vide supra: 2.5, p. 7.
90 Bock, in: Kreditwesengesetz, 4. Auflage, München 2012, § 18 para 1 with further references; Kober, Tagungsband der IGT 2012, Wien 2013, p. 243.

3.1.3.1 The dogmatic foundation

A legal obligation to conclude a contract of loan can neither be based on §§ 17–23 GCA nor on the provisions of the Banking Act.[91] Therefore, again only the articles of association, the GCA and the civil obligation to contract might be possible dogmatic foundations.

3.1.3.1.1 The articles of association and the GCA

If a co-operative bank enters into a contract of loan with one of its members, it should comply with its co-operative duty to support pursuant to § 1 I GCA. If the articles of association name as corporate purpose standard bank and additional services, this purpose can be as well fulfilled by contracts of loan. The principle of equal treatment, the mutual loyalty of the members together with the articles of association and § 1 I GCA found an obligation to conclude a contract on behalf of the members. This again cannot be negated due to a limitation of the negative aspect of the freedom to contract.[92] This is because such a limitation has its reason not only in the law, but also in the members' decision to form a co-operative for such a corporate purpose, hence in the freedom to contract itself.[93] Some see a risk that any obligation to conclude a contract of loan could reduce the group of members in advance.[94] However, such risk would only exist, if no conditions had to be met in order to lead to such an obligation. What is more is that such a duty can only exist within the normal member-transactions (*Mitgliedergeschäft*).[95] Of course the co-operative bank can bring forward objective reasons to justify any refusal to contract.

3.1.3.1.2 The common civil obligation to contract

A loan is without doubts a special and important good for the borrowing individual. However, any person that is not granted a loan will not be economically or socially excluded.[96] That is why a loan cannot pose a legally protected interest, and thus lead to a dependency as required for a CCOtC. Such a claim cannot provide for its dogmatic foundation.

3.1.3.2 The requirements for an obligation to contract founded on § 1 I GCA

The first requirement for an obligation to conclude a contract of loan based on § 1 I GCA is the obligee's membership in the co-operative bank. This first requirement prolongs the former explicit

91 *OLG Köln* judgment 07.08.2002, 13 U 149/01, WM 2003, 2138.
92 Like this though: *OLG Köln* judgment of 07.08.2002, 13 U 149/01, WM 2003, 2138; Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 116; Schöpflin, WuB II D § 18 GenG 1.04; Terbrack, EWiR 2003, 1031 (1032).
93 Vide supra: 3.1.1.1, p. 9.
94 Kober, Tagungsband der IGT 2012, Wien 2013, p. 243 (247).
95 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23.
96 *BGH* judgment of 26.03.1984, II ZR 171/83, *BGHZ* 90, 381 (399); Freitag/Mülbert, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., § 488 para 114 with further references.

prohibition of lending money to non-members, according to § 8 II GCA old version[97] dating back to 5/1/1889. This formerly existed ban is of course obsolete since the articles of association can permit non-member transaction according to § 8 I No. 5 GCA in 2006.[98]

Second, the articles of association must hold the contract of loan as a special support transaction specifying the duty to support. Again like with the giro contract, a passage suffices, which allows a subsumption of the contract of loan as support transaction.[99]

An obligation to contract exists, however, only with the same content, as the contract would be offered to other members as well.[100] Hence, if the co-operative bank usually assesses the creditworthiness of potential borrowers on the basis of standardized methods,[101] it can proceed in the same manner with its members as well. For such an audit realizes not only the usual habit, but is also congruent with the various legal requirements. In particular, the dutiful discretion of the management board pursuant to §§ 27 I 1, 34 I GCA can be exercised.[102]

The test can only have three results: a first-class credit rating, full credit unworthiness and doubted cases in which the default risk cannot be assessed.[103] In the first case, the first-class credit rating cannot lead to a refusal to contract. In the second case, it constitutes a factual reason to deny[104] the contract, as the lending would lead to a binding exceptional case,[105] which in itself could endanger the duty to support and at last the co-operative bank's existence. Only in the third case, the assessment of an objective justification is dubious. Membership then again has to carry weight, and concomitant the member's right to support. For doubtful cases, membership has to be integrated in the evaluation assessment, especially the distinction against non-members' businesses. While membership alone does not suffice *per se* in the third case for an obligation to contract, due to the potential threat to the co-operative bank's existence, it is an *ultima ratio* and as such must meet special requirements. However, an existing obligation to conclude a contract of loan has to be reduced in the third case to a special claim to loan review and rating.[106] This commands the

97 „*Genossenschaften, bei welchen die Gewährung von Darlehen Zweck des Unternehmens ist, dürfen ihren Geschäftsbetrieb, soweit er in einer diesen Zweck verfolgenden Darlehnsgewährung besteht, nicht auf andere Personen außer den Mitgliedern ausdehnen.*“ – Cooperatives, in which the granting of loans is the company's purpose may, if it is to this purpose, not extend the loan's granting to anyone other than the members.

