



European Banking Industry Committee

European Banking Federation (EBF) • European Savings Banks Group (ESBG) • European Association of Cooperative Banks (EACB)
European Mortgage Federation (EMF) • European Federation of Building Societies (EFBS)
European Federation of Finance House Associations (Eurofinas)/European Federation of Leasing Company Associations (Leaseurope)
European Association of Public Banks (EAPB)

Brussels, 2 May 2006

Comments on the content of the Modified Proposal for a Directive on Credit for Consumers

Dear Sir or Madame,

Further to our letter of 9th January 2006 to the Austrian Presidency of the Council presenting our Preliminary Remarks on the matter, we would like herewith to submit to your attention a number of detailed remarks on the content of the Modified Proposal for a Directive on Credit for Consumers¹ (hereinafter the 'Modified Proposal').

EBiC is keen to ensure that the future directive meets its two over-arching objectives: firstly, that it genuinely creates a legal framework for an internal market for consumer credit, and secondly, that in creating this framework care is taken not to impinge on Member States' domestic markets.

EBiC would like to emphasise the importance of assuring the clarity of the final text of the Modified Proposal and its consistency with the overall framework that the EU Commission seeks to develop. Furthermore, EBiC believes that, in accordance with the Commission's commitment to a Better Regulation policy², an impact assessment on the proposal should be undertaken to analyse the economic and legal consequences for the EU.

EBiC would encourage you to give further thought to this file in the light of the following EBiC comments and the two over-arching objectives mentioned above.

For this purpose, the enclosed Annex provides comments on the following sections of the Modified Proposal:

- Harmonization and Mutual Recognition (Article 21).
- Scope (Article 2) and Definitions (Article 3)
- Standard information / Advertising (Article 4)
- APRC (Articles 3-f and 18)
- Responsible Lending and Borrowing (Article 5.1.1, 5.1.2)
- Pre-contractual information (Article 5.2)
- Duty to provide assistance/ explanations (Art 5.5)
- Credit Database Access (Article 8)
- Overdraft facility (Article 11)

¹ Modified Proposal of a Directive on credit agreement for consumers amending Council Directive 93/13/EC, COM(2005) 483 final, 07.10.2005.

² Commission's Communication on Better Regulation for Growth and Jobs in the EU, COM (2005)97 final 16.03.2005.

- Right of Withdrawal (Article 13)
- Linked Credit Agreements and Linked Transactions (Articles 3.I and 14.2)
- Early Repayment (Article 15)
- Assignment of rights (Article 16)
- Overrunning of the total amount of credit (Article 17)
- Credit Intermediaries (Article 3-e, 19 and 20)
- Unfair terms (Article 27)

EBiC would appreciate to have the opportunity to meet you in order to discuss its position in more detail.

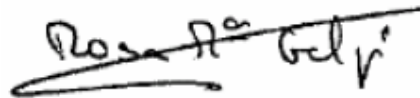
We remain at your disposal, should you wish any further clarification on this matter.

Yours faithfully,



Nicolas Merindol

EBiC Chairman



Rosa Maria Gelpi

Chairwoman of EBiC Working
Group CCD

ANNEX

EBIC COMMENTS ON THE MODIFIED PROPOSAL FOR A DIRECTIVE ON CREDIT TO CONSUMERS

Harmonization and Mutual Recognition (Article 21)

The modified proposal introduces a complex new harmonisation approach, combining full harmonisation with mutual recognition in certain areas.

The proposal asserts that only those elements explicitly dealt with in the text are fully harmonised whereas other issues are left to the national legal systems. As regards the fully harmonised provisions of the Directive, Member States will not be allowed to introduce or maintain national legislations other than those laid down in the Directive. Consequently, when it comes to the transposition and implementation of the Directive, it is essential to precisely identify what is fully harmonised and what is not. However, the current wording in the modified proposal would not make it easy to determine the perimeter of full harmonisation and this leads to an important legal uncertainty.

The following examples try to illustrate certain inconsistencies and difficulties in relation with article 21-2.

- Article 4 on standard information for advertisement is fully harmonised, so normally Member States cannot introduce more stringent measures. Despite this, the Commission considers that the regulation by some countries on for example the size of the letters is out of the scope and can be maintained. Many other examples will probably arise and it is not evident that all Member States will interpret the limits of the provisions in the same way.
- Similar problems may arise in relation to Article 9 on contractual information, where it is unclear whether Member States are entitled or not to introduce additional requirements which are not included under the list of requirements in Article 9-2, even if this present list is unnecessarily too long.

In the light of these examples, EBIC currently finds unclear which elements of the directive are fully harmonised, i.e. how uniform implementation in all Member States would be guaranteed, and which are partially harmonised but also left to the discretion of Member States.

In certain cases mentioned in Article 21-2, the Modified Proposal leaves some leeway for national implementation. However, to ensure that the degree of flexibility provided for national implementation within the limits of the Directive does not contribute to raise additional barriers, the Commission introduces mutual recognition for a limited number of issues.

Several remarks can be made concerning some of these articles:

As Article 5-2 provides for an exhaustive list of information requirements, and a real leeway for implementation to Member States is almost non-existent, EBIC considers it confusing to include this article in Article 21-2.

