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ITEM 8 OF THE AGENDA: CONSUMER CREDIT DIRECTIVE

The EBF observations (position paper) on the modified proposal for a Directive on Credit to Consumers are enclosed for your information (enclosure 1) along with a short summary of the decision of the last EBF Consumer Credit Directive Working Group meeting of 20 October 2006.

Ms. Arianna MELLINI SFORZA, EBF Adviser will give a presentation on the latest developments in the Consumer Credit Directive during the meeting.

Enclosures: 2

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FBE OBSERVATIONS ON THE MODIFIED PROPOSAL FOR A DIRECTIVE ON CREDIT TO CONSUMERS

Established in 1960, the European Banking Federation ("FBE") is the voice of the European banking sector. It represents the interests of over 4500 European banks, large and small, from 29 national Banking Associations, with assets of more than EUR 20.000 billion and over 2.3 million employees.

A. General remarks

Credit to consumers is one of the core businesses in the retail banking market. Its development in the future decades will be of major importance for boosting the economic growth of the EU.

As the body which represents the interest of the banking sector in Europe, FBE has been following the legislative procedure started with the publication of the proposal for a Directive in 2002, due to amend the legislation in force on credit to consumers¹. Since then, FBE – both individually and jointly with the other members of the European Banking Industry Committee (EBIC²) - has undertaken a deep analysis of the proposal.

Following the adoption of the First Reading Resolution by the European Parliament on 20 April 2004, the banking industry has highlighted in several occasions a number of key issues that, in our view, needed to be approached differently in order to achieve what the Commission has defined as the aims of the modified proposal published on 10 October 2005³ ('the modified proposal'), namely:

- (i) to establish the conditions for a genuine internal market,
- (ii) to ensure a high level of consumer protection, and
- (iii) to improve the clarity of the legislation at EU level⁴.

In the modified proposal the EU Commission has taken into account many of the amendments adopted by the European Parliament through its First Reading Resolution, as well as some of the remarks made by the banking industry since the publication of the

¹ Directives 87/102/EEC, 90/88/EEC and 98/7/EC.

² www.eubic.org

³ COM(2005) 483 final of 07.10.2005.

⁴ COM(2005) 483 final of 07.10.2005, page 2.

proposal. FBE welcomes those amendments as an important improvement in the drafting of the proposal.

However, while acknowledging the efforts of the EU Commission to keep open the dialogue with relevant stakeholders, FBE regrets that this proposal has not yet been submitted – as requested by the banking industry at several occasions - to those “better regulation principles” that currently define the EU Commission’s approach vis-à-vis new legislative initiatives⁵.

B. Priorities

- Impact assessment
- Overdrafts
- Linked credit agreements
- Responsible lending
- Right of withdrawal
- Harmonisation

FBE still believes that a rigorous **impact assessment** of the envisaged set of rules is needed in order to assess whether the provisions of the proposed Directive will facilitate a proportionate outcome against its stated goals. In our view, the arguments delivered in the Explanatory Memorandum that now precede the body text of the modified proposal appear to fall short of such a requirement.

While waiting for the launch of such an assessment – and without prejudice to the outcome thereof - FBE wishes at this stage to highlight, within the overall content of the modified proposal, the following priorities which we believe need to be addressed by the EU legislator with particular care and urgency:

- Under Article 2 **overdrafts** should be left out of the scope of the modified proposal;
- the definition of **linked credit agreements** under Article 3.I should be amended under indent (i) and (ii) so that the relevant regime does not unduly cover agreements that are not actually linked;
- the principle of **responsible lending** and the overall regime as presented under Article 5 is not addressed in a satisfactory manner; the first sentence of Article 5.1 should be deleted or, at least, a more balanced approach should be provided in order to clarify both the reciprocal obligations of the contractual parties in the articles of the future Directive (as referred to in Recital 20), and the fact that the task of the credit institution to assess the client’s creditworthiness belongs to the sphere of banking supervision law/public law and should therefore be treated accordingly;
- the content of the **right of withdrawal** should be fully harmonised among EU Member States based on a period of 7 days and combined with the possibility for the consumer to waive such a right, should he wish to ask for immediate delivery of the financed goods/services;

From the more general perspective of the **harmonisation** and the **aim** that the future Directive is meant to achieve, the confusion in the new wording represented by the combined reading of Article 1 and Article 21.1 remains ambiguous and should first be cleared; then the newly elaborated approach combining harmonisation with mutual recognition needs to be very carefully assessed with respect to its impact on the achievement of the objectives set out in the modified proposal.

Before presenting detailed comments and arguments on the above mentioned issues under section B, FBE wish to also draw the attention of the EU legislator on the need to

⁵ COM(2005) 97 final of 16.03.2005.

clarify in the framework of, among others, the rules on credit to consumers, how the implementation of the recently adopted rules on capital requirements introducing at EU level the content of the Basel II Accord⁶ should be regarded from the viewpoint of the adjustment, by credit institutions, of borrowing interest rate in relation to retail customers' risk rating for prudential purposes, since the modified proposal has not taken into account this banking supervision development. In particular FBE would welcome explicit clarification in the modified proposal of how possible conflicts between the two sets of rules should be resolved.

C. Specific remarks

Subject matter (Article 1)⁷ and Harmonisation, mutual recognition and imperative nature of the Directive (Article 21)

Article 1 of the modified proposal now streamlines the initial (rather ambitious) goal of the Directive and no longer tries to encompass all the areas related to the consumer credit, but reduces the purpose of the Directive to the harmonisation of certain aspects of this sector.⁸ In our view it appropriately refocuses the future Directive on those "certain aspects" because of their high relevance⁹.

A problem is encountered, however, when looking at Article 1 in combination with Article 21. Article 1 determines the "latitude" of the harmonisation, while it is silent about the "degree" of harmonisation. For that purpose, Article 21 has been inserted; the wording of Article 21.1 refers to a maximum level of harmonisation achieved by the modified proposal, insofar as Member States are not allowed to "*maintain or introduce provisions others than those laid down in [the] Directive*".

Yet, this paragraph fails to indicate which articles – if not all the articles –, are the provisions in the modified proposal that are not harmonised provisions. In other words, the article provides *only a confusing indication* of which parts of the Directive are to be deemed "fully harmonised" – i.e. it is unclear *in which cases its provisions do not require further rule-making in substance from national legislators, and where they leave Member States with 'discretionary leeway'*.

⁶ The new Basel capital accord (Basel II) was published on 26 June 2004 and will be implemented in EU law by amendments to Directives 2000/12/EC (Codified Banking Directive) and 193/6/EEC (Capital Adequacy Directive). It aims, among other things, at ensuring that banks take greater account of the risk of default of their customers than was the case in the past. This prudential objective does not, however, guarantee in itself that an interest rate contractually agreed with a customer can be adjusted under civil law in the event of the creditor changing its rating of the consumer.

⁷ The modified proposal bears a new title which currently refers only to credit agreements for consumers and to the amendment of the Unfair Terms Directive (Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts, OJ L95/29). If the modified proposal is meant to repeal the existing set of rules – as stated in Article 25 –, a reference in the title would be useful to clarify this aim.

⁸ Such a reduction is reflected in the deletion of a number of articles that were inserted in the first proposal, for instance, the previous Chapter VII on the performance of a surety agreement, or the previous Chapter X on non performance of a credit agreement, etc.

⁹ We understand that the degree of harmonisation is independent from the scope of harmonisation. For example, a minimum harmonisation Directive may contain 25 provisions covering all the aspects of a given area whereas a full harmonisation Directive may contain only 2 provisions. See FBE position paper of September 2004, *State of Integration of Europe's Financial Markets*, page 38:

"The scope of harmonisation means the issues being dealt with in the Directive. It may be more or less wide, i.e. it may cover only some ('limited scope' harmonisation) or all ('exhaustive/extensive scope' harmonisation) aspects of a given area.