98 Vide: Kober, Tagungsband der IGT 2012, Wien 2013, p. 243 (244 et seq.).

99 Vide supra: 3.1.2.1.1, p. 12.

100 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23.

101 Rolfes/Emse, DStR 2001, 316 et seq. with further references.

102 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23; Kober, Tagungsband der IGT 2012, Wien 2013, p. 243 (249 et seq.).

103 Kober, Tagungsband der IGT 2012, Wien 2013, p. 243 (248) with sample cases of unemployment, single-parent status, families with several children, old age, illness, divorce, separation.

104 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23.

105 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 18 para 23.

106 For the first time, though not reducing as to claim, but as a special corporate claim: Kober, Tagungsband der IGT 2012, Wien 2013, p. 243 (249 et seq.).

fiduciary duty based co-operative right to be heard together with the principle of proportionality and equal treatment. Looking at the latter, the criteria for granting credit have to be the same for all members, or must at least meet certain minimum standards. The science-based experiences in *micro*crediting could here be valuable to develop more and other relevant criteria. To relieve the board from reviewing and rating according to the claim in the third case, a special co-operative organ – which mustn't correspond with the supervisory board pursuant to § 37 GCA – could be formed. After an initial examination and classification of the potential borrower, in the group of doubtful cases the special aspect of membership could be assessed again.[107] In this way, the special co-operative idea is able to be incorporated in the assessment.

3.1.3.3 The legal consequences of an obligation to contract based on § 1 I GCA

The legal consequences are similar to those of the obligation to conclude a payment services framework contract.[108] One has to except however the cases of doubt, where the credit default risk cannot be assessed and the obligation to contract is converted to a right to re-evaluate the member's credit-worthinespp. Has the member tried unsuccessfully to enforce this claim, it may pursue an action of performance.

3.2 The obligation to contract for non-members

3.2.1 Merely the common civil obligation to contract

Assuming the articles of association permit non-member transactions according to § 8 I No. 5 GCA, an obligation to conclude any of the three contracts cannot be based on their favor on § 1 I GCA together with the principle of equal treatment and the articles of association.[109] As the CCOtC could neither be the foundation of a payment services framework contract nor the contract of loan, the only contract that can be further considered is the giro contract. Non-members may also derive therefrom the claim to contract. However, they cannot rely on the specifics of the membership, within reasonable limits,[110] so that an obligation to contract based on savings bank law represents a subjectively reasonable alternative. To gain this advantage the question is, whether co-operative banks are legally compelled to admit non-members.

3.2.2 The obligation to admission in favor of non-members

3.2.2.1 The dogmatic foundation

3.2.2.1.1 The GCA and the articles of association

107 Kober, Tagungsband der IGT 2012, Wien 2013, p. 243 (250).
108 Vide supra: 3.1.1.3, p. 11.
109 Niekiel, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011, p. 117.
110 Vide supra: 3.1.2.2.2, p. 16.

A co-operative is an organization of non-closed membership, and hence the "principle of the open door" applies according to § 1 I GCA. Nevertheless one cannot derive from this aspect an obligation to admit.[111] Rather Art. 9 I German Constitution implements the principles of autonomous private organization and self-determination in favor of any association.[112] Hence, associations may decide on the admission of their members by themselves. In contrast, the articles of association can found a compulsory obligation to admission. For this purpose, the by-laws must provide a right of subrogation for third parties, that is beyond the mere description of the material and personal conditions to qualify for membership.[113] The latter rather concretizes the co-operative institutions' admission decisions and as such bind those only, § 15 I 1 GCA.[114] However, such a legal consequence must be because of its severe and long-lasting constraining effect explicitly formulated.

