

## The Proposal for a new Directive concerning Credit for Consumers

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### A. Introduction

Since 1995 the Commission has repeatedly reviewed the operation of directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit.<sup>1</sup> This was regarded to be necessary mainly for two reasons: firstly, even at the time of the enactment of the original directive its level of protection was lower than in most member states;<sup>2</sup> secondly, the Commission repeatedly emphasised several changes, which had taken place in regard to the credit services sector in recent years.<sup>3</sup> Whereas the previous directive was targeted at the two most common “products” at that time, namely hire purchase agreements and instalment credit and reflected the cash-based society of that time, the range of products presently offered is much more colourful.<sup>4</sup>

Although these developments have led to some changes in several national laws, there exists no common standard of protection on the European level. Consequently, consumers lack confidence and there is scarcely any cross border business.

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<sup>1</sup> OJ 1987 L 42/48; Cf. COM (95) 117 final; COM (96) 79 final; COM (97) 465 final.

<sup>2</sup> COM (2002) 443 final 3. The European legislator was obviously aware of this fact; cf. Art. 15 dir. 87/102/EEC: “This Directive shall not preclude Member States from retaining ... more stringent provisions to protect consumers ...”.

<sup>3</sup> Cf. COM (2002) 443 final 25: “... for some years now the range of credit available has been growing ...”; COM (2002) 443 final 2: “... the reports and the consultations show that there are enormous differences between the laws of the various member states in relation to ... consumer credit...”. Interesting enough, the same reason was mentioned in the statement of reasons of directive 87/102/EEC: “whereas there has been much change in recent years in the types of credit available to and used by consumers; whereas new forms of consumer credit have emerged and continue to develop”.

<sup>4</sup> Cf. Art. 20 of the proposal (credit agreements providing constitution of capital) and Art. 21 (credit agreement in the form of an advance on a current account or a debit account); cf. COM (2002) 443 final 3; Amparo San José Riestra, The new consumer credit directive: a feasible attempt to harmonisation? (<http://www.ceps.be/Commentary/Oct02/SanJose.php>).

Needless to say, this phenomenon also constitutes a serious obstacle to the completion of the single market. The Commission was aware of this problem: in a discussion paper from July, 2001,<sup>5</sup> several interest groups such as the credit services sector as well as consumer friendly organisations were invited to comment on the necessary changes. The result of this consultation process was the publication of six guidelines on a necessary revision of the old directive.<sup>6</sup> On 11 September 2002 the proposal for a new directive concerning credit for consumers was finally presented.

### B. Implementation of the “old” Directive

Two examples shall illustrate how the 1987-directive was implemented. Whereas the German legislator chose to enact only one statute, the *Verbraucherkreditgesetz* (Consumer Credit Act),<sup>7</sup> Austria tried to blend the directive provisions into its existing laws. This multilevel implementation, in the Austrian *Konsumentenschutzgesetz* (Consumer Protection Code),<sup>8</sup> the *Bankwesengesetz* (Statute concerning banking business),<sup>9</sup> the *Versicherungsaufsichtsgesetz* (Statute regulating public insurance law)<sup>10</sup> as well as the *Verbraucherkreditverordnung* (administrative regulation concerning consumer credit),<sup>11</sup> led to several problems such as overlapping scopes of application and information problems for consumers about the state of the law. Although – as has been mentioned above – Germany only enacted one statute, leaving the remaining issues to be addressed by the general *Bürgerliches Gesetzbuch* (BGB -- German Civil Code), the legal situation there was also accused of unsurpassable complexity.<sup>12</sup>

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<sup>5</sup> Cf. [http://www.europa.eu.int/comm/consumers/cons\\_int/fin\\_serv/cons\\_directive/index\\_en.htm](http://www.europa.eu.int/comm/consumers/cons_int/fin_serv/cons_directive/index_en.htm).

<sup>6</sup> See press release IP/02/1289 Brussels, 11/09/02 ([http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action=gettxt=gt&doc=IP/02/1289%7C01RAPID&lg=EN&display=](http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action=gettxt=gt&doc=IP/02/1289%7C01RAPID&lg=EN&display=)), COM (2002) 443 final 5.