There is no definition in EU Law. An example of 'limited scope' harmonisation is Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 on the Annual Percentage Rate of Charge. An example of 'extensive scope' harmonisation is the Proposal for a Directive on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers (COM (2002)443).

There seems to be a specific concept called 'total harmonisation'. Although there is no official definition, it could be defined as the combination of maximum harmonisation and exhaustive/extensive harmonisation. The Commission seems to [have] used the term 'total harmonisation' pursuant to this meaning in the [previous] Article 30 of the [2002] proposal for a Consumer Credit Directive.

Assuming that the above interpretation is correct, **we still urge the EU legislator to clarify the interplay** of a “maximum harmonisation approach” as stated in Article 21.1 **with** the numerous limitations laid down in **Article 21.2 first sentence** (“...without prejudice to necessary and proportionate measures which Member States may take on grounds of public policy”) as well as in **Article 21.3** (“...provisions of national law implementing or corresponding to this Directive”) and **Article 21.4 to 6** (“...Member States shall ensure that the provisions they adopt in implementation of this Directive....”).

The provisions enumerated in Article 21.2 touch upon most of the “**key elements**” of the regulation of the consumer credit sector, **the content of which should be, in our view, fully harmonised**. Yet, the modified proposal states explicitly that some aspects regarding modalities of implementation are left to Member States’ discretion.

To minimise the fragmenting effect on the internal market of these provisions, a mechanism of mutual recognition has been introduced by Article 21.2 so that no Member State will be allowed to restrict, on its territory, the activity of foreign lenders which operate according to specific rules in force in their country of establishment.

We believe that this provision requires clarification as to its possible effects on both the establishment of the Internal Market under a regime of free establishment as well as of free provision of services, and the correct functioning of domestic markets, especially on the interplay, in practical terms, of the targeted full harmonisation and mutual recognition provisions. Indeed, in our view mutual recognition should apply only to residual matters, while most of the provisions enumerated in Article 21.2 are far from being “residual”.

Most of the provisions listed in Article 21.2 are, in our opinion, fundamental in offering credit to consumers and should be fully harmonised. In this context, the mutual recognition mechanism should be applied here only to avoid that the modalities further used by Member States to implement the directive according to Article 249 of the EC Treaty, for those provisions under Article 21.2 (and even if these ones do not leave any leeway to national legislators) are not misused as a means to erect barriers to foreign service providers willing to enter another Member State’s market.

Submitting these provisions to a regime of mutual recognition of national implementing legislations without ensuring that they are genuinely providing full harmonisation does not seem to us consistent with the aim of increasing the availability of cross-border credit and contributing to the objectives indicated in the preamble of the modified proposal and in the Explanatory Memorandum.

Indeed, unless provisions as those regulating e.g. the pre-contractual and contractual information requirements, the calculation of the APRC or the means to exiting a credit agreement are clearly fully harmonised, Article 21.2 introducing mutual recognition for those possible implementing measures that Member States might still have to adopt, risks jeopardising the achievement of the aims of this proposed Directive, as it would appear inconsistent, in our view, with the ‘targeted full harmonisation’ approach as described above.

Scope (Article 2.2)

FBE believes that the modified Article 2 has been substantially improved and welcomes most of the amendments. Nonetheless, there are still some issues of concern, the most important of which are presented below.

Article 2.2.a

FBE 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.

However, based on the current wording of this article, loans secured by sureties commonly used in a Member State, such as e.g. personal guarantees, which are non real estate-secured loans (currently covered by the Code of Conduct on Pre-contractual Information on Home Loans) are no longer excluded from the scope of the Directive (see Recital 13).

We are 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 to deviate, in the modified proposal, 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. In this respect, FBE strongly believes that these loans must be excluded as well, 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.

With respect to the treatment of **unsecured housing loans**, which exist in a number of EU countries, we strongly believe that these loans should also be excluded from the scope, because they too are long-term housing products with the corresponding specificities¹⁰. Loans used for renovation purposes, for instance, which were excluded from the scope of the 1987 Consumer Credit Directive¹¹ for the above reasons, would now be included in the Directive according to the current wording of the modified proposal.

We instead urge the EU legislator to again endorse the version of Article 2.2.a as amended by the European Parliament in its First Reading Resolution (Amendment 49) and to modify Article 2.2.a 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 would need to be amended accordingly.

Article 2.3 and 2.4

With regard to **small credit agreements** and **overdraft facilities** FBE is concerned that, despite the good intention to lift part of the burden and costs linked to the information requirements, the regime adopted for credit agreements up to **EUR 300** and for **overdrafts** still appears too cumbersome for credits of this size and this particular type of facility.

Small credit agreements and overdrafts are known and appreciated by customers for their simplicity and low costs. Particularly overdrafts are very often not stand-alone products but

¹⁰ 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.

¹¹ See Directive 87/102, Article 2.1.a and Directive 90/88, Article 1.3.

rather integral to current accounts' functionality and, as such do not require an ad hoc pre-contractual information regime. Including them in the scope of the future Directive – even if under a “light” or “simplified” regime for information requirements - would make them expensive and potentially unprofitable for lenders.

Indeed, under Article 2.4 loans of this kind will be subject, for instance, to the pre-contractual information requirements of Article 6 and to most of the information to be included in the contract itself under Article 9. Although they are fewer than those applying to other loans covered by the scope of the Directive, these information requirements alone go too far and would be unworkable in practice. Given the small sums involved and the fact that this market segment does not represent for banks a source of major revenue, even the “simplified” information regime envisaged by the modified proposal and the associated processing time and costs would be out of all proportion to the possible return.

The increase in costs triggered by these requirements would make small loans disproportionately expensive and ultimately increase costs that would have to be borne by the consumer. What is more, the new information requirements would result in so much associated red tape that many banks would probably stop extending very small loans altogether. This would make access to credit more difficult, particularly for those sections of the population who currently take out very small loans of this kind. Indeed Article 2.1.f of the Directive in force¹² quite rightly totally excludes “*credit agreements involving amounts less than 200 ECU*” from the application of pre-contractual and contractual information requirements. Similarly, Article 2.1.e of the same Directive excludes from the scope of application credits *in the form of advances on a current account granted by a credit institution or financial institution other than on credit card accounts*.¹³

FBE urges the EU legislator to:

- (i) set the ceiling of small credit agreements at **EUR500** so that credit agreements below that amount are excluded from the scope of application of the future Directive as it is the case under the Directive currently in force. Indeed, common market practice has not highlighted any particular problems linked to credits up to EUR500; also, this amount would keep the same proportion as the one adopted to set the maximum ceiling (from ECU20000 to EUR50000); and
- (ii) exclude overdrafts from the scope of the modified proposal.

Article 2.2.f)

The modified proposal envisages an exemption in Article 2.2.f for **loans granted by an employer to his employees**. This definition is too narrow. In practice, employers normally may offer loans of this kind not only to their own employees, but also to the employees of companies with which they have close corporate or business relationships (by means of shareholdings, for example, or a co-operation agreement). Based on the current wording of the rule, employers would no longer be able to grant such a type of loans to employees who had a special relationship with the “employer” because of e.g. an outsourcing contract, co-operation agreement or shareholding arrangement. To avoid this, the exemption should be reworded as follows:

- (f) *credit agreements which are granted by an employer to his employees or the employees of branches, subsidiaries or co-operating companies (...) free of*

¹² Directive 87/102 EEC as amended by Directives 90/88/EEC and 98/7/EC.