But how can one distinguish between admission conditions and attributes that lead to an obligation to admission in the articles of corporation? If the attribute is suitable via the specified properties of a member representing the very *essence of the co-operative*, then those hold an obligation to admission. If a co-operative that admitted members without such properties turned to a different corporation,[115] those admission conditions hold a claim to admission for potential members. Hence for an obligation to admission based upon the by-laws two things are required: the explicit reference to the legal consequences and the exclusion that it is a mere admission condition. The dogmatic classification is, as the obligation to contract under § 1 I GCA and the principle of equal treatment, a non-statutory one.

As it requires the explicit mentioning of the legal consequence in the articles of association and completely lacks a legal attachment, it is a *contractual* obligation to contract. It is so similar to an obligation to contract in the context of a preliminary contract because it realizes and does not restrict the freedoms to contract and of association. The obligation to admission is based upon the co-operative's will which is formed in advance. As a result, it does not have to be discussed in greater detail.

3.2.2.1.2 The obligation to admission according to §§ 33, 20 German Act against restraints of competition (ARC, GWB*) and common civil obligation to contract*

111 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 1 para 6 & 15 para 30.
112 Scholz, in: Maunz/Dürig, Grundgesetzkommentar, 66. Ergänzungslieferung, München 2012, Art. 9 para 68 with further references.
113 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 15 para 30.
114 *RG* judgment of 19.11.1900, I 257/00, RGZ 47, 76 (79); Beuthien, in: Beuthien, 15. Auflage, München 2011, § 15 para 29; Gierke, Deutsches Privatrecht, Band 1, Leipzig 1895, p. 492 para 3.
115 *RG* judgment of 03.05.1905, I 138/05, RGZ 60, 409 (411); Beuthien, in: Beuthien, 15. Auflage, München 2011, § 15 para 29.

An obligation to admission, that is entirely out of the co-operative bank's hands, can occur if it is market dominant or has deliberative market power (§§ 30, 20 II ARC) pursuant to §§ 33, 20 ARC and the CCOtC.[116] According to the prohibition of discrimination under § 20 I ARC, certain companies must not block or discriminate other *companies* without objective justification. Hence the claimant can therefore only be another company, that is neither member of the co-operative bank, nor a private individual.

3.2.2.2 The requirements

3.2.2.2.1 For a claim based on §§ 33, 20 ARC

The first requirement for an obligation to admission according to § 33 I ARC and the prohibition of discrimination (§ 20 I ARC) is that the co-operative bank must be possibly addressed by these rules of law. Thus, one needs either to be dominant according to § 19 II ARC, or a price-binding company with refrence to §§ 28 II, 30 I 1 ARC or a cartel in accordance with § 1 ARC. Only the former has to be considered for a co-operative bank, given its status in the market. A company is market dominant if it is not exposed at least to any substantial competition in the relevant product and local market or has in relation to the other competitors a superior position in the market. A company is assumed to be market dominant according to § 19 III 1 ARC if it has a market share of at least 1/3. In order to justify an obligation to admission, one has to determine at least the co-operative bank's market strength in the relevant product and local market in each individual case. The fact that all co-operative banks had a nationwide market share of total assets of the German banking sector of 8.8% in 2012[117] is irrelevant. Nevertheless, this number indicates that a dominance of any co-operative bank is rather an exception. In any case it has to be looked at in each and every case.

The co-operative bank's exclusion of admission must secondly either hinder or discriminate the company[118]. It does not suffice if the co-operative bank offers transport transactions to non-members at a different rate as compared to the members'.[119] As co-operative banks in general allow the non-

116 *BGH* judgment of 02.12.1974, II ZR 78/72, *BGHZ* 63, 282 (285); *BGH* judgment of 10.12.1984, II ZR 91/84, *BGHZ* 93, 151 (154); *BGH* judgment of 23.11.1998, II ZR 54/98, *BGHZ* 140, 74 (77): Criteria to a compulsory obligation to admission for associations arise indirectly from Article 9 I German Constitution; Birk, JZ 1972, 343 (349); Beuthien, in: Beuthien, 15. Auflage, München 2011, § 15 para 30; Nicklisch, JZ 1984, 105 (107 et seq.); Spindler, in: Bamberger/Roth, 26. Edition, München 2013, § 826 para 80; criticizing: Oechsler, in: Staudinger, Kommentar zum BGB, 13. Bearbeitung, Berlin 2003 ff., § 826 para 266 & 272 et seq.: in this respect a separate legal rule has been created by the courts, referencing § 826 GCC and §§ 20, 27 ARC.

