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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.9.2007
COM(2007) 546 final

2002/0222 (COD)

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT**

in accordance with the second paragraph of Article 251(2) of the EC Treaty

on the

**common position adopted by the Council with a view to the adoption of a Directive of
the European Parliament and of the Council on credit agreements for consumers**

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1. BACKGROUND

Date of forwarding of the proposal to the EP and Council 12 September 2002
(document COM(2002) 443 final – 2002/0222 COD):

Date of the opinion of the Economic and Social Committee: 17 July 2003

Date of the opinion of the European Parliament (First Reading) 20 April 2004

Date of forwarding of the first amended proposal 29 October 2004

Date of forwarding of the second amended proposal 7 October 2005

Date of political agreement in the Competitiveness Council 21 May 2007

Date of adoption of the Common Position 20 September 2007

2. AIM OF THE COMMISSION'S PROPOSAL

The proposal for a new Directive on consumer credit has a double objective: ensuring a high level of consumer protection and launching a process for establishing the conditions for a genuine internal market in consumer credit.

The Directive of 1987 was based on minimum harmonisation. Almost all Member States have gone beyond these standards to a different extent, which has hindered the creation of a single market. The full harmonisation of the five essential modules of the Directive (pre-contractual and contractual information, annual percentage rate of charge (APR), right of withdrawal and right of early repayment) aims to contribute to the creation of a single market in consumer credit, because creditors will not have to adapt their products to different national legislations in the Member States.

The current Directive on consumer credit (87/102/EC) was adopted in 1987 and provides only for basic consumer protection measures. Recent market evolutions called for adaptation of these rules.

3. COMMENTS ON THE COMMON POSITION

3.1 General remarks

For the Commission, the key elements were the harmonisation of: pre-contractual and contractual information requirements, calculation of the APR, right of early repayment and right of withdrawal.

The Commission supports the introduction of a standardised form for fulfilling the creditors' pre-contractual information duties.

3.2 Amendments made by the European Parliament at first reading

Amendments incorporated in the Common Position

Regarding the scope of the Directive the EP proposed a number of exemptions which were either accepted as such or in an amended version.

The exemption of surety agreements from the scope of the Directive was taken on board by the modified proposal and included in the Common Position [Article 2(1)].

The suggestion to exempt not only mortgage credits, but also credits secured by another comparable surety is also part of the Common Position [Article 2 (2) (a)], and the Council added (in the area of credits) new exemptions regarding financing the purchase of immovable property (see 3.3 below).

On the exemptions, the Parliament proposed to exempt credit agreements up to 500 € and over 100,000 €. The Commission's modified proposal foresaw a light regime for credits up to 300 €. The Council agreed on a full exemption for credits below 200 € and, in agreement with the Parliament opinion, to fix an upper limit of €100,000 [Article 2 (2) (c)]. This solution is acceptable because, for small credits, consumers throughout the EU may be protected by their Member State if it sees the need for protection rules. In addition, these small credits are rarely taken out cross-border. Credits above an amount of 100,000 € are not typical consumer credits and therefore do not require the protection mechanisms of the Directive.

In the area of overdrafts and overrunning, the Commission and the Council followed the Parliament idea of light regimes (i.e. to shorten the list of duties) in order to keep these products flexible [Article 2(3) and (4)]. However, the negotiations in the Council led in the end to a longer list than that proposed by the Parliament and the Commission.

The Council, based on the Commission modified proposal, introduced light regimes for other specific credit agreements (credits granted by credit unions [Article 2 (5)] and arrangements between creditor and consumer in respect of deferred payment where the consumer is already in default [Article 2 (6)]. The Parliament amendments had suggested a full exemption for these cases.