¹³ As a matter of derogation Article 2.1.e requires the provision of a very limited number of information as laid down under Article 6 thereof, namely information on: the credit limit, if any, the annual rate of interest and the charges applicable from the time the agreement is concluded, the conditions under which these may be amended, any change in the annual rate of interest or in the relevant charges at the time it occurs and the procedure for terminating the agreement. Furthermore, **tacitly accepted overdrafts** of less than three months are not even subject to the information regime mentioned above.

interest or at annual percentage rates of charges lower than those prevailing on the market;

Article 2.2.i and 2.4.c

Article 2.2.i rightly envisages excluding from the scope credit agreements “which relate to the **deferred payment, free of charge**, of an existing debt”. Conversely, under Article 2.4.c 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”.

This distinction is not justified and will cause problems in practice – to the detriment of the consumer. A situation may arise during the lifetime of the credit agreement or when the loan matures, in which the consumer is temporarily unable to meet his obligations due to, for instance, a short-term lack of liquidity. Under existing law in many Member States, it is possible temporarily to suspend the consumer’s payment obligations by concluding a debt deferral or repayment agreement without this involving any additional bureaucracy.

Aside from the fact that he naturally has to continue paying maturity-related costs (i.e., in particular, interest) on the amount he owes during the period of deferral under such an arrangement, the consumer does not normally incur any further costs. The consumer is consequently not made subject by the arrangement to less favourable terms compared to the initial credit agreement – except that his maturity-linked costs (particularly, interest) continue to fall due. The 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 simple, unbureaucratic assistance outlined above. Yet there is no need to impose additional information requirements 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 consumer will have been fully informed on them before the latter was concluded. To avoid the consumer to lose the opportunity of being allowed non-depreciatory debt deferral or repayment agreements in a simple, straightforward way, such agreements should continue to be excluded from the scope of the Directive¹⁴.

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;*

Definitions (Article 3)

FBE welcomes the new set of definitions that, from a general point of view, now better reflect the market practice, although we would welcome a number of clarifications.

Article 3.d

As said above, we recommend excluding overdraft facilities – as defined here - from the scope of the Directive.

According to the modified proposal, an **overdraft facility** is “a credit agreement whereby a creditor grants to a consumer the possibility to dispose of funds in his current account ...”.

This definition is too narrow and evidently assumes by using the term “funds” that there would normally have to be a credit balance on the account. This is often not the case (i.e.

¹⁴In 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.

a credit line might be allowed also without pre-existing funds on a bank account) and must not be a prerequisite for granting an overdraft facility. The definition should therefore be worded as follows:

- (d) “overdraft facility” means a credit agreement whereby a creditor grants to a consumer the possibility to dispose of funds in his current account ~~which exceed the current balance in that account~~ as far as he has been granted a credit line and where ...”

Article 3.e

The modified proposal defines the **credit intermediary** as a person acting “on behalf of the creditor”. Articles 19 and 20 subsequently set out the obligations of credit intermediaries on the basis of this definition and require Member States to regulate them. The current wording however seems to us inappropriate and should be modified in order not to apply to persons whose professional activity does not consist in providing credit. Accordingly, the three requirements under Article 3.e.(i)-(iii) should be cumulative instead of alternative, by replacing “or” with “and”.

On the other hand, loans are offered to consumers not only by persons working “on behalf of” the creditor, but also by a number of persons acting independently and who may well not receive a fee from the lending credit institution. We deem it essential that these intermediaries also be subject to the requirements in Articles 19 and 20. The existing qualification in Article 3.e should therefore be modified as follows:

- (e) “credit intermediary” means a natural or legal person who ~~on behalf of the creditor and~~ **is not acting as a creditor** and for a fee which may take a pecuniary form or any other agreed form of financial consideration, **as professional activity:**
- (i) presents or offers credit agreements **or undertakes other preparatory work for them; or and**
 - (ii) ~~undertakes other preparatory work for credit agreements other than that referred to in (i); or~~
 - (iii) concludes credit agreements....”

Article 3.f

According to Article 3.f, the total cost of the credit to the consumer – and thus also its expression in percentage under Article 3.g (the APRC) – has to include “any kind of fees in connection with the credit agreement”. We consider that the calculation of the total cost of credit and the APRC should not include the cost of operating a current account unless it is dedicated exclusively to processing and servicing the loan. For clarification purposes, the following sentence should be added to the definition in Article 3.f:

The costs of operating a current account which the consumer uses to effect payments are not to be included.

Furthermore, Article 3.f uses the wording “costs relating to ancillary services relating to the credit agreement”. Given that the objective of the APRC is to allow the costs of loans to be compared with one another, this is an unjustified extension of the definition. If costs are to be comparable, they must be based on the same or at least comparable elements. This is not the case under the present wording of Article 3.f which leads to compare different sets of circumstances (in particular, credit agreements which did not require an endowment policy and credit agreements which did). An endowment insurance policy is a service independent of the fate of the credit agreement: it is a means of accumulating capital and offers the policyholder protection against risk independent of the fate of the loan agreement. In other words, the consumer obtains an additional service.

If such costs had to be included in the APRC despite the arguments outlined above, they could theoretically only be the costs of covering risk and handling charges. The part of the insurance premium representing the savings portion of the insurance policy, in contrast, is

not part of the costs that directly affect the cost of the loan¹⁵. However, it would be disproportionately onerous – if not at all possible - to split the covering risk from the overall insurance premium¹⁶.

Moreover, in cases where instalment loans are concerned it would only be possible to calculate the APRC or the “total cost of the credit” on the basis of fictitious data since the life of the insurance policy will normally be longer than the fixed interest period of the loan at the end of which repayment will become due. And even with credit agreements which do not take the form of instalment loans, the variable amount of profit generated by the insurance would mean that the calculation of the APRC or the “total cost of credit” would be based on at least partially fictitious data. Using the “safe” guarantee interest rate as the basis of calculating the effective rate of interest, on the other hand, would mean quoting the customer an effective rate of interest which most probably would not be accurate.

It is therefore not appropriate to include expenditure relating to a savings programme in the costs used to calculate the APRC. This would ensure that the APRC included only the costs of products which directly benefited not only the consumer, but also the loan agreement and the creditor, such as mandatory residual debt insurance, for example.

We consequently suggest amending the wording of Article 3.f as follows:

(f) “total cost of the credit to the consumer” means all the costs, including interest, commissions and any kind of fees which the consumer has to pay in connection with the credit agreement in conformity with the terms thereof, and which are known to the creditor; costs relating to ancillary services relating to the credit agreement, ~~in particular insurance premiums,~~ – in the case of insurance, only premiums for insurance policies whose sole objective is repayment to the creditor in the event of realisation of the insured risk – are included if the conclusion of the service contract is compulsory for obtaining the credit or the advertised interest rate, (...)

The costs of operating a current account which the consumer uses to effect payments are not to be included, unless it is dedicated exclusively to processing and servicing the loan.

Article 3.l

Although we welcome the improvement in defining **linked credit agreements**, it is our belief that this definition, as it stands, fails to specify a fundamental point: 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; but also the relationship between the lender and the supplier/service provider should be exclusive. A simple financing function stated in the credit agreement is not sufficient to create such a link.

This concept, developed in several Member States through national jurisprudence¹⁷, defines when two commercial transactions form an economic unit from an objective point of view.

The relevant criterion has been 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

¹⁵Unlike interest payments, for example, this savings portion of the insurance premium is not “used up” during the lifetime of the loan, but accumulates to the benefit of the insurance taker.

¹⁶In Germany, a Federal Court of Justice ruling of 18 January 2005 (WM 2005, 415 ff.) rejected the idea of splitting the covering risk from the overall premium as impracticable.