117 Statista, Marktanteile der Bankengruppen an den gesamten Aktiva der Bankenbranche in Deutschland von 2010 bis 2012, Hamburg 2013, accessable at:http://de.statista.com/statistik/daten/studie/166006/umfrage/marktanteile-der-bankengruppen-in-deutschland/, last accessed on 12.06.2013 at 10 p.m. Older data: Bankenverband, Marktanteile der Bankengruppen, Berlin 2008, accessable at: http://bankenverband.de/downloads/022009/ta0902-vw-793markt-bgr.pdf, last accessed on 12.06.2013 at 10 p.m.

118 Markert, in: Immenga/Mestmäcker, 4. Auflage, München 2007, § 20 para 114.

119 *OLG Köln* judgment of 22.05.1984, 9 U 262/83, ZfgG 1989, 216 et seq.; Beuthien, in: Beuthien, 15. Auflage,

member transactions in their bye-laws according to § 8 I No. 5 GCA,[120] a relevant omission can only be found if they refuse to conclude the contract at all. As a refusal usually impairs the company's ability to compete, and the company has a disadvantage[121] in relation to the majority of the other contractual partners of the co-operative bank, this omission is factually so far.

The refusal must thirdly be either unfair or at least without any objective reasons. This normative assessment requires a balancing of the interests of all parties, and the freedom to compete as an overarching *telos* of the ARC has to be considered as well.[122] The co-operative bank has to take into consideration any of the company's interests, as long as it is not illegal; it does not have to be commercially or economically worthwhile.[123] Hence, it cannot generally refuse the membership and transport transaction based on the argument that their business policy foils the co-operative idea. For the examples chosen here, one can thus hardly find an interest to refuse a giro contract, but might probably derive from a high credit risk a reason to deny a contract of loan for non-members. The company seeking admission, however, can only bring forward those interests according to § 20 I ARC. The interest should be able to be traced back to an interference by market power related behavior, such as the interest in free access to the market, or the interest to equal opportunities for competitive activities in relation to other companies; (extra-)economic interests, such as the interest in continuance, do not suffice, even not for SMEs.[124]

These interests must then in each individual case be weighed according to the evaluating standard of freedom of competition to justify a restriction of the co-operative bank's freedom of action. Alternatives for the admission-seeking company or the quality of the co-operative bank's market strength have to be particularly considered.

3.2.2.2.2 For a claim based on the common civil obligation to contract

First, the non-member must rely on the membership to guard its essential interests.[125] Such

München 2011, § 15 para 30: *ultima ratio*.

120 Sandkühler, Bankrecht, 2. Auflage, Köln 1993, p. 5.

121 Markert, in: Immenga/Mestmäcker, 4. Auflage, München 2007, § 20 para 116 & 121.

122 Markert, in: Immenga/Mestmäcker, 4. Auflage, München 2007, § 20 para 129 with further references.

123 Markert, in: Immenga/Mestmäcker, 4. Auflage, München 2007, § 20 para 131 with further references.

124 Markert, in: Immenga/Mestmäcker, 4. Auflage, München 2007, § 20 para 132 with further references.

125 *BGH* judgment of 10.12.1984, II ZR 91/84, *BGHZ* 93, 151 (152): „*Die Monopolstellung eines Vereins oder Verbands ist aber für sich genommen auch gar nicht der innere Grund, an den der Aufnahmezwang anzuknüpfen ist. Dieser besteht vielmehr darin, dass die Rechtsordnung mit Rücksicht auf schwerwiegende Interessen der betroffenen Kreise die grundsätzliche Selbstbestimmung des Vereins über die Aufnahme von Mitglieder nicht immer ohne weiteres hinnehmen kann. Dies ist […] ganz allgemein der Fall, wenn der Verein oder Verband im wirtschaftlichen oder sozialen Bereich eine überragende Machtstellung innehat und ein wesentliches oder grundlegendes Interesse am Erwerb der Mitgliedschaft besteht.*“ – The monopoly of a club or association is not in itself also the inner reason for an obligation to admission. It is rather that the legal system can not accept the principle of self-determination of the association without any limitationpp. This is [...] generally the case if the club or association holds in the economic or social field a preponderance of power, and thus it is an essential or fundamental interest to become a member.

dependence in turn relies on the support transaction offered by the co-operative bank and the admission of non-members' transactions.[126] If the non-member relies on the conclusion of the support transaction, the required significant interest is given. As the respective support transaction is of relevance, here again the same applies as for members, unless one was not just arguing with the membership. Since neither the conclusion of a payment services framework contract nor an agreement of loan could be based on the common general civil obligation to contract due to the lack of dependence,[127] the giro contract is the only support transaction, that is of interest[128].