<sup>7</sup> VerbrKrG, dBGBl I 1990, 2840 as amended. In the meantime most special statutes were implemented into the German Civil Code (BGB). The relevant provisions concerning consumer credit can be found in sections 491 et seq. BGB.

<sup>8</sup> KSchG, öBGBl 1979/140 as amended (öBGBl I 2002/111).

<sup>9</sup> BWG, öBGBl 1993/532 as amended (öBGBl I 2001/97).

<sup>10</sup> VAG, öBGBl 1978/569 as amended (öBGBl 1999/194).

<sup>11</sup> ÖBGBl II 1999/260 as amended (öBGBl II 2001/490).

<sup>12</sup> Mülbert, ÖBA 1993, 105.

### C. The most important new Provisions

This section shall illustrate the most important changes between the old and the new directive. Thereby it should be kept in mind that the Commission primarily aimed at modernizing the existing body of law and creating more consumer confidence. The following analysis shall show whether this aim has been achieved. It should be mentioned, however, that the credit services sector has already massively criticised the new provisions. In their opinion, regulating consumer credit as stringently and in such detail as foreseen in the proposal patronizes consumers in a way which is not necessary.<sup>13</sup> They also point to the fact that the new regulations will lead to a considerable increase in credit costs, which will eventually be passed on to the consumers. These, in consequence, will change their behaviour, particularly causing them to take out fewer loans and, in the end, spend less money.<sup>14</sup> Because of the disastrous effect this would have on overall demand, some experts even talk of a leverage effect on economic growth.<sup>15</sup> Nonetheless, one might doubt the credibility of the industry's critique considering their clearly interested motive: after all, it is mainly the lenders who suffer from an increase in costs and consequently lower profits. Additionally, they might also fear that the burden of more duties of disclosure and the principle of responsible lending<sup>16</sup> might lead to more liability on their side.

#### *I. Scope of Application of the New Directive*

The first obvious change concerns the planned new directive's scope of application: This relates to both, its personal as well as its substantial scope. However, the Commission refrained from redefining the meanings of the central terms: con-

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<sup>13</sup> Cf. the German Association of credit institutions (Bankenfachverband), <http://www.bankenfachverband.de/Artikel/startseite007920.cfm> as well as the French Association of Specialised Credit Establishments, Consumer Credit Directive. Brussels threatens economic Growth, European Voice of 31<sup>st</sup> October/6<sup>th</sup> November 2002: "In their current wording the directive's provisions appear to have forgotten that consumers are adults."

<sup>14</sup> Up to 75% [other figures mention 50-65%] of the consumers in Europe currently use consumer credit and 30% of consumers enjoy an overdraft facility on their current account. The total amount of these credit arrangements exceeds € 500.000 million, corresponding to more than 7% of GDP. The annual growth rate is overall around 7%; cf. COM (2002) 443 final 3.

<sup>15</sup> Cf. the French Association of Specialised Credit Establishments (supra footnote 13; Jean-François Vilain, CEO of Franfinance, a specialised subsidiary of Société Général).

<sup>16</sup> See below [7] and [8].

sumer, creditor and credit agreement.<sup>17</sup> Substantially new is that the proposal now also covers **surety agreements**.<sup>18</sup> These are ancillary agreements to a credit agreement, whereby a consumer as the “guarantor”<sup>19</sup> promises to guarantee the fulfilment of any form of credit granted to natural or legal persons.<sup>20</sup> It is, however, not a necessary prerequisite that the contract guaranteed for is a consumer contract.