¹⁷An example is the jurisprudence developed in Germany by the Federal Court of Justice on the interpretation and application of Section 358 (3) of the German Civil Code. A linked credit agreement may be deemed to exist only if there is more than a simple means-to-an-end relationship between the financed goods or services and the credit agreement; the two agreements must be so closely connected with one another that neither would have been concluded without the other and each achieves its purpose only with the conclusion of the other contract (cf. decision of the Federal Court of Justice in BGH NJW 2000, 3065, 3066 and, as one of many examples, the academic legal commentary by Habersack in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4th edition, Section 358 par. 36).

other one loses its cause and falls too, i.e. cannot be maintained in the absence of the other one.

In order to clarify the scope of application of related Article 14.2 and 14.3 on linked transactions and to avoid that the definition of linked credit agreements creates unintended, very serious risks of increase in liability exposure of lenders, this should be specified in Article 3.1. Indeed, without such a specification, most of the credits can be wrongly defined as linked credit agreements, without any of the parties (the lender, the consumer or the supplier/provider) having intended them to be used as such.

Accordingly, Article 3.1.(i) could be modified as follows:

- (i) *the credit in question serves exclusively to finance an agreement concerning the supply of goods or the provision of a service and the two agreements are connected with one another so that neither agreement would have been concluded without the existence of the other and each achieves its purpose only with the conclusion of the other agreement; and*

The last part of the sentence under Article 3.1.ii) should be deleted:

- “ii) 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 ~~or if the credit agreement makes reference to the specific goods or services to be financed with the credit.~~”*

Lastly, we deem it essential that the modified proposal explicitly exempts from the application of the rules on linked credit agreements if the credit is used to purchase shares, derivatives or other financial instruments which are subject to the fluctuations of the capital markets. Otherwise, the consumer would be able to speculate on the financial and capital markets at his bank's expense. In this respect, the exclusion from the scope under Article 2.2.g would not be sufficient to avoid the described circumstance in those cases where the credit is not concluded with an investment firm but with a credit lender not comprised within the definition under Article 1.2 of Directive 93/22/EEC (as amended).

The following provision should therefore be added to Article 3.1:

- (iii) The provisions on linked credit agreements do not apply if the credit agreement serves to finance the purchase of securities, foreign currency, derivatives, fund units, precious metals or other financial market instruments which are subject to fluctuations in the capital markets.*

Standard information for advertising (Article 4)

FBE is aware of the vote of the First Reading Resolution of the European Parliament which introduced a set of standardised information also for advertisements (so called “info-box”). Although we share the objective that consumers be given clear and exhaustive pre-contractual and contractual information, when reading the modified proposal we find it difficult to distinguish between what is considered an advertisement and what is rather regarded as pre-contractual and contractual information. The information overload, which is evident when reading Article 4 in conjunction with Articles 5, 6 and 9, is far from enabling the consumer to make an informed decision.

In our view, advertising is one tool, among others, of marketing strategies and is usually addressed at a very preliminary stage to the general public rather than to individual consumers.

When looking at the quantity and level of details of information required by the current Article 4.2 for advertisements, we believe that so much information would eventually:

- overload the consumer with too many details for the purpose of an advertisement, which is used to invite consumers to get in contact with the lender in order to “find out more”;
- be misleading for consumers who have not yet expressed any intention to enter into negotiations with the lender, i.e. at the moment they watch/read/listen to an ad, they have not yet engaged in any pre-contractual phase;
- be in any case impossible to provide *a priori* and in general and abstract terms, since many of the elements enumerated under Article 4.2.a-e are identifiable only with reference to a specific consumer and once his individual file has been considered;
- restrict the development of marketing tools and media such as television, radio or the internet, since any advertising slot has a very limited duration and cannot possibly deliver what is required under Article 4 in very short (in some cases, a few seconds) presentations.

In any event, we see neither particular reason to insert such an exhaustive and binding list of the information requirements in the broadcast advertisements, nor the need for providing “2 representative examples”.

In that respect, FBE would strongly advocate the need for a clearer distinction between advertisements and pre-contractual information standards and for a limitation in the provision of detailed requirements only to the latter. Alternatively, should Article 4 remain as it stands now, we would urge the legislator to provide at least an exception to its application to advertisements broadcast by TV or radio.

Pre-contractual information (Article 5)

One of the main concerns of FBE remains the provisions under Article 5.

Article 5.1

The modified proposal does not clearly define, but still refers to, the “principle” of **responsible lending** to which the lender must adhere when providing pre-contractual information to the consumer. FBE reiterates its concern over the consequences that may derive from introducing such an obligation.

Although not precisely defined in the modified proposal¹⁸, the principle of behaving responsibly when lending out money is already one of the guidelines of any bank’s daily activity and a benchmark for the development of a bank-customer relationship; however, what is in our view inappropriate is to give such a principle the connotation of legal obligation which implies a private law liability regime built thereupon.

The obligation to “lend responsibly”, as referred to in the modified proposal, would inevitably create, besides the general notion of professional care, a further liability regime giving the consumer the possibility to claim for damages from the lender against the violation of such a further obligation whenever the consumer can no longer pay back his

¹⁸ According to Article 5.1, *the creditor (...) shall adhere to the principle of responsible lending. Therefore, the creditor (...) shall comply with [his] obligations concerning the provision of pre-contractual information and the requirement (...) to assess the consumer’s creditworthiness on the basis of accurate information provided by the latter and where appropriate, on the basis of a consultation of the relevant database.* (our emphasis).

As currently drafted, Article 5.1 does not explicitly define what ‘responsible lending’ is and does not determine the limit of its interpretation. Namely, the provision does not clarify whether the content of responsible lending might consist only of (i) providing pre-contractual information, (ii) assessing the consumer’s creditworthiness and, where appropriate, (iii) consulting relevant database for that purpose, or should it be wider than that. In particular, it is not clear whether such a liability regime would also apply to the provision of Article 5.5 by virtue of the overarching provision of Article 5.1 (see also Recital 20).

As a consequence, the lack of clarity on the precise content of such a legal obligation to “lend responsibly” would seriously undermine the legal certainty and might risk to lead lenders to refrain from offering credit in order to avoid taking such a legal risk.

loan. By arguing that the lender is responsible for the consumer's default because it failed to assess his creditworthiness adequately, the consumer could potentially clear himself of any obligation to repay the loan. Such an arrangement is blatantly at odds with the principle that it is the consumer himself who must ultimately – and on an informed basis – decide whether or not to take out a loan.

In this respect, we regret that the wording of the proposal has kept the concept of “responsible lending” without any – equally necessary – “responsible borrowing” provisions. The mere reference introduced by Recital (19) to the fact that “*Consumers should also act with prudence and respect their contractual obligations*” is, in our view, not sufficient to balance the liability burden that is unfairly put on lenders. Nor does it seem to us that the reference in Article 5.1 to the fact that the information provided by the consumer has to be “*accurate*”, may clarify that the consumer is the one responsible for the ultimate choice of the credit agreement.

We also underline that common banking practice already applies the “Know Your Customer” principle for anti-money laundering purposes; moreover, credit institutions must already assess the level of risk of their customers for prudential purposes which belong to the sphere of public law. By contrast, the modified proposal would create an additional private law regime of liability based on lenders' alleged negligence in providing pre-contractual information and assessing clients' creditworthiness. This seems to us inappropriate and potentially overlapping with existing EU and national rules.

FBE urges the legislator to delete the first sentence of Article 5.1 or, at least, provide a more balanced approach and to clarify in this sense the reciprocal obligations of the contractual parties in the articles of the future Directive, thereby specifying that the task of the credit institution to assess the client's creditworthiness belongs to the sphere of banking supervision law/public law.