Secondly, the co-operative bank must be inclined and capable in terms to admit new members. This also means that the potential member must satisfy statutory admission conditions.

Thirdly, regarding the offered support transaction, there must not exist any reasonable alternatives for non-members. Similar to the claim pursuant to §§ 33, 20 ARC, the co-operative bank's market dominance is needed.[129]

Fourthly, the rejection of non-members may not be objectively justified. Here, the interest of the co-operative bank's interest of its continuance and efficiency have to be taken into account. A justifying reason might be found from the articles of corporation,[130] but it does not necessarily have to be considered, e.g. because of the monopolistic position. Reasons in the vicinity of the second requirement, the obligor's inclination and capability to contract, any conditions for the member's admission do not constitute an objective reason for rejection. In such case, the co-operative bank may even be committed to change its by-laws.[131] However, an obligation to admission does not flow from the mere non-admission of non-member transactions.[132]

---

126 Birk, JZ 1972, 343 (348 et seq.): *ultima ratio* of the obligation to contract and the Kontrahierungszwanges und principle of proportionality in civil law; Beuthien, in: Beuthien, 15. Auflage, München 2011, § 15 para 30: *ultima ratio*; Nicklisch, JZ 1984, 105 (110): checking whether a less extensive form of participation is sufficient.

127 Vide supra: 3.1.1.1.2, p. 11 & 3.1.3.1.2, p. 18.

128 Vide supra: 3.1.2.2.2, p. 16.

129 *BGH* judgment of 26.06.1979, KZR 25/78, NJW 1980, 186 in an *obiter dictum*: „*Es ist zwar richtig, daß nach der Rechtsprechung des BGH ein Monopolverband zur Aufnahme von Bewerbern um die Mitgliedschaft verpflichtet sein kann […]. Das mag auch schon für solche Vereinigungen gelten, die keine Monopolstellung erlangt haben, die aber eine erhebliche wirtschaftliche und soziale Machtstellung besitzen, sofern der Bewerber zur Verfolgung oder Wahrung wesentlicher Interessen auf die Mitgliedschaft angewiesen ist.*" –"It is true that according to the jurisprudence of the Supreme Court a monopoly may be required for admission of applicants for membership [...]. That may already apply to such associations, which have gained no monopoly, but have a significant economic and social position of power, unless the applicant to persecution or protection of essential interests is dependent on the membership.

130 Spindler, in: Bamberger/Roth, 26. Edition, München 2013, § 826 para 80.

131 *BGH* judgment of 02.12.1974, II ZR 78/72, *BGHZ* 63, 282 (285): „*Ein Aufnahmezwang kann aber […] trotz entgegenstehender Satzung bestehen, wenn die Rechtsordnung die Berufung auf die satzungsmäßige Aufnahmebeschränkung gerade wegen der Monopolstellung des Verbandes nicht hinnehmen kann und diese daher nichtig oder nur eingeschränkt anwendbar ist.*" – A compulsory obligation to admission can [...] despite conflicting by-laws exist, if the legal recourse to the statutory limitation cannot be fair due to the monopoly of the Association, and they are not applicable, but void or only applicable in a restricted way.

132 *BGH* judgment of 08.05.2007, KZR 9/06, NJW-RR 2007, 1113.

3.2.2.3 The legal consequences for an obligation to admission according to §§ 33, 20 ARC and based on the common civil obligation to contract

Regardless of the foundations of the claims, claims can be brought to court only after the co-operative's internal remedies are exhausted. Otherwise, the necessary need for legal relief might be absent.[133] The claim following an obligation to admission according to §§ 33, 20 ARC has to be brought to the local competent County Court (*Landgericht*) as an antitrust sanction action.[134] The obligation to admission based on the common civil obligation to admission has the same legal consequences as the one to conclude a giro contract. If a non-member wants to conclude a support transaction contract based on an obligation to contract of § 1 I GCA and the articles of corporation, it can reduce the litigation risk via an action by stages (*Stufenklage*): first, he sues for admission, and only if he is successful, he may then sue for the conclusion of the respective support transaction.