Without prejudice to EBIC's views on Article 5-5, analysed later on, we would like to present EBIC's specific comments on this article in relation to mutual recognition. In its current wording, this provision is based on subjective valuations (*"advantages and disadvantages"*) unsuitable for giving the consumer the elements needed to make his choice. By granting Member States the competence to set certain

modalities regarding the fulfilment of the “*duty to explain*”, the modified proposal contributes to render the legal background even more uncertain and complex. Discrepancies in defining such modalities from one Member State to another could create further obstacles to the functioning of the Internal Market.

Furthermore, EBIC believes that the degree of powers left to Member States on grounds of public policy in the case of mutual recognition under article 21-2 requires better delimitation.

Scope (Article 2) and Definitions (Article 3)

The Modified Proposal has reduced to EUR 50000 the maximum amount for credit agreements falling into its scope of application. EBIC welcomes the revised ceiling, since it reflects more appropriately the reality of the consumer credit market. Indeed, according to an ESBG research³, the average yearly amount of credit per EU inhabitant is not more than EUR 2000.

EBIC believes that the modified Article 2 has been improved but still confirms some matters of concern:

Small amount credits and overdrafts

The Modified Proposal still provides to regulate credit agreements involving an amount up to EUR 300, although it foresees a so-called ‘light regime’ for them. In our view, small amount credits should be fully excluded up to an amount of EUR 500. Indeed, even a ‘lighter’ information regime would render such credits, which can be assimilated to a payment facility, too expensive and potentially unprofitable for lenders to keep offering them. This aspect should not be underestimated in particular with regard to its impact on access to micro credit.

Similarly, overdrafts are still in the Modified Proposal subject to a quite extensive information regime including four different sets of information to be provided to the borrower (Articles 4, 6, 9-1, 9-2 (a) to (d), (h) and (o), 9-3, 10 and 11). Such a regime appears too heavy for overdrafts, since very often they are integral to current account functionality so that they are appreciated more as ‘payment facilities’ than ‘credits’. In order to ensure that lenders maintain the possibility to offer this simple and low cost product, EBIC believes that it should be fully excluded from the scope of application of the future directive and left to Member States’ discretion.

Credit agreements with a repayment period not exceeding three months

Article 2-2.e currently excludes from the scope of the Directive credits that are to be repaid within a period not exceeding three months without the payment of any interest or other charges. Whereas that exclusion is to be welcomed, EBIC would suggest adopting the same approach also towards those credit agreements that are remunerated⁴ since they appear to be, as it is the case for small amounts credits and overdrafts, appreciated by consumers for their simplicity and low cost and would become too costly, should they be submitted to the full range of information requirements.

Mortgage credits/home loans

EBIC welcomes the exclusion of all credits “*secured either by a mortgage on immovable property or by another comparable surety commonly used in a Member State*” (therefore excluding mortgage equity withdrawal loans from the scope of the Proposal) on the grounds that mortgage loans are very different, long-term products, often funded through long-term instruments.

³ ESBG calculation based on statistical data from EU National Banks and Eurostat (2000-2004).

⁴ This is the case actually under French legislation.

However, EBIC is very much concerned that the emphasis given to the existence of the mortgage/real estate collateral with respect to the exclusion of mortgage equity withdrawal loans has led the Commission to deviate from the definition of Home Loans as it exists in the Code of Conduct and therefore to leave aside the criterion of the purpose of the loan. As a consequence, loans secured by sureties commonly used in a Member State, such as for instance personal guarantees, which are non real estate-secured loans (currently covered by the Code of Conduct) are no longer excluded from the scope of the Directive (see Recital 13, page 12 of the Modified Proposal). In this respect, EBIC strongly believes that these loans must be excluded, because they are similar to mortgage credit in that they are long-term products with their own specificities.

Indeed, due to the characteristics of these non real estate-secured loans, the negotiators of the Code of Conduct considered them to be similar to real estate-secured loans, which is the reason why they included them in the Code alongside the latter. What is more, these loans are included in the consultation on the Integration of European Mortgage Markets launched by the Commission. In addition, if the current wording of Article 2-2.a was maintained the Code of Conduct could be at risk, since two different legal regimes would apply to the same product, i.e. non real estate-secured loans.

Another important issue in relation to the scope of the Modified-Proposal is the treatment of unsecured housing loans, which exist in a number of countries. EBIC strongly believes that these loans should also be excluded from the scope, because they too are long-term housing products with the corresponding specificities⁵.

Loans used for renovation purposes, for instance, which were excluded from the scope of the 1987 Consumer Credit Directive (see Directive 87/102, article 2 (1) lit. a) and Directive 90/88, article 1 (3)) for the above reasons, would now be included in the Directive according to the current wording of the Modified -Proposal.

Against this background, EBIC strongly believes that it would be inconsistent to apply two different legal regimes, i.e. the Code and the CCD. As a concrete example, in France, an obligation to apply these two regimes would result in the principle secured loan being subject to a 10 day reflection period before the signing of the contract, while the smaller unsecured loans would be subject to a 14 day right of withdrawal.

In light of the above, EBIC would recommend the endorsement of the version of Article 2-2.a of the Proposal agreed upon by the European Parliament in its Plenary meeting on 20 April 2004 (amendment 49). The revised article 2-2 (a) of the Modified Proposal (page 19) would therefore read as follows:

"This Directive shall not apply to the following credit agreements:

(a) credit agreements the aim of which is to grant credit for the purchase or transformation of the private immovable property that the consumer owns or aims to acquire or which are secured either by a mortgage on immovable property or by another surety commonly used in a Member State for this purpose."