Article 5.2

We believe that the reference to the moment in time when the consumer shall be provided with the necessary and essential (pre-contractual) information, i.e. “*in good time before the consumer is bound by any credit agreement or offer*” could lead to different and possibly conflicting interpretations among Member States. With a view to avoiding such discrepancies, we suggest the EU legislator to refer, as the criterion to test whether the consumer has been given pre-contractual information early enough, to the possibility for the consumer to still shop around and compare offers from different lenders. This would also be consistent with the approach taken by the Code of Conduct on Pre-contractual Information on Home Loans with regard to the mortgage credit sector.

As a general comment on the content of the pre-contractual information, we believe that the appropriateness of providing the consumer with pre-contractual information should be determined against the consumer's profile. A case-by-case approach might better satisfy the needs of both the lender and the consumer who might even request an “execution-only” type of service without needing to receive – redundant – pre-contractual information. The current wording of Article 5.2 does not yet allow such an approach, and we invite the EU legislator to explore this option further.

As regards detailed provisions, we wish to comment on the following.

Article 5.2.d

We would suggest dropping the reference to “*representative examples*” to be given to the consumer, of the APRC and the total cost of the credit, as these examples may appear too complex and of no added value for the consumer.

Indeed, we believe it would not be helpful – even in the interests of transparency – to confront the consumer, either before or on signing a contract, with financial mathematical and economic data of this kind (i.e. “*all the financial data and assumptions used for calculating [the] rate*”). Even a consumer with a background in financial mathematics and

business economics would be unable to understand and evaluate “all the financial data and assumptions used for calculating that rate”, as it is worded in Article 5.2.d. What is more, the “financial data and assumptions” referred to in this subparagraph will include factors influencing the bank’s pricing and business policy – i.e. confidential internal matters that do not need to be disclosed for competitive reasons.

In Article 5.2.d, therefore, the final phrase

by means of a representative example mentioning all the financial data and assumptions used for calculating this rate

should be deleted.

Article 5.2.e

According to Article 5.2.e, the pre-contractual information provided to the consumer should include the amount, number and frequency of payments to be made, “*where possible set out in a payment schedule*”.

Given that both the pre-contractual and contractual information rules (see Article 5.2.b and d, and Article 9.2.c and e, respectively) require that the consumer be advised, in addition, of the “total amount of the credit” and the “total cost of the credit”, the consumer is already fully informed about the monthly charges and the aggregate cost of the loan. There is consequently no need to introduce a requirement for a payment schedule. Use of such schedules is not currently common practice and the associated administrative costs would make lending more expensive. We would see it more appropriate to delete this requirement.

In Article 5.2.e, the final phrase

where possible, set out in a payment schedule

should therefore be deleted.

Article 5.2.g

FBE strongly disagrees with the insertion of this element in the pre-contractual information. Lenders cannot be requested to inform consumers about the existence – and even less, about the amount – of costs payable by consumers on conclusion of the credit agreement to persons other than themselves (or credit intermediaries).

Notary fees and taxes to be levied by tax authorities are not necessarily known by lenders, can and do vary from one Member State to another, may depend on criteria that are linked to individual consumers and are not in the remit of lenders. Creating an obligation upon the latter to deliver such information would unacceptably unbalance the role and liability of the lender within the credit agreement. The lender should not be required to ascertain and disclose the existence and the 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. In the interest of both lenders and consumers, FBE thus firmly reiterates the request to drop this element from the list of mandatory pre-contractual information to be provided to consumers.

Article 5.2.h

Article 5.2.h uses the term “ancillary service” and refers to its relationship to the “advertised interest rate. Article 5.2.d stipulates that the consumer must be informed of the “annual percentage rate of charge” and the “total cost of the credit”. To clarify the relationship between these two provisions, particularly in cases in which the ancillary service is not compulsory (see also the definition in Article 2.f-g), the following wording should be added to Article 5.2.d:

The portion of the annual percentage rate of charge relating to an ancillary service may be itemised separately.

Article 5.2.i

Article 5.2.i, which envisages that the consumer should be advised of “interest in the case of overdue payments” and “charges for defaulting”, would also be unworkable in practice.

Costs and “charges” of this kind are incurred only if the consumer fails to honour his contractual obligations, particularly his financial obligations, or fails to do so promptly. The question of what loss will then be incurred by the bank or, using the modified proposal’s wording, what “costs” or “charges” the consumer will have to pay for failing to meet his contractual obligations cannot be answered at the time the agreement is concluded and no figure can be put on the amounts involved. This is because the amount the consumer will be asked to pay in the event of him violating his contractual obligations is determined, among other things, by the length of time and the extent to which he fails to make the repayments and (particularly if a variable-rate loan is involved) by the interest rate applicable at the time he fails in part or in full to honour his contractual obligations.

Any attempt at the time the agreement is concluded to put a figure on the costs the consumer would incur, should he fail to meet his contractual obligations at some point in the future, would therefore be totally arbitrary, provide the consumer with no meaningful information and be highly misleading. The bank’s obligation to indicate “costs” can thus – in line with the definition of “total cost of the credit to the consumer” in Article 3.f and the calculation of the APRC under Article 3.g on which this is based – refer only to costs which will be incurred if the consumer acts in accordance with the contract.

Article 5.2.i must therefore be deleted.

Article 5.2.l

Even if the consumer were to be given the right to repay the loan principal at any time and in the absence of a compelling reason (which would lack all justification - see our comments on Article 15 below), the bank would still have no way of informing him, at the time the agreement is concluded, of what “costs” he would incur in the event of premature repayment.

Regardless of whether a fixed-rate or variable-rate loan is involved, the amount to be paid by the consumer in the event of early repayment depends first and foremost on the rate of interest specified in the contract and the prevailing interest rate at the time the principal is repaid prematurely. Only by applying these parameters is it at all possible to calculate the amount of “a fair and objective indemnity”, as Article 15 defines it. Since the future development of interest rates and thus the amount of the indemnity to be paid to the bank in the event of early repayment is not known at the time the contract is concluded, it is impossible to indicate the associated costs in the credit agreement.

The rule in Article 5.2.l must therefore be limited to the calculation method.

Article 5.5

Although some clarification has been brought to the current wording, this provision still imposes on lenders a duty to “*explain (...) the advantages and disadvantages associated with the product proposed*”.

We cannot comfort such a provision for the following reasons:

- the wording still fails to recognise that any provision of advice constitutes a service per se and cannot be made mandatory, it represents an added value and its regulation should be left to the market¹⁹;
- if the aim of this rule is to allow the consumer to make his own choice based on appropriate information, the explanation of the pre-contractual information elements enumerated under paragraph 5.2 is sufficient;
- requesting the lender to explain the advantages and disadvantages of a specific product offered would appear contradictory: indeed, nobody else but the consumer himself can assess what is advantageous or disadvantageous with respect to one product based on his own perception and individual situation/preferences;
- this requirement would appear rather impossible to be fulfilled in a cross-border context using electronic media, (either the internet banking, which is one of the objectives of the modified proposal – or more generally distance selling, which the Commission wishes actively to promote with Directive 2002/65/EC). Envisaging a bilateral dialogue between the parties in these kind of cases is very difficult if not at all possible, and such a requirement would end up thwarting the development of internet banking;
- the only explanation that the lender may provide is upon the features or the characteristics of a given product, so that the consumer – and only him/her – can evaluate whether it fits with his own financial situation or not; in this sense, it should be ensured that Recital 20 is properly interpreted as it is the consumer that has to decide which agreement among those described to him, is the most suitable for his own financial situation;
- should the provision aim at contrasting over-indebtedness, introducing such a duty would not overcome the risks related to access to credit, since only the consumer may have an overall perception of his own financial situation; increasing the scope of the lender's liability and the related risk for litigation would rather lead to a contraction of the offer to the detriment of consumers.