4. Results and conclusion

§ 1 I GCA, together with the co-operative principle of equal treatment and the by-laws that concretize funding objective, forms the dogmatic foundation for a special obligation to conclude support transaction contracts for the member's benefit. Three requirements have to be satisfied: in addition to the membership (first requirement), the by-laws have to name the transport transactions as funding objective, under which the desired contract can be subsumed (second requirement). Thirdly, there must not be a reason justifying the refusal of the conclusion. Fourthly, the contract may justify denial with no ground for exclusion. Such co-operative obligation to contract, however, exists due to the principle of equal treatment only within the limits of the usually contracts concluded by the co-operative and within the otherwise existing criteria of selection and conclusion.

From this one can derive an obligation to contract for both, the payment services framework contract as well as the giro contract, but only for the co-operative bank's members. The CCC's recommendation is not a suitable foundation for an obligation to conclude a giro contract. However, it can be based on the CCOtC, which has the following four requirements. Firstly, the prospective contract partner must have a legally protected interest (dependence on the performance). Secondly, the provider must always be inclined to contract and be capable to perform. Thirdly, the prospective contract partner has to be dependent on the providing co-operative bank and has no reasonable alternatives to get access to the goods and services needed. Fourthly, any rejection by the co-operative bank must be objectively founded. Membership in a co-operative bank reduces the acceptability limits to conclude a giro contract. Unlike than without any co-operative binding, the

133 Beuthien, in: Beuthien, 15. Auflage, München 2011, § 15 para 30.
134 Schmidt, in: Immenga/Mestmäcker, 4. Auflage, München 2007, § 87 para 13.

member must neither request presence banks nor non-local banks, nor can he be referred to savings banks. Non-members are not granted with those benefits. Though they are entitled to conclude a giro contract based on the CCOtC, they have to prove within the margins of reasonability that neither national or presence banks are willing to contract.

The co-operative obligation to contract can within its requirements force a co-operative bank to conclude a contract of loan with one of its members. However, this conclusion is not an automated one. A first-class credit rating leads to such an obligation, as a proven non creditability justifies the bank's refusal. However, cases of doubt have to be evaluated in a different why. These are the cases, in which credit default risk of the member cannot be uniquely determined. Here, the existing obligation to contract is reduced to a special claim to a repeated loan review and rating. Non-members do not benefit from such a special claim.

However, they have a claim to be admitted as a member, provided they are companies, based on §§ 33, 20 ARC. Individuals can derive such a claim to admission from the CCOtC. The offered transaction support is of importance for the non-member's relevant interests.

Does the obligation to contract in its various forms withdraw *per se* from the co-operative bank's freedom of contract? No. In the contrary, the member's interests which are concretized by the co-operative's funding objective, as well as the co-operative's interests are brought into a proper balance. What is more is that the co-operative bank's *negative* freedom to contract is protected from an excessive reduction: the bank can objectively justify a refusal to contract – regarding both, members and non-members – and can decide beforehand on admission conditions. Thus the bank specifies the potential contract partners – regarding only members.

claim's subject	**member**	**non-member**
payment services framework contract	§ 1 I GCA	–
giro contract	§ 1 I GCA & common civil obligation to contract	**only** common civil obligation to contract
contract of loan	§ 1 I GCA	–
special claim to a repeated loan review and rating	§ 1 I GCA	–
membership	–	§§ 33, 20 ARC & common civil obligation to contract

Chart I: results and conclusion

Bibliography

Adler, Edward A., Business Jurisprudence, 28 Harvard Law Review (1934), pp. 135–173

Arterburn, Norman F., The Origin and First Test of Public Callings, 75 University Pennsylvania Law Review (1926–1927), pp. 411–428

Bachmann, Gregor, Kontrahierungspflichten im privaten Bankrecht, ZBB 2006, pp. 257–264

Bamberger, Heinz Georg/ Roth, Herbert , Beck'scher Online-Kommentar BGB, edited by Heinz Georg Bamberger und Herbert Roth, 26. Edition, München 2013

Berresheim, Daniel S., Kontrahierungszwang der Kreditwirtschaft für Girokonten aufgrund von Selbstverpflichtungserklärungen?, ZBB 2005, pp. 420–426

Beuthien, Volker/ Wolff, Reinmar/ Schöpflin, Martin, Kommentar zum Genossenschaftsgesetz mit Umwandlungs- und Kartellrecht sowie Statut der Europäischen Genossenschaft, 15. Auflage, München 2011