Recital 13 (page 12) would need to be amended accordingly.

To conclude, EBIC welcomes the exclusion of mortgage credit as well as mortgage equity withdrawal loans. It would however strongly insist on the further exclusion of non real estate-secured loans for housing as covered by the Code of Conduct, as well as unsecured housing loans based on the same

⁵ In France, unsecured housing loans are loans granted under a "single financing package", which encompasses one principle secured loan complemented by a number of smaller unsecured loans. The common feature shared by the principle secured loan and the smaller unsecured ones is that both are long-term products with their own specificities and granted to finance the same property. From the lender's risk management perspective, these loans are granted in a context where the lender considers that the collateral pledged for the principle secured loan provides him with a sufficient guarantee.

In Germany, unsecured loans can be granted as individual loans and are as such independent from another secured loan. These loans are similar to mortgage loans not only because they are long-term products, but also because they are taken out for investment purposes. The value of the financed object is always equivalent in the real estate.

arguments, i.e. that these are long-term products, often funded by specific funding techniques, and granted for housing purposes.

Deferred payments

Article 2-2.i) rightly envisages excluding from the directive's scope credit agreements "*which relate to the deferred payment, free of charge, of an existing debt*". Under Article 2-4 (c), in contrast, other arrangements concerning deferred payment or repayment methods are to fall within the scope, even if "*the consumer would not thereby be subject to less favourable terms compared to the initial credit agreement*". In our view, the exclusion in Article 2-2 (.i) related to deferred payments "*free of charge*" should encompass deferred payments "*with interest*" as well, since such a distinction is not justified and will cause problems in practice, to the detriment of the borrower.

Indeed, a situation may arise during the lifetime of the credit agreement or when the loan matures, in which the borrower is temporarily unable to meet his obligations due to a short-term lack of liquidity, for example. As a matter of practice, it is often possible to temporarily suspend the borrower's payment obligations by concluding a debt deferral or repayment agreement without this involving any additional bureaucratic hurdles and without any additional costs. It must be noted that this kind of agreement concerns the repayment of the capital while maturity-related costs, i.e. interests, remain due in any event. In the case contemplated under Article 2-2.i) no additional costs other than maturity-related costs, i.e. interests, are charged to the consumer. From that perspective, no substantial difference appears between the situation described under Article 2-2. i) and the one contemplated under Article 2.4.c.

The Commission's proposal to impose additional formalities on debt deferral or repayment agreements of this kind under Article 2-4.c) will make it more difficult for banks to offer the unbureaucratic assistance outlined above. Yet there is no need to impose additional information requirements under Article 2-4 on these agreements because the maturity-related costs (particularly interest) will not change for the period of the debt deferral or repayment agreement compared to those in the original contract and the borrower will have been fully informed of them before the latter was concluded.

The exemption in Article 2.2-i) should therefore be worded along the following lines:

"(i) credit agreements which relate to the deferred payment, free of charge, of an existing debt and credit agreements which relate to deferred payment or repayment methods as long as the consumer would not thereby be subject to less favourable terms compared to the initial credit agreement except for the maturity-related costs arising from the longer life of the loan or costs arising from legal obligations such as the payment of default interest;"

In contrast, debt deferral or repayment agreements which make the consumer subject to less favourable terms compared to the original contract in a manner going beyond that outlined above should have to comply with the directive's full general information requirements. The partial exemption currently envisaged in Article 2-4.c.i) to (ii) could then be dropped.

Credit Intermediaries (Articles 3-e)

The term "*credit intermediary*" should be restricted to any natural or legal person whose principal activity consists in offering and or concluding credit agreements for remuneration. This does not apply to sellers whose main activity is the sale of goods or services other than credit.

For this reason EBIC proposes the following wording:

“...a person who... ~~habitually~~ as a main activity... “

For the sake of consistency, and in order to guarantee a coherent transposition, the word “and” should replace “or” between conditions (ii) and (iii).

This wording would be consistent with Recital 18 *“if suppliers of goods and services act as credit intermediaries in an ancillary capacity, it is not appropriate to also burden them with the pre-contractual information requirements as laid down in this Directive”*

EBIC believes that not only those intermediaries working “on behalf of a creditor”, but also “independent brokers” should be covered by the definition. For this reason, EBIC proposes the following wording:

“... a natural or legal person, who ~~on behalf of the creditor and~~ for a fee,”

Besides, the White Paper on Financial Services Policy announces the establishment of an Intermediaries Experts Group in 2007 and the elaboration of a legislative initiative consolidating existing rules on financial services intermediation. Therefore, EBIC urges the European institutions to adopt an approach which ensures consistency across the sets of proposals for regulation in this area, i.e. to refrain from incorporating fragmentary rules on intermediation in the CCD.

Total Cost of Credit and calculation of APRC (Article 3.f and Article 18)

The purpose of an APRC is comparability of prices of products available to consumers both at national and cross-border level. The key condition for that purpose to be fulfilled is that the APRC is calculated in the same way and includes the same components in all Member States, so that consumers can compare the same piece of information. To assure comparability, the definition of the APRC needs to be narrow and to include exclusively those costs levied by the lender for the loan for his benefit.