The fact that the modified proposal now leaves to Member States the competence to set the modalities of the fulfilment of such a duty contributes to render even more uncertain and complex the legal background of this provision, since discrepancies in defining such modalities from one Member State to another creates further obstacles to the functioning of the internal market.

We urge the EU legislator to delete this provision in full and, to amend accordingly Recital 20 by replacing the words “advantages and disadvantages” with “product features” and by deleting the reference to the “most” appropriate credit fro the individual consumer.

Furthermore, any reference to Member States' competence under Article 5.5 should be deleted in order to avoid diverging and/or conflicting implementation by Member States.

Pre-contractual information requirements for overdraft facilities and specific credit agreements (Article 6)

As stated above, we believe overdrafts should be excluded from the scope of the future Directive as does the Directive currently in force under Article 2.1.e, since including them therein would make them too expensive for consumers and unprofitable for lenders so that they might no longer be offered to consumers.

¹⁹Only if a consumer approaches the bank with a concrete request for advice in connection with the credit agreement and is prepared to pay the associated additional costs is the bank naturally obliged to provide the customer with such specifically solicited advice. Even in this case, however, the bank cannot take the ultimate decision for the consumer about whether to take out a loan and, if so, which of the various types of credit agreement to select.

In addition, we would like to stress again that overdraft facilities are strictly connected to the functioning of current accounts. In the absence of a well-developed infrastructure for cross-border current accounts, overdrafts face major problems in being provided at cross-border level. Nevertheless, should the need be felt to keep overdrafts or small amount credit agreements in the scope of the modified proposal, we would at least recommend that a truly light information regime be applied in order to avoid any unintended contraction of that market segment; provisions included in Article 11 (contractual information on overdraft facilities) should be sufficient to ensure the proper information of the consumer.

In particular, the requirement under Article 6.1.c should be deleted, since providing the APRC for overdraft facilities at a pre-contractual stage is not only redundant, but also in contradiction with the fact that overdrafts are exempted from the requirement of giving the same information at a contractual stage. Indeed, according to current Article 2.3, only a limited number of rules should apply to overdrafts, among which are Article 9.1, 9.2.a-d and 9.2.j. Mentioning the APRC in the credit agreement as Article 9.2.e provides, is not contemplated among the contractual information requirements laid down by Article 2.3 for overdrafts. If there is no need for that information when the credit agreement is concluded, there is no point in requiring it at an earlier (pre-contractual) stage.

Exceptions to pre-contractual information requirement (Article 7)

According to this article, the exceptions provided aim at exempting those suppliers/service providers that act as credit intermediaries, but only in an ancillary capacity. Yet it seems to us that, when read in conjunction, Article 3.e and Article 7 may contradict each other. Since the peculiar aspect that makes a supplier/service provider a credit intermediary is the fact that he performs “habitually” those actions mentioned above, we would suggest to replace the words “acting as a credit intermediary” in Article 7 with the following sentence:

“undertaking one [or more] of the actions listed under Article 3.e) sub-paragraphs i)-iii)”.

Arguably, a credit intermediary who behaves “in an ancillary capacity” should not be even defined as such and, in this context, this paragraph could equally be removed.

Database access (Article 8)

FBE welcomes the modified Article 8 which in its current drafting ensures the non-discriminatory access of databases to lenders across Member States. For the sake of consistency with the EU legislation in force, we would suggest the EU legislator to add in Article 2 a definition of what is meant by ‘database’ according to the definitions laid down in the Data Protection Directive²⁰. We also feel that ‘non-discriminatory access’ requires further clarification, to reflect the reciprocal nature of effective sharing of credit data.

Furthermore, in order to make Article 5.2.m consistent with the data protection rules, it should be made clear under Article 8 that the obligation of the lender to keep record of the consultation of the consumer’s file in a database is not open-ended and so is the right of the consumer allowed under Article 5.2.m.

Contractual information (Article 9)²¹

²⁰Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281/31, 23.11.95; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

²¹There seems to be a drafting mistake when comparing this paragraph with Article 5.4. If the reference in the latter 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 and should refer to them only.

Based on the same motivation explained for the provisions of Article 5 on pre-contractual information, the following provisions in Article 9 should also be deleted.

Article 9.2.e

As already explained in our comments on Article 5.2.d, it would not be helpful, also for sake of transparency, to confront the consumer - either before or on signing the contract - with mathematical and economical data. Consistently with the amendment suggested for Article 5.2.d, we see it necessary to delete also the last half sentence in Article 9.e as follows:

~~"..... all the financial data and assumptions used for calculating this rate shall be mentioned"~~

Article 9.2.f-h

As it is recognised in the modified proposal, it will not be feasible to draw up a payment schedule for a number of loan products, e.g. revolving lines of credit and those loans where the consumer can draw on the funds when required in one or more instalments, possibly of differing amounts. A statutory requirement calling on banks to prepare payment schedules "where possible" would thus merely create uncertainty in practice and be totally unhelpful for those trying to implement the rule.

Article 9.2.i

As explained above for Article 5.2.g, it would appear unfeasible to advise the consumer not only of the "total cost of the credit" which will be used to calculate the APRC within the meaning of Article 3.f and g, but also of all "*costs ... which are not included in the calculation of the annual percentage rate of charge*", i.e. also costs payable to third parties. The lender has neither influence on such costs nor knowledge of the amounts involved and will sometimes not even be aware of the reason for those costs.

Furthermore, it is unclear whether 9.2.i extends so far as to capture the transactional costs for credit card payments, which are bespoke to the retailer and therefore impossible to quantify with any certainty.

Article 9.2.n

The provision of the information on the amount to be paid in relation with early repayment should also be deleted.

Information requirements for overdraft facilities (Article 11)

FBE believes that the deletion of overdrafts from the scope of application of the future Directive would be of major importance for keeping their offer available. However, should this not be possible, at least we would suggest the EU legislator to clarify how existing overdrafts, in particular "tacit" overdrafts which are allowed by credit institutions to their customers without the need of an ad hoc agreement, should be submitted to the forthcoming new regime.

Open-end and long-term credit agreements (Articles 12)

We welcome the amendment of Article 12.2 since a rule of this kind is absolutely essential for prudential reasons and constitutes a basis for ensuring that banks can continue to offer credit facilities, particularly in the form of credit lines on current accounts, to both retail and corporate customers.

Under prudential rules applying to the entire European banking industry, a bank must set aside liable capital equivalent to 8% of all risk assets (including loans). In other words: a bank's scope for lending is equivalent to 12.5 times its regulatory capital. Under the European regulations for capital adequacy, banks so far do not have to provide regulatory capital for open-end credit agreements. As a consequence, banks today can provide liquidity in the European market for retail and corporate customers through open-end credit

lines on current accounts. One prerequisite to offer these loans to retail and corporate customers without being forced to set aside regulatory capital is however that such open-end loans can be terminated by the bank without notice. If, on the other hand, a credit facility is agreed in a form that does not allow the bank the possibility of termination without notice, supervisory rules stipulate that such credit facilities must be counted as off-balance-sheet transactions at 50% of their basis of assessment and backed by regulatory capital²².

The ability to terminate open-end credit agreements without notice consequently determines to what extent banks have to set aside regulatory capital for such credit lines. If the EU legislators withdrew the banks' ability to terminate credit agreements of this kind without notice, they would in future need to be backed by regulatory capital, both in the retail and corporate sectors. This would inevitably lead to a tightening of the amount of credit which the banks could potentially make available to retail and corporate customers.