As we will not deal with surety agreements in more detail in this article, the relevant provisions shall only be mentioned briefly. Art. 23 protects the guarantor by stating that a surety agreement with respect to an open-end credit agreement can only be concluded for a period of up to three years at the utmost and can solely be extended when the guarantor specifically agrees.<sup>21</sup> Furthermore the guarantor is only liable to the second degree<sup>22</sup> and his or her liability is basically limited to the outstanding balance of the total amount of credit.<sup>23</sup>

Most of the proposal’s provisions also apply to **credit intermediaries**.<sup>24</sup> Except in Art. 29,<sup>25</sup> these are in general stated together with the obligations of the creditor and therefore do not require separate mentioning.<sup>26</sup>

Art. 3 para. 2 of the proposal constitutes another remarkable novelty. The **number of exceptions** to the scope of application has been **reduced** substantially. One of the most eye-catching changes is the abolition of the present thresholds.<sup>27</sup> From now on

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<sup>17</sup> Art. 20-22 cover specific credit agreements and modalities which partially also justify certain exceptions of other directive provisions (cf. Art. 16). They shall not be looked at in detail. See, Art. 2 lit a, b and c of the proposal.

<sup>18</sup> Art. 3 par 1 of the proposal.

<sup>19</sup> Art. 2 lit f of the proposal.

<sup>20</sup> Art. 2 lit e of the proposal.

<sup>21</sup> Art. 23 para. 1.

<sup>22</sup> Art. 23 para. 2.

<sup>23</sup> Art. 23 para. 3.

<sup>24</sup> For a definition of the term see Art. 2 lit d. See, It should not be forgotten that also Art. 3, 12, 14 of the Directive 87/102 are applicable to credit intermediaries; cf. Knobl, ÖBA 1995, 667 (section 3.1.).

<sup>25</sup> Concerning advertisement of the intermediary and fees granted to him.

<sup>26</sup> Such as e.g. Art. 6 par 1 (exchange of information in advance and duty to provide advice), Art. 10 (information that must be included in credit and surety agreements), Art. 28 (registration of creditors and credit intermediaries), Art. 33 (burden of proof).

<sup>27</sup> Art. 2 par 1 lit f of the Directive 87/102 states that the directive shall not apply to credit agreements involving amounts less than ECU 200,-- or more than ECU 20.000,--. This will have to lead to an

any credit agreement covered by the proposal shall be regulated by the directive's provisions, regardless of the amounts involved.

It needs to be mentioned in this context that Art. 5 of the proposal prohibits the negotiation of a credit or a surety agreement **outside business premises**. This was harshly criticised as doorstep selling is already subject to detailed European legislation<sup>28</sup> and its prohibition is prone to only "increase costs and in no way consumer protection".<sup>29</sup> Moreover, also the 2001 judgement of the European Court of Justice in Case 481/99, *Heininger*, points in the opposite direction as the Court stated that directive 87/102/EEC on consumer credit did not restrict the application of Directive 85/577/EEC on doorstep selling.<sup>30</sup>

## *II. Duties of the Creditor and/or Credit Intermediary*

One of the principal aims of the proposal is described in number four of the six guidelines:<sup>31</sup> "... more comprehensive information for the consumer and any guarantors". The proposal, however, does not impose a single, all-embracing clause covering all various aspects of **duties of disclosure**. Instead they are divided into pre-contractual (Art. 6), contractual (Art. 10) as well as other duties.

Art. 6 of the proposal – titled "**exchange of information in advance**" – immediately attracts one's attention as it is obviously not only the creditor who shall be obliged to meet certain **duties of disclosure** preliminary to the conclusion of the credit agreement (par 2), but also the borrower. The latter has to provide the creditor with information which is relevant to him "with a view to assessing [the consumer's] financial situation and [the consumer's] ability to repay".<sup>32</sup> Despite these mutual duties the main idea behind Art. 6 still seems to be protection of the consumer as

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amendment of the respective Austrian provision in the Consumer Protection Code as well. Also the present directive has already led to changes within the Austrian Consumer Protection Code concerning the respective thresholds stated in § 16 par 1 and § 26b applicable to instalment plans and the sale of periodicals – They were then increased from ATS 150.000,-- (now approx. € 11.000,--) to ATS 310.000,-- (now € 25.000,--).

<sup>28</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31.

<sup>29</sup> Cf. the French Association of Specialised Credit Establishments (supra footnote 13; Arnaud de Marcelus, chairman of ASF's Surety Committee).