While welcoming the narrower approach to the definition of the APRC under Article 3.f, EBIC highlights that the use of the term ‘total cost of the credit’ as the basis to calculate the APRC under Article 18.2 could be misleading in so far as Member States could be induced to include in the APRC calculation at the national level any costs which are in some way related to the credit. To avoid confusion, EBIC would suggest using other terms which would be more appropriate to define the cost elements of the APRC, as for instance: calculation base, or direct costs.

Furthermore, EBIC believes that Annex II should not be deleted as the mathematical formula set out in Annex I does not guarantee by itself comparable results in APRC calculation. Rather, it requires some mathematical conventions (i.e. a kind of “operating instruction”) to ensure a uniform application of the formula throughout the EU. This “operating instruction” is provided for by the calculation examples set out in Annex II. As a result, these are indispensable to prevent Member States from deviating from the fully harmonised calculation of the APRC. However, as some of the examples are redundant, their number may be reduced.

Standard information for Advertising (Article 4)

As a matter of general approach, EBIC considers inappropriate overloading consumers with too much and/or duplicated information, creating both excessive information for consumers and unnecessary



burden and costs for lenders, and is concerned by the risk of over-lapping application of existing Directives providing advertising and information requirements.

The Modified Proposal now lays down too many requirements for advertisement and pre-contractual information. The result is that both concepts actually look the same, while they should be clearly different.

EBiC therefore believes that many of the information requirements laid down under Article 4 should indeed be part of the pre-contractual requirements (to be laid down under Article 5) as it is only at the pre-contractual stage where lenders are able to provide accurately such information and consumers are in a position to effectively use the information to make an informed choice.

Advertising is one tool among others of marketing strategies. It is usually addressed at a very preliminary stage to the general public rather than to individual consumers. The requirements under this Article are inappropriate to radio, TV or even internet advertising and might foreclose the development of such marketing media, given the very limited duration of advertisements and the significant increase of costs they would bring. Moreover, EBiC sees neither the need nor the justification for giving the order of presentation of information items a binding nature as indicated in Article 4-2, since consumers are already well protected by the provisions of the Directive 2005/29/EC of Unfair Commercial Practices⁶ and by the Directive 2002/65/EC on Distance Marketing of Financial Services in the case of credit agreements sold via e.g. Internet, telephone.

In particular, so detailed information at such an early stage can mislead the consumer who has not yet expressed any intention to enter into negotiations with the lender. Most of the information items under Article 4-2.a)-e) are identifiable only with reference to a specific profile so that it is impossible to provide them in a general, standardised advertisement. It is particularly the case for the revolving credit (credit line of a limited amount that builds up again as reimbursements go along), in which each parameter (drawdown amount, monthly payment, rate...) is likely to evolve rapidly.

EBiC also warns against the lack of clarity of the requirement under Article 4-2 to provide the information "*in a prominent way*" and sees no need, at this early stage of providing "*at least two representative examples*" for APRC under Article 4-3.

Article 5

Responsible Lending and Borrowing and Creditworthiness (Article 5-1)

Banks already engage in lending responsibly for their own business profit and in order to comply with currently existing prudential rules. Article 5-1 of the modified proposal appears inevitably linked to a new risk of litigation for lenders by enabling consumers to bring actions against lenders in case of borrower's default on the basis of alleged wrongdoings in lender's creditworthiness assessment. It is EBiC's view that it is not necessary to add this new level of responsibility, since general regulation of civil law liability existing in all Member States already provides the right for the consumer to seek redress if a lender happens to infringe these principles. In addition, borrowers can dispute against lenders through the national out-of-court settlement schemes and the European scheme (FINNET). For these reasons,

⁶ See EU OJL 149 of 11.06.2005. This Directive which has amended Directive 84/450 as modified by Directive 97/55 concerning misleading and comparative advertising provides under Article 9 that "Member States may impose requirements which are more restrictive or prescriptive than this Directive".

EBiC urges the European institutions to provide a more balanced approach and to clarify in this sense the reciprocal obligations of the contractual parties in this article.

For this purpose, EBiC believes that the borrower should as well have the duty to act responsibly. This would be in line with the aim of Recital 19 which states that consumers should also act with prudence and respect their contractual obligations. Recital 19 should be incorporated into the main body of the Directive. This also means clarifying that borrowers need to take responsibility for the ultimate decision for their credit choice.

As explained below (see Duty to assist on comments to Article 5- 5), the borrower is the only one responsible for deciding which product is the most appropriate according to his personal situation. In this regard, EBiC warns against the risk of any incorrect interpretation of the “*most appropriate*” credit, referred to in Recital 20, in the context of defining lenders’ obligations to provide pre-contractual information.

Pre-contractual information (Article 5-2)⁷

Article 5 on Pre-contractual information currently contains inappropriate information requirements which are likely to overload consumers with unnecessary information.

Article 5-2.c)

According to this article, the creditor shall provide “...*where available, any index or reference rate applicable to the initial borrowing rate...*” The industry is concerned about the need to leave the free market interest rates vary in open competition conditions; this provision should therefore be deleted. For the sake of consistency, the following sentence should be added to the definition of the “*borrowing rate*” in Article 3.h in accordance with the wording of Article 13-3 of the proposal as endorsed by the European Parliament in first reading⁸:

“A variable borrowing rate may vary either after agreed periods provided for in the credit agreement and in line with the agreed index or reference rate, or in accordance with other arrangements agreed on by the parties.”