In the area of definitions, the initial proposal of the Commission gave a wide definition of the total cost of credit (all costs which the consumer has to pay for

the credit). The Parliament proposed a narrower definition only including costs known to the creditor in connection with the management of the credit agreement, and excluding costs payable to third persons (notaries, tax authorities). The Commission followed the amendment by including the costs in connection with the credit agreement which are known to the creditor and by excluding costs payable to third persons. However, it proposed to include costs relating to ancillary services relating to the credit agreement (in particular insurance premia) if the service is compulsory for taking out credit or for obtaining the advertised rate, and the contract is concluded with the creditor or under certain circumstances with a third party. The Common Position is in line with the Commission modified proposal except for taxes, which were not excluded [Article 3 (g)]. Although the exclusion of taxes would have been preferable, the Commission can accept this solution as a compromise.

On linked credit agreements the Council took a definition from the Parliament which was slightly modified [Article 3 (n)].

Concerning the information requirements in advertising, the Common Position took into consideration the Commission modified proposal which suggested a list of important information (APR, duration of credit, number and amount of monthly payments and total cost of credit) to be given unless the advertisement does not contain a specific credit offer [Article 4]. However, in the Common Position the mandatory information list is dependent on whether the advertisement indicates an interest rate or another figure. This takes into account that consumers need more information (such as the APR) whenever a figure is mentioned in the advertisement in order to prevent consumers from being misled by a single figure. The Council found that this provision would not need to be applied to cases in Member States where the national legislation requires an indication of the APR for advertising which does not indicate a figure [Article 4 (1, second sentence)]. The Commission agrees (this exemption relates only to cases which are not covered by the Directive and assures the Member States concerned that they can maintain their legislation).

The list of information to be given was modified and the Council introduced the possibility that Member States would not require the indication of the APR in the case of overdrafts [Article 4 (2) (c)]. This leeway for Member States is acceptable as overdrafts have at present almost no cross-border impact.

On pre-contractual information requirements, after having taken over EP amendments entirely or partly, the Commission, in its modified proposal, suggested requirements which again were entirely or partly taken on board by the Council. The Council introduced new elements (such as the standard pre-contractual information form, see 3.3 below).

When determining the general obligations of the creditor prior to the conclusion of the credit agreement, the Council followed the Commission modified proposal suggestion to require the assessment of consumers' creditworthiness. The creditor will have to assess the creditworthiness of the consumer on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of a database [Article 8 (1)]. However, the Council abandoned the principle of

responsible lending. This is acceptable as the Council accepted the obligation for Member States to ensure that creditors provide adequate explanations in order to put the consumer in a position to assess whether the proposed credit is adapted to his needs and his financial situation [Article 5 (6)].

The Parliament and the Council added other pieces of information to the initially shorter list of mandatory pre-contractual information. From among the additions of the Parliament (additional costs provided the creditor knows them; costs of an account set up specifically for the purpose of the loan in question; charges for the use of means of payment; costs for payment transactions; total cost of credit to the consumer; procedures for the right of withdrawal; method of repayment; in case of overdue payments the interest and charges, the arrangements for their adjustment and the charges for defaulting) the Council took into account the charges for maintaining one or several accounts [Article 5 (1) (i)], the charges for using a means of payment and any other charges [Article 5 (1) (i)] and the information for overdue payments [Article 5 (1) (l)]. Based on the Commission modified proposal, the Council added the indication of notary costs to the list [Article 5 (1) (j)], the obligation to take out an ancillary service relating to the credit agreement [Article 5 (1) (k)], the existence or absence of a right of withdrawal [Article 5 (1) (o)], the right of early repayment [Article 5 (1) (p)], the right to be informed of the result of a database consultation [Article 5 (1) (q)] and payments made by the consumer which do not give rise to an immediate amortisation of the total amount of credit [Article 5 (5)]. In addition, the Council added, on its own initiative, the information on the type of credit [Article 5 (1)(a)], the identity and address of the creditor [Article 5 (1)(b)], a warning regarding the consequences of missing payments [Article 5 (1)(m)], the right to be supplied, upon request, with a copy of the draft credit agreement [Article 5 (1)(r)] and, if applicable, the period of time during which the creditor is bound by the pre-contractual information [Article 5 (1)(s)].

While the Commission argued that the list of pre-contractual information requirements should not be extended beyond what was in its modified proposal in order to avoid information overload, it agreed to the list of information as it stands now, taking into account that some of the added information is relevant only in specific cases and will, in these circumstances only, be listed in the mandatory form (see 3.3).