<sup>30</sup> Judgement of December 13<sup>th</sup> 2001, Case C-481/99, *Heininger*, [2001] ECR I-9945.

<sup>31</sup> COM (2002) 443 final 5.

<sup>32</sup> Art. 6 para. 1.

the "... creditor may request of a consumer ... only such information as is adequate ... and not excessive". However, thinking of systematic interpretation, it is irritating that the obligation of the consumer is mentioned first.

Art. 10 of the proposal, titled "information that must be included in credit and surety agreements" can be identified as the central provision with regard to the contractual duties of disclosure. Otherwise various other provisions of the proposal must be looked at to fully grasp the information concept of the directive: such as Art. 21,<sup>33</sup> 23 para. 3,<sup>34</sup> 24 para. 1 lit. d<sup>35</sup> and Art. 25.<sup>36</sup>

It has already been mentioned that these extensive duties of disclosure were severely criticized. They were said to be "unclear, unrealistic and not adapted." The credit services sector especially criticized the lack of clear guidelines as to how to perform the duties.<sup>37</sup> Moreover, some of them were simply seen to be impossible to fulfil.<sup>38</sup> Another argument brought forward was that too much information would not contribute to more autonomy of decision-making but rather result in the opposite.<sup>39</sup>

The next core provision of the proposal is Art. 9, which contains the concept of "**responsible lending**". This principle is also reflected in Art. 6 para. 3, which states that the creditor "shall seek to establish among the credit arrangements [he] usually offer[s] or arrange[s], the most appropriate type and total amount of credit ..." for the consumer. This novelty seems to be the biggest bone of contention for the credit services sector. Indeed it remains unclear what the creditors really have to do to meet the requirements arising from this concept. The proposal seems to be contradictory. Art. 8, titled "Central Database", indicates that the concept of responsible lending only requires the creditor to consult the central database before concluding

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<sup>33</sup> Titled credit agreement in the form of an advance on a current account or a debit account. Art. 21 of the proposal proposes a standard method for providing information during the term of the credit agreement.

<sup>34</sup> ... which stipulates a duty to inform the guarantor in time before he is made liable.

<sup>35</sup> This clause states the creditor's duty to hand over a detailed statement of account in case of the consumer's non-performance with his obligations or early repayment, allowing him to verify the charges and interest claimed.

<sup>36</sup> Information that has to be given in the case of overrunning of the total amount of credit.

<sup>37</sup> Cf. the French Association of Specialised Credit Establishments (supra footnote 13; Michel Lecomte, Chairman of ASF).

<sup>38</sup> Cf. the French Association of Specialised Credit Establishments (supra footnote 13).

<sup>39</sup> Cf. the French Association of Specialised Credit Establishments (supra footnote 13) with regard to the obligation to state three different kinds of rates, which in their opinion "can only confuse consumers".

a credit agreement with a consumer. On the other hand, Art. 9 itself states that the creditor has to use “any means at his disposal” to assess whether the consumer can reasonably be expected to discharge his obligations under the credit agreement. The wording of the latter provision suggests that these duties comprise more than just checking the database. Furthermore, Art. 6 par 3 quoted above obviously further substantiates the general concept. Understanding the concept of “responsible lending” completely therefore requires careful interpretation.

The proposal also increases the lender’s liability in cases of bad performance of the financed contract. Whereas directive 87/102/EEC only stipulates a subsidiary responsibility of the creditor in cases where the purchase of a good and its financing are closely connected,<sup>40</sup> the proposal takes this a step further by establishing **joint and several liability on the part of the supplier and the creditor**, as long as the former acts as a credit intermediary.<sup>41</sup> The consumer therefore has the option of going to court against one or the other or against both at the same time.<sup>42</sup>