Article 5-2.d)

EBiC would suggest deleting the reference to “*a representative example mentioning all the financial data and assumptions used...*” to be given to the consumer, of the APRC and the “*total cost of the credit*”. This example may appear far too complex for an average consumer. Further, in certain cases, indicating the “*total cost of the credit*” might be difficult, for instance when the credit agreement is concluded for an indefinite time.

Article 5-2.e)

EBiC would appreciate some clarification on the added value of a *payment schedule* “*set where possible*” to inform the consumer, at the pre-contractual stage, about the amount, number and frequency of payments to be made, since from a lender’s perspective this would imply administrative costs that would eventually be transferred to the consumer. Based on “*the amount, number and frequency of payments*”, consumers are already well informed about the monthly charges and

⁷ There seems to be a drafting mistake when comparing this paragraph with Article 9-3. If the reference in Article 5-4 to “pre-contractual” information is correct, we see it in contradiction with Article 9-3 referring to the same while Article 9 regards “contractual” information.

⁸ See first Commission’s modified proposal in simplified form, COM (2004) 747 final of 28.10.2004.

aggregate cost of the loan. Since the use of such schedules is not a common practice, and the associated administrative costs would increase costs of lending, the requirement to provide a payment schedule should be deleted.

Article 5-2.g)

Lenders are not always in a position to quantify all costs payable by consumers at the conclusion of a credit agreement, to persons other than the lenders (or credit intermediaries). Notary fees and taxes to be levied by tax authorities are not necessarily precisely known by lenders. These costs can and do vary from one Member State to another, since they depend on criteria that are linked to individual consumers and are not in the remit of lenders.

The lender should not be required to ascertain and disclose the precise amount of costs that are not levied by him for his own benefit.

This issue is of particular importance in a cross-border context, where such an obligation – and the liability regime which is related thereto - could easily discourage lenders to even try to penetrate foreign markets if they are not able to manage this “informational” risk, i.e. to obtain such information on a regular basis from reliable sources. This would become a barrier in particular to free provision of financial services where the establishment on the territory of a Member State through branches or subsidiaries is not contemplated. This goes against one of the objectives of the Modified Proposal, i.e. to establish a genuine internal market for the interest of both lenders and borrowers.

Article 5-2.i)

A similar problem as the one treated under Article 5-2.e) is inherent in the provision of this paragraph, since it is impossible to determine in advance what the interest rate will be before any actual failure of re-payment occurs. EBIC would suggest limiting the requirement to informing about the application of an interest rate in case of failure of re-payment.

Article 5-2.l)

It is not always possible for lenders to quantify a priori the costs arising from early repayment since the calculation of early repayment fees depends on different contractual parameters, amongst which the interest rate, that are not always known when pre-contractual information has to be made available. The word “*amount*” should therefore be deleted.

Duty to provide assistance/explanations (Article 5-5)

EBIC very much doubts whether this provision (the wording of which is quite flexible) correctly fits into the larger framework of Article 5.

The current terms of this article would shift the balance of liabilities inappropriately and exclusively towards financiers (in particular according to the wording of Recital 20).

EBIC welcomes the fact that this provision does not expressly introduce a duty to advise. Nevertheless, the new wording within this provision still imposes on lenders a duty to provide *adequate explanations* to the consumer in order to put the consumer in a position to assess whether the proposed credit agreement is adapted to his needs and to his financial situation. It is currently felt that this new wording leads to an important degree of legal uncertainty regarding where the limits lay between a duty to provide the relevant pre-contractual information, a duty to advise, and maybe interpreted as somewhat

in the middle, a duty to provide “adequate explanations”. This aspect is likely to become a crucial one in case of litigations in the context of defaulted credits. EBIC would favour a clarification in the Directive establishing only a duty to provide the relevant pre-contractual information as set in Article 5.2.

Equally problematic for lenders is the obligation to explain “*advantages and disadvantages*” associated with a specific credit product. Lenders can only describe the features of their products. The aim of this rule is to allow the consumer to make an informed choice based on appropriate information: for that purpose, the obligation to provide consumers with appropriate pre-contractual information is sufficient.

The appreciation of products’ “*advantages and disadvantages*” is a subjective matter, which can only be assessed by the consumer himself against his particular situation. Based on clear pre-contractual information, the individual consumer is the only one in a position to assess whether a product is more or less advantageous, depending on his personal situation as well as the economic context. We recall that the consumer bears responsibility for the final choice.

EBIC would therefore ask for replacing the wording “*advantages and disadvantages*” by “*product features*”.

Besides, the duty to explain, in its present wording, would appear very difficult to be fulfilled in the area of the internet banking, where a bilateral dialogue between the parties is not possible. This requirement contradicts the Commission’s announced intention⁹ to facilitate the cross-border provision of services for retail banking since Internet banking is an increasingly appreciated banking channel for cross-border financial services.

Credit Databases Access (Article 8)

Whilst the Directive indicates that access to databases shall be on a non-discriminatory basis, the terms remain too vague. To ensure legal certainty it should be expressly specified that this access should not include internal databases set up by individual lenders. Access shall be granted to credit registries and/or databases commonly available to creditors operating in a given market.