Regarding the pre-contractual information in specific cases such as overdrafts, the light regime proposed by the Parliament was incorporated in the Common Position, but the list of information was extended [Article 6 (1), (2), (3)]. As these specific cases do not have a significant cross-border impact, the Commission did not oppose this list. This position applies as well to the leeway given to the Member States in relation to the indication of the APR in cases of overdrafts [Article 6 (2)].

In the area of database access, the Parliament suggested abandoning the obligation for Member States to ensure the operation of a central database. The Commission and the Council agreed on this amendment [Article 9]. The Parliament proposed to maintain the requirement that creditors from other Member States must have access to existing databases under the same

conditions as creditors of that Member State. The Commission added that the access must be non-discriminatory which was taken on board by the Council [Article 9 (1)]. The second provision which the Parliament suggested to maintain, concerns informing the consumer of the result of any database consultation immediately and without charge. The Commission's modified proposal incorporated this amendment while limiting it to situations where the consumer requests the information. The Council further narrowed the obligation to inform the consumer to cases where the rejection of a credit application is based on the database consultation [Article 9 (2)]. This is acceptable as it covers the situation where it is most important for consumers to know about a database consultation.

In the area of contractual information, the Parliament proposal to add the information on the procedure to be followed when exercising the right of termination of the credit agreement was taken on board [10 (2)(r)].

As regards the APR, the Parliament had proposed that insurance costs should be reflected in the APR only when they are compulsory to obtain the credit. This was accepted by the Commission and the Council, however, for reasons of clarity, it was inserted in the definition of the total cost of credit (Article 3(g)). The Parliament had also proposed two assumptions to be used in cases where the borrowing rate may vary in the course of the contract or where a promotional rate is proposed at the beginning of the credit only. This suggestion was fully accepted by the Commission and the Council and is now reflected in Annex I (II) (i) and (j).

Regarding the borrowing rate, the Parliament had suggested additional conditions for variable borrowing rates. These additions were taken into account and are now reflected in the definition of "fixed borrowing rate" (i.e. not variable) in Article 3(k).

As regards early repayment, the Parliament had proposed drafting changes which were incorporated in the Common Position: the consumer can repay early at any time [Article 16].

On the assignment of rights, the Parliament had proposed that the consumer should be informed that the contract has been assigned to a third party. This was incorporated in the Common Position, however, it does not apply when the original creditor, in agreement with the assignee, still services the credit vis-à-vis the consumer [Article 17].

As regards linked transactions and the effect of the right of withdrawal on such transactions, the Commission and the Council confirmed that where the consumer withdraws from the purchase contract by virtue of Community law, he shall no longer be bound by the linked credit agreement (Article 15). The Parliament proposed in addition that Member States should be allowed to maintain or introduce joint and several liability systems. This is reflected in the Common Position (Article 15(2)).

The Council and the Commission followed the Parliament idea that each party can terminate an open-ended credit agreement by simply giving notice. In

addition, and as a consumer protection measure, the Common Position proposes that creditors should be obliged to give at least two months' notice (Article 13).

On overrunning, the part of the amendment proposed by the Parliament concerning consumer information (penalties and interest on arrears) was accepted and incorporated in the Common Position (Article 18)

As regards the regulation of creditors and intermediaries, the Parliament amendment proposing that they should be regulated or supervised by an independent body or authority was reflected in the Common Position (Article 20). However, intermediaries are no longer included in this Article.

Amendments not incorporated in the Common Position, which were nevertheless found acceptable by the Commission

The Parliament proposed that the creditor could fulfil his pre-contractual information requirements by supplying a draft credit agreement including all necessary contractual information. The Council did not take this suggestion on board. Taking into account that the terms of a credit agreement are very difficult to understand for an average consumer and that the mandatory form (see 3.3) is a good solution for providing the consumer with understandable pre-contractual information, the Commission agrees that creditors should be obliged to always use the form.