Right of withdrawal (Article 13)²³

The provision under Article 13 is a key element in the provision of credit to consumers. FBE welcomes the improvement in drafting this article in a way closer to full targeted harmonisation. Yet, the current wording does not seem to solve some of the problems already highlighted by the banking industry.

Article 13.1

FBE believes that the content of the right of withdrawal should be fully harmonised among EU Member States. Therefore no leeway should be left to Member States on the merit of the right itself.

As regards the duration of the withdrawal period, we deem it inappropriate to establish a 14-day period for the exercise of such a right because of the very nature of the consumer credit agreement. The current wording of the modified proposal aligns the duration of the withdrawal period for consumer credits to the duration foreseen by Directive 2002/65/EC for financial services marketed by distance. We see no reason for this choice, in particular with regard to the fact that, if a period of 14 days might have possibly appear – and in our view, it is not – justified by the need for the EU legislator to compensate the lack of a face-to-face contact in distance selling of financial services, the same period appears evidently not justified as being the rule for all credit agreements regardless the way (by distance or not) they are negotiated.

We therefore asks the EU legislator to explicitly shorten the withdrawal period up to 7 days, as already fixed in the framework Directive 97/7 on distance contracts, instead of the 14-day period proposed in the modified proposal, for all types of credit and in all Member States for the benefit of consumers, lenders and suppliers of goods and services.

In addition, in the specific case of credit agreements concluded at the point of sales, the consumer should be allowed the faculty to waive his right of withdrawal by way of written request. In several Member States the exercise of the right of withdrawal from the credit agreement results in a *de facto* right of withdrawal from the goods sale/services provision contract. Under such circumstances it is easy to understand why a supplier would wait until the end of the 7-day withdrawal period before delivering its product or providing its service. It would be unacceptable for suppliers to have a product that has lost a significant part of its value returned after a few days²⁴.

²² For further details on those supervisory rules see also the EU Banking Directive (2000/12/EC), Annex II, Classification of off-balance sheet Transactions, section Low Credit Risk. Based on these EU provisions, also several Member States' banking supervision and civil law rules today allow banks to terminate open-end loan (with no fixed term) commitments without notice; see e.g. Section 8.2.d of Principle I of the German Supervisory Rules in connection with N°19 section 2 of the General Business Conditions of the German Banks.

²³ The reference to paragraph 2 in Article 13.4 is incorrect. The first sentence should read: Following the exercise of the right of withdrawal in accordance with paragraph 3, the creditor shall notify the consumer...

²⁴ Amendment n.106 put to a vote during the First Reading at the European Parliament specifically addressed this issue of credit at the point of sale. FBE favoured this amendment and so did EBIC.

When the consumer, by express agreement in writing, freely chooses the immediate delivery of goods/services financed by the credit, this should as a consequence constitute a waiver to the 7-day (and even more, to the current 14-day) right of withdrawal from the credit agreement. A right to a waiver should be offered to allow this, upon clear and understandable warning by the lender that the right of withdrawal is thereby, waived. Alternatively, as it is already the case in France for the so called “*crédit affecté*”, the waiver could be coupled with a period of 3 days in order to guarantee the consumer a time for reflection.

Therefore, we reiterate that:

- the withdrawal period be reduced to 7 days; and
- the consumer be granted the right to ask for immediate delivery of the financed goods/services upon express request in writing, thereby waiving the right of withdrawal.

Alternatively, the right to request immediate delivery may be coupled with a 3-day reflection period; this option is recommended with a specific regard to credit at the point of sale, to mirror the existing legal framework of some Member States.

Article 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; it should then be dropped.

Linked transactions (Article 14)

The proposed rules on linked transactions would result in virtually unlimited liability for the banks, particularly due to the ill-defined and largely impracticable definition in Article 3.I, and cannot be retained in their present form. It is therefore essential, first, to more precisely define this term, which determines the scope of Article 14.1. For details, please see our comments under Article 3.I.

For the sake of clarity, we would also advise to clarify, by making it explicit in the text of the modified proposal, that the various circumstances listed under Article 14.2 are cumulative and not alternative to each other: the word “*and*” should thus be added at the end of each condition.

But the content of the rule in Article 14 itself is unclear, too. Since Article 14.3 leaves to national legislators the fleshing out of the rules on joint and several liability applying to linked transactions, there is a lack of legal certainty about the implications of a cross-border linked transaction.

We therefore urge the EU legislator to delete Article 14.3 and leaving the general matter of liability regimes to the competence of national legislation, i.e. out of the scope of the Directive.

Early repayment (Article 15)

Article 15.1

Under Article 15.1, the consumer is entitled to an “equitable reduction in the total cost of the credit”. Such a reduction must refer to costs that have not yet been used, however. Costs which have already been incurred and used, on the other hand, such as the fee for concluding the contract or evaluation fees for collateral must be excluded and cannot be reduced or refunded. To make this clear, Article 15.1 should be reworded as follows:

In such cases, [the consumer] shall be entitled to an equitable reduction of the maturity-related total cost of the credit.

Article 15.2

The proposal envisages granting the consumer the right to repay the principal at any time irrespective of what was agreed in the contract and even in the absence of a compelling reason. Even if the exemption from the scope in Article 2.2.a means that this rule does not apply to loans secured by a mortgage, it constitutes serious interference in the civil law principle of “*pacta sunt servanda*”, which applies in many Member States.

Furthermore, banks are subject to detailed prudential rules on managing liquidity and interest rate risk. The purpose of these rules is to ensure that a bank, taking into account the liabilities arising from its deposit-taking business and the income generated from lending operations, will always have sufficient liquidity at its disposal. Allowing consumers to repay their loans at any time without a compelling reason and without paying an early repayment penalty would constitute interference in these prudential liquidity and interest rate management mechanisms.

In addition, the rule would actually give the consumer an unconditional right which would produce in practice the same effects as a withdrawal from the credit agreement at any time – although the right of withdrawal is actually supposed to be limited to 14 days under Article 13. This might be particularly harmful for those fixed-interest loans that, thanks to their funding mechanism relying on primary market investment products requiring long-term repayment commitments can be offered to consumers at very low interest rates. Product diversity would be restricted on the loan market, if the possibility of early repayment was to be granted as a mandatory right without any possibility of a waiver.

In the light of this, a right to early repayment of the principal should only be granted to the consumer provided that the lender is fully compensated for the losses incurred for the early termination of the contract.

Furthermore, there is neither logical nor justifiable reason why the creditor should not be entitled to claim such an indemnity for a credit agreement “where the period used to fix the borrowing rate is less than one year”, for example, as envisaged under Article 15.2.a. The bank incurs a loss if the fixed interest period is less than one year in exactly the same way as it does when other fixed interest periods are involved. The exemptions in Article 15.2.a and b should therefore be deleted.

Assignment of rights (Article 16)

We welcome the actual wording of the article, although it contains an inaccuracy which distorts the intended meaning and must be eliminated.

The use of the term “for securitisation purposes” in both Article 16 and Recital 27 fails to reflect the intention of the provision (already envisaged in the previous version of the proposal and now contained in Article 16) which aims at allowing banks to transfer the risk arising from a credit agreement. Securitisation is only one of the methods used by banks to transfer credit risk. A bank is just as likely to transfer the risk arising from a credit agreement without a securitisation transaction being involved. It is, moreover, totally irrelevant from the consumer’s point of view whether or not a securitisation transaction is effected in connection with the assignment of the credit agreement or transfer of credit risk. The securitisation takes place outside the legal relationship between the consumer and the bank and does not affect the consumer’s legal position vis-à-vis his bank with respect to the credit agreement. This linguistic inaccuracy must be eliminated.

The objective outlined above could be achieved with the following wording:

... except where the assignment is effected for the purpose of transferring the credit risk or for refinancing purposes only ...