Right of Withdrawal (Article 13.1)

The regime proposed by the provisions in the Modified Proposal is much more restrictive than the current situation in many EU Member States and, in our view, the necessity of introducing such a general right of withdrawal is indeed questionable.

In a number of countries in the EU (e.g. Austria), there is no general right of withdrawal applying to any kind of credit agreements. In those countries where a right of withdrawal exists, as illustrated by the following examples, the regimes in force are by far less constraining than the one envisaged by the Modified proposal.

We also recall that special rights of withdrawal are already in place when consumers require a special protection. For instance, for contracts negotiated away from business premises, the Council Directive 85/577/EEC¹⁰, grants consumers a special protection due to the fact that the contract is signed in the premises of the consumer in most cases.

⁹ Green Paper on Financial Services Policy 2005-2010 COM (2005) 177.

¹⁰ Council Directive 85/577/EEC, 20th December 1985 to protect consumers in respect of contracts negotiated away from business premises.

Where a general right of withdrawal exists, its duration period is in most cases limited to 7 days. This right is often combined with mechanisms such as a waiver, reduction of withdrawal period, compensation for losses incurred and/or reimbursement of costs borne by lenders, which allow a certain flexibility to satisfy the consumers' particular needs, i.e. immediate delivery of funds or goods/services financed via credit.

In particular:

- In **Belgium**, the consumer credit contracts are submitted to a right of withdrawal period of 7 days. Before 2003 the right of withdrawal did not apply to instalment credits. Since then it applies only to instalment credit contracts beyond EUR1250. For these instalment credits, should consumers withdraw from the credit contract, they would also withdraw from the sales contract. As a matter of particular commercial practice in the specific sector of motor vehicle sales, the right of withdrawal period starts only when the consumer signs the book order ("*bon de commande*").
- Legislation in **France** provides for a right of withdrawal period of 7 days. In case of credits granted to consumers in order to finance the supply of a specific good or service (so called *crédits affectés*¹¹), should consumers withdraw from the credit, they also have the choice to withdraw from the sale contract. Conversely, the credit contract is automatically cancelled in case of cancellation of the sales contract. If consumers ask for immediate delivery, the right of withdrawal can then be reduced to three days upon explicit request by the consumer.
- Similarly, in **Portugal** a right of withdrawal of a 7-day period applies but consumers have the possibility to waive their right of withdrawal if they want immediate delivery of goods or supply of services.
- In **Spain** the legislation governing instalment sales ("*Ley de ventas a plazos*") provides for a 7-day right of withdrawal period for the sale contract and as a consequence for the credit contract. This provision does not apply, however, to motor vehicles.
- In **Germany**, the legislation provides, since 2000, for a 2 week-period to exercise a right of withdrawal. But when the sale contract and the credit agreement are linked, the cancellation of the latter also affects the former so that the sale contract is also cancelled. In addition, and provided that the supplier has forewarned the consumer in writing that the he/she would be liable for any loss in value of the good returned, the supplier is entitled to claim compensation for all losses incurred. The consumer may therefore avoid the risk of incurring such a liability only by refraining from using the goods.
- In **Ireland** a right of withdrawal is provided by the law and can be exercised within 10 days from the reception of the agreement by the consumer; but again, the consumer may forego his right to a cooling-off period by signing a separate statement to that effect.
- In the **UK** the Consumer Credit Act 1974 (sections 67 to 73) provides for a limited right of cancellation. Broadly speaking, credit agreements regulated by the Act are only cancellable if there have been negotiated personally – 'face to face' - with the lender or with an agent of the lender (i.e. retailer of the goods whose purchase is to be financed by the credit agreement) *and* if the credit agreement has *not* been signed by the consumer on the premises of either the lender or the lender's agent.

¹¹ In this kind of credit agreements, it must be explicitly stipulated in the credit contract that the funds will be assigned to the given transaction.

- In **Poland** a right of withdrawal has been introduced by the legislation and can be exercised in 10 days. However, the implementation of this regulation has caused so far considerable difficulties and has increased the number of legal actions taken by providers against consumers who had not paid for the goods after having withdrawn from the credit agreement. As a consequence, many small size retailers have been simply led out of the instalment sales business.

The concern stated above and backed by the described examples is even reinforced when reading the consideration in paragraph 5.7 of the explanatory memorandum of the Modified Proposal where it is stated that:

“The length of the withdrawal period corresponds to the Distance Marketing Financial Services Directive. As a consequence, at least for consumer credit agreements which are also marketed by distance means, it will not involve additional costs for creditors”.

This statement indeed ignores that in the absence of a waiver, the regime as fixed in Article 13 will govern **all** credit transactions, the majority of which are not conducted by distance. Whereas a period of withdrawal of 14 days might be justified in that context in consideration of the particular means by which the contract is concluded, the reference to the Distance Marketing Directive does not provide adequate grounds for extending such period of withdrawal to all credit agreements; even more so, where EC and national legislations provide examples of shorter periods of withdrawal.

Additionally, we are concerned with the consequence of the provisions set under Recital 9 providing that:

“Member States should remain free to maintain or introduce national legislation”, and stipulating that “an(other) example of this possibility for Member States could be national provisions introducing or maintaining a right of withdrawal from the contract of sale of goods or supply of services if the consumer exercises his right of withdrawal from the credit agreement (...)”.