Bewdley, Baldwin of, THE UNFADING GENIUS OF RUDYARD KIPLING, The Kipling Journal 1971, pp. 4–9

Birk, Rolf, Der Aufnahmezwang bei Vereinen und Verbänden, JZ 1972, pp. 343–349

Blackstone, William Sir, Commentaries on the Laws of England in four Books, Volume II, Books III & IV, Philadelphia 1860

Boos, Karl-Heinz/ Fischer, Reinfrid/ Schulte-Mattler, Hermann, Kreditwesengesetz, edited by Karl-Heinz Boos, Reinfrid Fischer und Hermann Schulte-Mattler, 4. Auflage, München 2012

Breucker, Marius, Zulässigkeit von Stadionverboten, JR 2005, pp. 133–138

Busche, Jan, Privatautonomie und Kontrahierungszwang, Habilitationsschrift, Tübingen 1999

Bydlinski, Franz, Zu den dogmatischen Grundfragen des Kontrahierungszwanges, AcP 180 (1980), pp. 1–46

Derleder, Peter, Zum Anspruch auf Abschluss eines Girovertrages bei abgegebener Selbstverpflichtungserklärung, EWiR 2003, pp. 963–964

Derleder, Peter, Zum Anspruch auf Einrichtung eines Girokontos auf Guthabenbasis, EWiR 2006, pp. 9–10

Einsele, Dorothee, Bank- und Kapitalmarktrecht, nationale und internationale Bankgeschäfte, 2. Auflage, Tübingen 2010

Erman, Walter/ Westermann, Harm Peter/ Grunewald, Barbara, Handkommentar zum BGB, 13.

Auflage, Köln 2011

Geschwandtner, Marcus/ Bornemann, Ralf, Girokonto für jedermann – Vertragsabschlussfreiheit, Selbstregulierung oder gesetzlicher Zwang?, NJW 2007, pp. 1253–1256

Gierke, Otto von, Deutsches Privatrecht, Band 1, Allgemeiner Teil und Personenrecht, Leipzig 1895

Glenk, Hartmut, Genossenschaftsrecht, Systematik und Praxis des Genossenschaftswesens, 2. Auflage, München 2013

Grundmann, Stefan, Das neue Recht des Zahlungsverkehrs – Teil I Grundsatzüberlegungen und Überweisungsrecht, WM 2009, pp. 1109–1117

Grüneklee, Stefan, Der Kontrahierungszwang für Girokonten bei Banken und Sparkassen, Dissertation, Baden-Baden 2001

Grunewald, Barbara, Vereinsaufnahme und Kontrahierungszwang, AcP 182 (1982), pp. 181–213

Hillebrand, Klaus-Peter/ Keßler, Jürgen/ Kühnberger, Manfred , Berliner Kommentar zum Genossenschaftsgesetz, edited by Klaus-Peter Hillebrand, Jürgen Keßler & Manfred Kühnberger, Berlin 2001

Immenga, Ulrich/ Mestmäcker, Ernst-Joachim, Kommentar zum deutschen Kartellrecht, edited by Ulrich Immenga und Ernst-Joachim Mestmäcker, 4. Auflage, München 2007

Kilian, Wolfgang, Kontrahierungszwang und Zivilrechtssystem, AcP 180 (1980), pp. 47–83

Kober, Rouven, Kontrahierungszwang oder freier Wille – Gibt es einen genossenschaftsrechlichen Anspruch auf Kredit?, Tagungsband der IGT 2012, Wien 2013, pp. 243–252

Koch, Jens, Das Girokonto für jedermann – ein altes Problem in neuem Licht, WM 2006, pp. 2242–2249

Kohte, Wolfhard, Das Girokonto für jedermann im Lichte der Rechtsgeschäftslehre, in: FS Derleder, Baden-Baden 2005, pp. 405–420

Kohte, Wolfhard, Kein Anspruch auf Einrichtung eines Girokontos auf Guthabenbasis, VuR 2006, pp. 163–165

Kümpel, Siegfried/ Wittig, Arne, Bank- und Kapitalmarktrecht, edited by Siegfried Kümpel und Arne Wittig, 4. Auflage, Köln 2011

Larenz, Karl, Schuldrecht, Band I, Allgemeiner Teil, 14. Auflage, München 1987

LexisNexis, Halsbury's Laws of England, 5th edition, London 2008, volume 67, Licensing and Gambling