In the provision on linked transactions, the Parliament had proposed the existence of a pre-existing agreement between the creditor and the supplier as a necessary condition for the consumer to pursue remedies against the creditor in case of non-supply, partial supply or non conformity. This was accepted by the Commission, however the Council did not retain the idea. However, the Common Position leaves it to Member States, as suggested by the Parliament, to determine to what extent and under what conditions these remedies shall be exercisable.

As regards open-end credit agreements, the Commission was not against the obligation to obtain explicit prior consent from the borrower before renewing an agreement, but this was not maintained in the Common Position.

The amendment proposed by the Parliament regarding the article on the performance of a surety agreement was not applicable as the whole issue of sureties was excluded from the scope of the Directive. The same applies to the article on default notice and enforceability.

Amendments not acceptable

The suggestion of the Parliament to foresee that credit agreements would have to be drawn up in writing was not incorporated in the Common Position because the Commission and the Council think that the formal requirements must be in line with all the features of distance marketing. However, the Council included a possibility for the Member States to maintain or introduce

national rules regarding the validity of the conclusion of the contract [Article 10(1) (3)].

On the APR (Article 19), the Parliament had proposed to explain the calculation formula in further detail in the relevant Article. The Council and the Commission have considered that having the formula in the Annex, which is not only indicative but is part of the legislative text, was sufficient.

The assumption of a constant capital balance for the calculation of the APR in the case of open-end credit agreements, as proposed by the Parliament, was not accepted as it does not reflect the reality of open-end credit.

In the case of linked transactions, the Parliament had proposed that in the case of withdrawal from the credit agreement, the consumer should not be bound by the linked purchase agreement anymore. This was not accepted by the Commission and Council because this Directive deals with credit contracts and not the contracts of sale. In addition, this might lead suppliers to delay delivery of goods or services until the end of the withdrawal period. However, Member States may still introduce or maintain such systems at national level.

On overrunning, the wording proposed by the Parliament referring to "unauthorised overrun" was not incorporated because it refers to something which is accepted by the creditor and therefore, by nature, is not "unauthorised" [Article 18].

On the harmonisation approach, the Parliament had proposed to introduce a minimum harmonisation clause in the Directive. This was not incorporated in the Common Position. The Commission believes that the minimum clause contained in the current Consumer Credit Directive has led to very different legislations in the Member States, resulting in market entry barriers and market fragmentation. Launching the process for the establishment of a genuine internal market for consumer credit being one of the key objectives of the Directive, the Commission is of the opinion that the full harmonisation as foreseen in the Common Position (Article 22) is absolutely necessary, not only on the issue of the APR as suggested by the Parliament amendments, but also on the other key issues dealt with by the Directive.

3.3 New provisions introduced by the Council

The Council added overdrafts which have to be repaid in one month to the list of exemptions to the scope of the Directive [Article 2 (2) (e)]. However, a short list of information is to be given at pre-contractual stage [Article 6 (5)]. As these credits cover only a very short period of time and therefore will not lead to extensive costs, this exemption is acceptable.

In the area of mortgage credits the Council introduced two new exemptions which cover credits designed to finance the purchase of immovable property in a similar way as mortgage credits [Article 2 (2) (a, second alternative)] and credits by banks based on Islamic faith principles in the UK [Article 2 (2) (b)]. The Commission supports these exemptions because they intend to cover

specific legal solutions in some Member States which are comparable to mortgage credits.

In line with the light regimes created for overdrafts and overrunnings the Council introduced definitions for both types of credit agreements, in the case of overdrafts based on a suggestion of the Commission [Article 3 (d) and (e)].

Regarding pre-contractual information, the Council introduced a mandatory standardised form which will be exactly the same in all Member States and has to be used by creditors to provide the consumer with pre-contractual information [Article 5 (1, second sentence)/ Annex II]. The Commission fully supports this because the form will facilitate comparison of offers for consumers and the pre-contractual information will be more understandable for consumers.

In the cases of light regimes the Council drafted a special standardised form (Annex III) which is not mandatory, but can be used by creditors to discharge their pre-contractual information obligations [Article 6 (1, fourth and fifth sentence)].