This discretion left to national legislators is likely to have damaging consequences on the economic growth, particularly of small businesses in many EU Member States.

In practice, when a right of withdrawal for credit agreement exists, it is, in general, coupled with a right of withdrawal from the sales contract. When a sale is financed with a credit at the point of sale, the credit provider does not give the money to the consumer, but pays directly the retailer. Payment by the credit provider to the supplier is settled according to the terms of their mutual agreement (it can be made a few days later, settled on certain days every week or every month). If a consumer were allowed to cancel the credit contract without an option to waive the right of withdrawal, the credit provider will most probably wait until the end of the right of withdrawal period to pay the supplier. If the consumer cancelled the credit before the supplier was paid, the credit provider will not pay the supplier because the credit contract will no longer exist. Two possible scenarios can then be contemplated in case the goods were made available to the consumer during the withdrawal period:

- 1) The consumer can not withdraw from the sale. In such circumstances the supplier would be taking on a risk that the consumer may not pay, and be open to all the complications-and costs-of repossession, recovery and financial shortfall, which he is not equipped to handle. Absorbing or managing the risk of cancellation will be difficult for him.

- 2) The consumer, as it is frequently the case, is allowed to withdraw from the sale. Then the supplier will be confronted eventually to the problem of repossession and in any case to the problem of recovering goods that if used will lose part of their value.

Both cases will have downside implications for growth of supplier's business. This negative side effect could be particularly harmful as figures available for example in the UK show that small retail business grow faster than large ones; during the period from 1994 to 2002, small retail business grew 73% compared to 5% for larger ones.

The industry is concerned that a right of withdrawal of 14 days, with neither a waiver nor a satisfactory compensation mechanism, will lead to lenders being reluctant to release funds to shops and motor dealers until the period has expired. By the same token, suppliers would be reluctant to release goods immediately to their customers. Consequently, consumers would be in a disadvantaged position.

To sum up, the right of withdrawal as put forward in the Modified Proposal, instead of protecting consumers, would complicate or even jeopardise their plans.

Therefore, EBIC proposes to introduce the following changes, subject to full harmonisation:

- 1) the withdrawal period be reduced to seven days; and
- 2) the consumer be granted the possibility to waive the right of withdrawal upon his express agreement. At least, for credit agreements signed at the point of sale, when the consumer asks for immediate delivery of goods or services, leave open the possibility to reduce the right of withdrawal to three days;
- 3) a provision that full repayment must be a pre-condition of cancellation of the credit contract be introduced.

Art. 13-2

By referring to an "*intention to withdraw*", this paragraph is unclear, introduces an element of confusion in the proposal and does not seem to provide any added value to the parties; EBIC proposes to delete this paragraph.

Article 13-4¹²

The concept "right of withdrawal" does not have the same consequences throughout Europe:

- In certain Member States, the right of withdrawal allows the borrower to pay back to the lender the amount made available under the credit contract;
- In other Member States, the right of withdrawal prevents the lender from making the credit available to the borrower during the withdrawal period. Although this is referred to as a "withdrawal right", this is indeed more a reflection period.

According to the harmonisation approach of the Modified Proposal, elements which are not explicitly dealt within the Directive are left to national legal systems to regulate. Therefore, unless the exercise of the right of withdrawal is explicitly harmonised within the directive, national regulations that prevent borrowed sums from being made available during the withdrawal period will be maintained. In those countries, consumers will have to wait 14 (or 7) days before receiving the money that will enable them to make their purchase. This will have the following negative consequences:

¹² Article 13.4 contains a drafting error since the accurate reference should be to Article 13 paragraphs 1 and 3.

- Consumers, instead of being protected, will see their plans complicated and possibly jeopardized
- Lenders involved in cross-border transactions will be at a serious competitive disadvantage with respect to credit institutions located in Member States whose regulations allow credit to be made available immediately.
- Suppliers will have to wait 14 days before making a credit sale.

In order to avoid the above described negative impact of the directive, lenders should be expressly allowed to make credit available to borrowers before the end of the withdrawal period for all types of credit.

Furthermore, Article 13.4 refers to settlement conditions when the right of withdrawal was exercised (*"interest shall be calculated on the basis of the agreed borrowing rate"*) compensation for the lender should be fairly calculated in order to cover at least his administrative charges. Existing legislation, for instance Article 6-2 of Directive 97/7 on the Protection of Consumers in respect of Distance Contracts (OJL 144, 04.06.1997), allows sellers to be reimbursed for the *"direct costs of returning the goods"*.

Article 13-5

The current wording of Article 13-5 is unclear and would lead to inconsistencies and contradicting provisions. EBIC would therefore suggest replacing article 13-5.b) by the following: *"credit agreements which fall under the scope of the following provisions"*.

Linked credit agreements (Article 3.1) and Linked transactions (Article 14.2)

Linked Credit Agreements and definition of "commercial unit" (Article 3 I ii)

EBIC feels that the definition of *"commercial unit"* in Art 3 I ii, as it stands, fails to specify a fundamental point, and thereby the definition remains too broad. Not only must there be an exclusivity link (*"inner"* link or *"causality"* link) between the credit agreement and the supply/provision of specific goods/services which must be identified in the credit agreement itself (indent (i)); but also the relationship between the lender and the supplier/service provider should be exclusive. A simple financing function of the credit agreement is not sufficient to create such a link.