Overrunning of the total amount of the credit (Article 17)**Article 17.2**

Article 17.2 envisages that “any significant overrunning of the total amount of credit which exceeds a period of three months shall be rectified, where necessary through a new credit agreement providing for a higher total amount of credit”. This would require the bank to check after every movement on a current account whether the credit limit had been exceeded and, if so, by how much and exactly when the three-month period had begun and would end. A new three-month period would have to be calculated based on every single entry on the account.

This is not feasible. What is more, the introduction of a monitoring mechanism of this kind and the associated administrative work involved would make tolerated overdrafts so expensive that it is doubtful whether this unbureaucratic form of credit on a current account could continue to be offered. Article 17.2 should therefore be deleted.

Calculation of the APRC (Article 18)

As said above, 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. In order to assure comparability, the definition of the APRC needs to be narrow and to include exclusively those costs levied by the lender in relation to the loan and for his own benefit.

While welcoming the narrower approach to the definition of the APRC under Article 3.f, FBE strongly warns against the concept of ‘total cost of credit’ which is still used as the basis to calculate the APRC under Article 18.2 (also related to Article 4.2). We believe that the “total cost of credit” is an additional piece of information on costs which are not included in, but complement the APRC: including them in the basis for the calculation would be misleading and would hamper comparability, since in most of the cases they are not levied by the lender and change from one Member State to another. To avoid confusion, we believe it is indispensable that other terms are used which would be more appropriate to define the cost elements of the APRC (for instance, ‘calculation basis’ or ‘direct costs’) in order to distinguish them from any notion of ‘total cost of credit for the consumer’.

Furthermore, the APRC should not be expressed on a daily basis, as this would not add any value to consumers’ capability to compare offers but could rather create confusion and mislead them when comparing prices. As such, certain formulas in Annex II might be useful to ensure that when adopting implementing measures, Member States do not deviate from the fully harmonised calculation of the APRC.

Regulation of creditors and credit intermediaries (Article 19 and 20)

On this chapter, please refer to our comments above under Article 3.e.

Transitional measures concerning Open-end credit agreements (Article 26)

In addition, we note that according to Article 26 in case of credit agreements granted as “open-end”, i.e. without any specified term, the provisions of the future Directive will apply to them without any transitional period by means of an addendum to the existing contract.

As such, the rule would cover all credits agreements provided to consumers on current accounts in force in Europe. In addition to the obvious bureaucratic burden created by such a “repapering process”, the cost for the whole credit industry would be likely to reach at least several hundred millions of euros.

Additionally, in a lot of cases such a “repapering process” would inevitably result in many agreements not being continued in their present form but having to be terminated or offered to consumers on less favourable terms.

For these reasons we believe Article 26 should be deleted.

Entry into force and applicability (Article 28)

Because of the different timing provided for the transposition and application of certain provisions (either 2 years or 6 years from the entry into force of the future Directive according to Article 28), some uncertainty remains over the precise legal framework that will apply until the complete entering into force of all the provisions of the Directive.

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Fédération Bancaire Européenne
European Banking Federation

Enclosure 2 to letter C1539

G 6
AMS
C1385

MEMBERNET

Brussels, 23 October 2006

Circulation: Consumer Affairs Committee

For information: Consumer Credit Directive Working Group

Subject: *Summary of last meeting of the CCD WG*
Action points for today's conference call

For Action: ***URGENT – Summary of the last meeting of the CCD WG and action points for today's conference call***

Dear Sir/Madam,

In view of today's conference call, please find below a brief summary of the discussion made by the CCD WG at its last meeting held on 20 October 2006.

Enclosed (enclosure 1) you will also find a briefing note submitted by Professor Jules STUYCK of the Centre for European Economic Law (Leuven University), upon request of the EP's committee for Internal Market and Consumer protection (IMCO) on the specific issue of harmonization in the CCD.

During the conference call, members are invited to:

- **Exchange information on their position as regards to the last Finnish Presidency consolidated text;**
- **Prioritise the issues that still need to be solved;**
- **Provide the Secretariat with further guidance as to the necessary lobbying actions to be undertaken ;**

We look forward to speaking to you at the conference call.

Yours faithfully,

Sébastien de Brouwer
Head of Legal Department

Arianna Mellini Sforza
Legal Adviser

Enclosures:2



CONSUMER CREDIT DIRECTIVE

Summary of the FBE CCD WG meeting of 20 October 2006

I. CALENDAR

Council meetings

Working group for CCD:	25 and 26 Oct., 7 Nov., 20 Nov.
COREPER	end November
Competitiveness Council	4 December

European Parliament

IMCO (general calendar)	21-23 Nov., 27-28 Nov., 19-20 Dec.
Economic study	approved by IMCO, but still to be allocated to an independent body

- The Finnish Presidency consolidated a text and proposed to consider it as a whole at the next meeting of the Council working group on 25-26 October; some Member States are critical towards that approach, due to the diverging positions still existing on a number of issues.
- The Finnish Presidency is still committed to try to achieve the common position at the Competitiveness Council of December, but the chances that a consensus is reached by that time are very low; in case of no agreement, the file will be taken over by Germany starting from 1 January 2007.
- The European Parliament's committee IMCO has agreed to conduct an economic study of the modified proposal of October 2005, while the independent body entrusted with the study will not be selected by a public tender and has still to be identified.

II. PRELIMINARY ANALYSIS OF THE FINNISH PROPOSAL

The preliminary analysis of the consolidated text made by the FBE CCD WG on 20 October revealed that the Finnish Presidency has slightly improved the text but has not tackled most of the major issues prioritised by FBE in its position of April/May 2006 (see letter C1109 of 1 September 2006). In particular:

1. the need for an **impact assessment** is still strong (e.g. for issues like the ceiling and the threshold of the scope of application, now significantly enlarged);
2. several minimum **harmonisation** provisions have been added in key articles granting Member States the possibility of adopting more stringent/diverging rules, thereby nullifying the attempt to produce a targeted full harmonisation directive (see e.g. Article 2.5, Article 15.1.a);
3. **scope**: unsecured home loans have been excluded from the scope, which is to be welcomed, but overdrafts are still covered and now submitted to a heavier regime;

4. **APRC:** the definition of APRC is still based on the notion of ‘total cost of credit, which is in turn no longer a tool for comparison, due to its very large scope (any kind of costs are included now);
5. **linked credit agreements:** the clarification requested by FBE on the exclusivity link has been taken into account only partially; in addition, a new paragraph has worsened the definition; as a consequence, the regime applicable to linked credit agreements which introduce a joint and several liability between the supplier and the lender still applies to a very high number of credits;
6. **responsible lending:** the reference to the principle has been moved to Recital 19, which has to be welcomed, but the risk for the lender to be suited by the borrower in case of non compliance with the pre-contractual obligations, now specified in different articles, persists; in particular, Article 7.a now provides an outstanding obligation to assess the client’s creditworthiness before of the conclusion of the credit agreement; in addition, in addition, Article 5.5 still represents a very heavy duty to ‘provide the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of a possible breach of contract by the consumer’; a minimum harmonisation clause has been also added therein;
7. **right of withdrawal:** the period is still set at 14 days and no mechanism of waiver has been foreseen; in addition, a maximum period of 30 days has been added for the borrower to pay back the capital drawdown and the interest calculated thereupon until the day of payment.

III. POSSIBLE FURTHER LOBBYING ACTIONS

- To meet the Finnish presidency to highlight the FBE’s priorities
- To send a letter to the various national permanent representations Consumer attachés
- To organise a meeting with the permanent representations attachés (or some of them)
- To support the initiative of an economic study as planned by the EP IMCO and to be proactive
- To issue a press release?

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