The preamble of the new proposal emphasises the **principle of proportionality** as the “principle element linking all the articles in the chapter of non-performance of a credit agreement”.<sup>43</sup> Despite its fundamental relevance it is neither explicitly mentioned in any of the proposal’s articles nor in any of the 30 recitals<sup>44</sup> as a general concept. The only trace of it can be found in Art. 24 par 1 a) with respect to measures of the creditor to recover amounts due in the event of credit or surety agreements. This – in our opinion – does not adequately express the general importance of the principle. Art. 24<sup>45</sup> et seq. then explicitly lay down the creditor’s obligations and rights in cases of non-performance of the consumer. The creditor can only de-

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<sup>40</sup> Art. 11 par 2 of Directive 87/102. It should be mentioned that the Austrian implementation of Art. 11 (§ 18 KSchG) only stipulates the consumer’s right to refuse repayment as long as the supplier has not performed his duties.

<sup>41</sup> Art. 19 par 2 of the proposal.

<sup>42</sup> COM (2002) 443 final 22.

<sup>43</sup> COM (2002) 443 final 26 et seq.

<sup>44</sup> Recital 28 thereby only refers to the general meaning of the principle of proportionality with respect to Art. 5 EC, i.e. with respect to measures taken by the Community and not specifically to contractual obligations between creditors and consumers.

<sup>45</sup> According to Art. 24 par 2 this is not necessary if the consumer is accused of fraud or acting against his obligations arising from the credit agreement; however, it is the creditor who has to provide the evidence for such circumstances.

mand immediate full payment if he gives a prior default notice and grants the consumer a reasonable period of time to comply with his duties.<sup>46</sup>

It should only briefly be mentioned that a few provisions remained unchanged in comparison to directive 87/102/EEC, such as Art. 23 on the assignment of the creditor's rights to a third party.<sup>47</sup> In such a case the consumer shall be entitled to plead against that third person any defence which was available to him against the original creditor.

### *III. Rights of the consumer*

The duties of the creditor described in the previous section often constitute corresponding rights of the consumer. However, a few more provisions concerning consumer rights have to be mentioned separately.

Art. 11 stipulates a **right of withdrawal** for the consumer. He shall have a period of fourteen calendar days to withdraw his acceptance of the credit agreement without having to give any reason.<sup>48</sup> This is another provision criticized in strong terms by the economy.<sup>49</sup>

Just as in directive 87/102/EEC, the new proposal contains the consumer's right of **early repayment**. A comparison between Art. 8 of directive 87/102/EEC and Art. 16 of the proposal is, however, very surprising. Art. 8 of the directive states: "The consumer shall be entitled to discharge his obligations under a credit agreement before the time fixed by the agreement. In this event, in accordance with the rules laid down by the Member States, the consumer shall be entitled to an equitable reduction in the total costs of the credit".<sup>50</sup> Art. 16 para. 1 of the proposal, on the other hand, only states the right to early repayment itself without referring to the right of an equitable reduction in credit costs. Also the proposal's preamble ("examination of the articles") does not mention this right of reduction anymore. This

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<sup>46</sup> Art. 24 par 1 b) of the proposal.

<sup>47</sup> Formerly Art. 9 of Directive 87/102.

<sup>48</sup> Cf. supra footnote 30 (*Heininger*).

<sup>49</sup> "Credit providers have neither the means nor services to manage restitution of goods ... [This provision] entails a dramatic increase of internal costs for specialised credit establishments, and therefore, at the end of the day, of expenses borne by the consumer...The Directive shows a severe lack of understanding of what actually goes on in the field ..." (Cf. supra footnote 13).

<sup>50</sup> The statement of reasons of directive 87/02 makes clear that both elements of Art. 8 were of importance: "Whereas the consumer should be allowed to discharge his obligations before the due date; whereas the consumer should then be entitled to an equitable reduction in the total cost of the credit."



irritates even more as Art. 16 contains a new paragraph 2 which seems to only emphasise creditor's interests by entitling the creditor to require an early repayment indemnity from the consumer to offset his charges and lost investment. However, this new provision must not only be interpreted according to its wording: An examination of the preamble shows that Art. 16 actually aims at improving the consumer's situation. The Commission thereby refers to its legal opinion that the "old" Art. 8 of directive 87/102/EEC did not stand in the way of requiring such indemnity but that this indemnity, for the time being, was only justified in the very limited circumstances now mentioned in Art. 16 para. 2. On the other hand the Commission does not restate the consumer's right to have the credit costs reduced. This is not only curious but might even be dangerous as the provision now seems to only protect the creditor.<sup>51</sup>

As a last point it should not be forgotten that all provisions in favour of the consumer are not subject to **party autonomy**.<sup>52</sup> The proposal makes clear that its provisions are imperative and that the rights granted to consumers and provided by the proposal may under no circumstances be surrendered.