The Council introduced some new provisions for the credit agreement itself. It added to the information requirements information on other contractual terms and conditions [Article 10 (2)(t)], the supervisory authority [Article 10 (2)(u)] and a general warning regarding the consequences of missing payments [Article 10 (2)(m)]. In cases of overdrafts the same leeway for Member States regarding the indication of the APR is foreseen [Article 10 (2) (g)]. Whereas all these additions can be supported by the Commission, the Council amendment that Article 10 should be without prejudice to any national rules regarding the validity of the conclusion of credit agreements is more problematic. Article 10 is meant to be a fully harmonised provision, therefore Member States should not be free to regulate formal requirements (e.g. handwritten signature of the contract) at national level. Such formal requirements, which are not harmonised, can become internal market barriers.

Concerning the information on the borrowing rate [Article 11], the Council has determined that the information in the case of a change to the borrowing rate should be given only periodically if it is linked to a change in a reference rate, in order to avoid unnecessary bureaucracy and an overload of information for the consumer.

The Council has introduced a more detailed description of the procedure for exercising the right of withdrawal. It also added a paragraph (Article 14 (6)) according to which Member States may maintain national provisions establishing a period of time during which the execution of the contract cannot begin.

On early repayment (Article 16), the Council has introduced the possibility for creditors to claim compensation in case the consumer repays early, under certain conditions. Member States may fix a threshold of maximum €10,000 for the amount repaid early below which no compensation may be claimed; the maximum compensation is 1% of the amount repaid if the rate is fixed for

more than one year and 0.5% otherwise. In addition, the creditor is not entitled to compensation if the ECB reference rate has raised between the date of conclusion of the agreement and the date of early repayment. The Commission believes that harmonisation of compensation calculation is useful in view of the internal market objective, and that the conditions agreed by the Council do not harm the level of consumer protection. However, the Commission would have preferred a higher level of harmonisation on this issue.

The Council added the possibility of recourse to comitology (according to Articles 5a(1) to (4) of Decision 1999/468/EC, having regard to the provisions of Article 8 thereof) for determining the assumptions to be used for calculating the APR for certain types of credits [Article 19(5)]. This is reflected in the Common Position at Article 25, and is supported by the Commission. The highly technical nature of this issue was not adapted for an in-depth discussion in the Council, which therefore decided to leave it to a more adapted procedure.

The Directive contains a number of regulatory choices for the Member States (possibility to apply a light regime only to certain credit agreements [Article 2(5) and (6)], to foresee indication in advertising of the APR only [Article 4(1)], right not to impose the indication of the APR for overdrafts in advertising, pre-contractual and contractual information [Article 4(2)(c), 6(2), 10(2)(g)], possibility to adapt assistance for consumers [Article 5 (6)], not to foresee the right of withdrawal in case of notarial contracts [Article 14 (5)], right to determine remedies for linked credit agreements [Article 15 (2)], right to maintain or introduce conclusion validity rules [Article 10(1)] and to fix a threshold of maximum €10,000 below which no compensation can be claimed for early repayment [Article 16(4)]). The Council added an obligation for Member States to inform the Commission when they make use of most of these choices, so that this information can be made public (Article 26). This is complemented with a provision which foresees monitoring by the Commission of the effect of the use of these regulatory choices on consumers and the internal market [Article 27 (2)]. The Commission agrees with those additions.

4. CONCLUSIONS

The Common Position is satisfactory as regards four of the five key issues of the Directive. Pre-contractual information, contractual information, APR and the right of withdrawal are fully harmonised and guarantee a high level of consumer information and protection, while putting in place the conditions for a genuine internal market in consumer credit. The standardised pre-contractual information form introduced by the Council will provide consumers with a good basis for comparison of offers.

The Commission was in favour of further harmonisation on the issue of early repayment. The Commission did not support the possibility for Member States to maintain or introduce national legislation regarding the validity of the conclusion of credit agreements. However, it considers that the overall compromise found by the Council can be supported, taking into account the progress done on the other key areas and the difficulties to achieve an agreement in Council at all.