LexisNexis, Halsbury's Laws of England, 5th edition, London 2008, volume 7, Carriage and Carriers

Maunz, Theodor/ Dürig, Günter, Grundgesetzkommentar, edited by Roman Herzog, Matthias Herdegen, Hans H. Klein und Rupert Scholz, 67. Ergänzungslieferung, München 2012

Medicus, Dieter/ Lorenz, Stephan, Schuldrecht, ein Studienbuch, Allgemeiner Teil, 20. Auflage, München 2012

Michel, Heinrich, Die Fördergeschäftsbeziehung zwischen Genossenschaft und Mitglied, Dissertation, Göttingen 1987

Mülbert, Peter O, Zum Unverbindlichkeitscharakter der Empfehlung des Zentralen Kreditausschusses "Girokonto für Jedermann", WuB I C 1 Kontoführung 1.06

Müller, Klaus, Kommentar zum Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften, Vier Bände, 2. Auflage, Bielefeld 1991 et seq.

Nicklisch, Fritz, Der verbandsrechtliche Aufnahmezwang und die Inhaltskontrolle satzungsmäßiger Aufnahmevoraussetzungen, JZ 1984, pp. 105–113

Niekiel, Oliver, Das Recht auf ein Girokonto, Dissertation, Baden-Baden 2011

Nipperdey, Hans Karl, Kontrahierungszwang und diktierter Vertrag, Habilitationsschrift, Jena 1920

Nobbe, Gerd, Neuregelungen im Zahlungsverkehrsrecht – Ein kritischer Überblick –, WM 2011, pp. 961–968

Oechsler, Jürgen, Die Entwicklung des privaten Bankrechts im Jahre 2005, NJW 2006, pp. 1399–1404

Otto, Hansjörg, Personale Freiheit und soziale Bindungzur Kontrolle und Gewährleistung personal motivierten Verhaltens im Privatrecht, München 1978

Palandt, Otto, Palandt, Kommentar zum BGB, 71. Auflage, München 2012

Pöhlmann, Peter/ Fandrich, Andreas/ Bloehs, Joachim, Kommentar zum GenG, 4. Auflage, München 2012

Rauscher, Thomas/ Wax, Pete/ Wenzel, Joachim , Münchener Kommentar zur ZPO, edited by Thomas Rauscher, Peter Wax, und Joachim Wenzel, 4. Auflage, München 2013

Rolfes, Bernd/ Emse, Cordula, Interne Rating-Verfahren zur Bonitätsklassifizierung, DStR 2001, pp. 316-324

Säcker, Franz Jürgen, Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 1, Allgemeiner Teil, §§ 1–240; Band 2, Schuldrecht Allgemeiner Teil, §§ 241–432; Band 3, Schuldrecht

Besonderer Teil I, §§ 433–610, Band 4, Schuldrecht Besonderer Teil II, §§ 611–704; Band 5, Schuldrecht Besonderer Teil III, §§ 705–853, 6. Auflage, München 2012

Sandkühler, Gerd, Bankrecht, ein Leitfaden für Ausbildung und Praxis, 2. Auflage, Köln 1993

Schmidt, Karsten, Der Zivilrichter als "Schöpfer" und "Vollstrecker" wirtschaftlicher Normen, DRiZ 1977, pp. 97–102

Schöpflin, Martin, Zum Anspruch eines Mitglieds einer Genossenschaftsbank auf Gewährung eines Kredits, WuB II D § 18 GenG 1.04

Schürmann, Thomas/ Hartmann, Wulf/ Wittig, Arne , Die zivilrechtliche Umsetzung der Zahlungsdiensterichtlinie, Finanzmarktkrise und Umsetzung der Verbraucherkreditrichtlinie, Bankrechtstag 2009, edited by Thomas Schürmann, Wulf Hartmann, Arne Wittig, et al., Berlin 2010

Segna, Ulrich, Anspruch auf Einrichtung eines Girokontos aufgrund der ZKA-Empfehlung Girokonto für jedermann?, BKR 2006, pp. 274–280

Simpson, A. W. B., A history of the common law of contract, The rise and fall of the action of assumpsit, Oxford 1975

Staudinger, Julius von, Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, 13. Bearbeitung, Berlin 2003 et seq.

Terbrack, Christoph, Zum Kontrahierungszwang der Kreditgenossenschaft, EWiR 2003, pp. 1031–1032