#### *IV. Conceptual Novelties of the Proposal*

Next to the substantive changes described in the previous chapters the proposal also contains conceptual novelties that need further examination:

##### *1. The concept of maximum harmonization*

The first conceptual novelty, which strikes the reader's attention, is the switch from minimum to maximum harmonisation.<sup>53</sup> Whereas directive 87/102/EEC allowed member states to adopt or maintain more stringent provisions to protect consumers<sup>54</sup> – which has been the traditional way of regulating consumer protection issues

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<sup>51</sup> Which becomes even more delicate because of the principle of maximum harmonisation; cf. *infra* [17ff].

<sup>52</sup> Art. 30 par 2 and 4 of the proposal.

<sup>53</sup> Also called "full harmonisation"; cf. the Consumer Policy Strategy 2002-2006, Communication of 7 May 2002, COM (2002) 208 final ([http://europa.eu.int/eurlex/pri/en/oj/dat/2002/c\\_137/c\\_13720020608en00020023.pdf](http://europa.eu.int/eurlex/pri/en/oj/dat/2002/c_137/c_13720020608en00020023.pdf)). If and to which degree national legislation is allowed to deviate from the regulations of a directive depends on the type of harmonisation intended; cf. Taschner in Groben/Tiesing/Ehlermann (Ed), EU-/EG-Vertrag<sup>5</sup>, 2/II (1999) Art. 100 EG par. 44; Herrenfeld in Schwarze, Art. 94 EG par. 42 et seq.; C-128/94 (Hönig – Stadt Sockach) [1995] ECR, I-3389 par. 9; C-1/96 (ex parte Compassion in World Farming – Minister of Agriculture, Fisheries and Food) [1998] ECR I-1251 par. 49 et seq.

<sup>54</sup> Art. 15 of Directive 87/102.

– Art. 30 para. 1 of the proposal confirms the principle of total harmonization. Member States shall not be entitled to provide for a higher level of protection unless otherwise stipulated.<sup>55</sup>

It surprises that, in line with the new proposal, no official reasons for this remarkable change are given. The trend, however, was foreseeable. In its paper on Consumer Policy of 7 May 2002 the Commission already pointed in this direction, but again without an official justification.<sup>56</sup> In our view a plausible explanation seems to be that the Commission no longer considered the older concept of minimum harmonization appropriate for producing optimal results in line with the completion of the single market. Considering the principle of minimum harmonization more closely, and particularly in regard to the reasons mentioned in the various preambles, led us to the conclusion that this principle was conceptually misleading right from the beginning. Minimum harmonization can, in effect, never really promote European economic integration. First of all it cannot be explained from the suppliers' point of view, as they are still confronted with fifteen different member state laws. But also scrutinizing the demand side does not lead to a satisfying explanation one might conclude that minimum harmonization in this respect at least bears the advantage of being able to rely on a common minimum standard of protection; the consumer is confronted with a legal situation which is only different in so far as it is more favourable to him or her. We doubt, however, that this latter presumption can be upheld because the consumer is only familiar with his or her own national legal situation and not with the minimum standard of the directive, he or she still risks a loss in protection when entering the market of another member state, if his or her home member state provides for a higher level of protection than the latter. In our view it is therefore doubtful that consumer cross border activities are really enhanced by a concept of minimum harmonization.