The underlying concept developed in several Member States through national jurisprudence, defines when two commercial transactions form an economic unit from an objective point of view. The relevant criterion is to be found in the consequences derived from the loss of such a *"causality"* link: if one of the two agreements happens to be cancelled or terminated, the other one loses its cause and falls too, i.e. cannot be maintained in the absence of the other one. The mere reference of specific goods or services in the credit agreement does not render credit agreements *"legally linked"*.

The reference to the goods or services to be financed by the credit agreement is valuable from the perspective of an informed consumer, enabled to make a prudent decision. However, the current wording of the proposal would lead to a situation where the sole reference to the specific goods to be financed with the credit would be sufficient to apply the linked transactions regime. The current wording of the Modified Proposal creates the risk that a large number of credits could be defined as *"linked credit agreements"* without any of the parties having intended to give this effect to the agreement.

As a consequence and looking at the definition of “linked credit agreement”, the last part of the sentence under Article 3.1).ii) should be modified as follows:

“Those two agreements form, from an objective point of view a commercial unit; a commercial unit is involved where:

- the supplier or service provider himself finances the credit for the consumer; or,*
- if it is financed by a third party, if the creditor uses the services of the supplier or service provider in connection with the conclusion or preparation of the credit agreement ;and*
- if the credit agreement makes reference to the specific goods or services to be financed with the credit.”*

The exclusivity link for “*linked credit agreement*” not only should cover the credit agreement and the supply/provision of goods/services, but also the relationship between the lender and the supplier/provider of goods/services.

Linked Transactions (Article 14-2)

Art. 14-2 sets out the conditions which determine the consumer's right to pursue remedies against the creditor based on the existing provision of the 1987 Directive. The logic of Article 11 of the 1987 Directive, specifying that these conditions are cumulative, has been endorsed by the Parliament's first reading on the proposal. It is well understood that in order to facilitate a uniform transposition and implementation at national level, conditions (a), (b), (c), (d) and (e) should be seen cumulative. The conjunction “and” should be inserted between the respective criteria, as follows:

“2. *Where:*

- (a) in order to buy goods or obtain services the consumer enters into a credit agreement with a person other than the supplier of them, and*
- (b) the creditor and the supplier of the goods or services have a pre-existing agreement whereby credit is made available exclusively by that creditor to customers of that supplier for the acquisition of goods or services from that supplier, and*
- (c) the consumer referred to in point (a) obtains credit pursuant to that pre-existing agreement, and*
- (d) the goods or services covered by the credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract to supply them, and*
- (e) the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled,*

the consumer shall have the right to pursue remedies against the creditor. Member States shall determine to what extent and under what conditions these remedies shall be exercisable.”

Early Repayment (Article 15)

The fulfilment of the need for the lender to structure accurately its refinancing liquidity and cash flow depends on the borrower's commitment to repay in accordance with the underlying agreement. It would be unfair to burden the lender unilaterally with the risk of a sudden termination of the contract by early repayment that might jeopardize the management of the interest rate's risk.

In case of early repayment, borrowers should compensate lenders for all losses which have arisen from the prepayment.

Although we welcome this improvement, EBIC sees no justification to exclude in Art. 15-2 the compensation of losses for credit agreements where the period used to fix the borrowing rate is less than one year.

As regards the definition of the fees related to an early repayment of the borrowed funds, those costs which have already been incurred and used, such as the fees for concluding the contract or for the evaluation of the collateral cannot be reduced or refunded and must be excluded. Therefore EBIC would suggest replacing in Article 15.1 the reference to the *“total cost of the credit”* with a reference to the *“maturity-related cost of the credit”*.

Assignment of rights (art. 16)

EBIC welcomes the intention of Article 16, which does not require the consumer to be informed where the assignment of rights is effected for refinancing purposes and does not affect his legal position. However, the terms *“for securitisation purposes”* used in Article 16.2 are too limited and do not reflect the intrinsic intention, since securitisation is not the only method used by lenders to transfer credit risks and refinance them.

Therefore, EBIC proposes to modify Article 16.2 as follows:

“The consumer shall be informed where the credit agreement has been assigned to a third party except where the assignment is effected for ~~securitisation purposes~~ the purpose of transferring the credit risk or refinancing purposes only and....”

Overrunning of the total amount of credit (Article 17)

By allowing customers to overrun, lenders provide a special service that can be seen as a facility analogous to overdraft operations. The bureaucratic constraints on lenders imposed by Article 17.2 would render it complex and no longer workable in practice. Therefore, EBIC would suggest deleting Article 17.2, as requested by the European Parliament¹³ in first reading.

Unfair terms (Art.27)

EBIC would ask to delete Article 27 of the Modified Proposal as the European Parliament did with the former Article 15. Changes in the Unfair Terms Directive should for consistency reasons be done within the respective Directive 93/13/EEC in a separate procedure.

These proposed amendments to the Annex of the Directive 93/13/EEC would also have as its consequences that certain kind of credit and refinancing models would be prohibited by the unclear wording proposal of this Modified Proposal.

¹³ Amendment 131 of the European Parliament deleting former article 25 paragraph 3, on grounds that this obligation is out of step with common practices.