The real reason for this development therefore seems to be a political one. When harmonization in the field of consumer protection started, minimum harmonization seems to have been the lowest common denominator and therefore the only consensus to be reached.<sup>57</sup> The foregoing analysis shows, however, that it did not constitute a real step towards more integration, although it should not be forgotten that it definitely initiated a process, which now culminates in the new concept of maximum harmonization.

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<sup>55</sup> National provisions concerning maximum or exorbitant annual percentage rate of charge or any other type of setting or evaluation of maximum or exorbitant rates continue to apply, as these specific aspects are not dealt with in the proposal.

<sup>56</sup> Quoted *supra* note 53.

<sup>57</sup> Cf. Craig & de Búrca, *EU Law*, 3<sup>rd</sup> ed. (2003) 1195.

It remains to be seen if this new concept will be able to reach its ambitious goals rather than eventually weakening consumer protection. In this respect it is important to keep in mind that, because powerful pressure groups resist many provisions of the proposal, it seems unlikely that the high level of protection presently granted by its regulations can be maintained. If substantial cutbacks must be made, the concept of maximum harmonization may well have a boomerang effect, as half-hearted maximum harmonization – this time the lowest common denominator from a substantial point of view – would then lead to a loss of the high protection level granted in some member states, as they would not be allowed to introduce additional provisions.<sup>58</sup> Since consumer credit and consumer protection in general constitute highly sensitive political issues, the outcome is hard to predict. All elements of the proposal are expected to be extensively discussed.<sup>59</sup>

It must be mentioned that there are two exceptions to the principle of maximum harmonization.<sup>60</sup> The first is the optional “positive registry” mentioned in Art. 8 para. 4.<sup>61</sup> Art. 8 states that Member States shall make it compulsory to maintain a central database holding “negative data” recording late payments. This final paragraph 4, however, allows the member states to go further by setting up central “positive databases” recording all consumer commitments relating to credit.<sup>62</sup> The

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<sup>58</sup> Similar reasons seem to constitute the background for the European Parliament’s fears that the concept of maximal harmonisation could lead to a decline in consumer protection (this is e.g. mentioned by María Sornosa Martínez in an outline for the European Parliament of November 2002, PE 319.393). Another potential problem in regard with the principle is mentioned by the European Mortgage Federation in an official letter regarding the Position Paper on the Green Paper on European Union Consumer Protection (<http://www.hypo.org>): Despite welcoming the concept (“The efficiency ... clearly depend[s] on the condition that it is based on the full (maximum) harmonisation principle, thus eliminating the fragmentation which results from the minimum clause”), it calls into question the possibility to achieve the aim strived for by stating that it still remains unclear if the existing fragmentation resulting from a wide range of often very specific and detailed national legislation really can be suppressed.

<sup>59</sup> Rohe, *Privatautonomie im Verbraucherkreditrecht wohin?*, BKR 2003, 267; Danco, *Die Novellierung der Verbraucherkreditrichtlinie*, WM 2003, 863; Kaiser, *Vorschlag der EU-Kommission für eine Überarbeitung der Verbraucherkreditrichtlinie – Darstellung der wesentlichen Änderungen* (<http://www.vur-online.de/beitrag/33.html>).

<sup>60</sup> Art. 30 par 1 a) and b) of the proposal.

<sup>61</sup> This is indicated by the wording: “The central database ... may include the registration of credit agreements and surety agreements.”

<sup>62</sup> The creditor would thus have at his disposal an instrument that is more reliable than a negative database. This would offer him the chance to check, whether a consumer, or possibly a guarantor, has concluded other credit or surety agreements that have not yet been subject to litigation but constitute an obstacle to further credit.

second exception relates to the burden of proof:<sup>63</sup> Art. 34<sup>64</sup> states, that member states *may* provide that the burden of proof lies with the creditor or credit intermediary in various respects.

## 2. *The restriction of a free choice of law*

Secondly the proposal follows the examples of former consumer directives<sup>65</sup> and introduces a private international law clause restricting the free choice of law in Art. 30 para. 5 The consumer cannot be deprived of the rights granted by the directive on the grounds that the law applicable to the credit or surety agreement is that of a third country.<sup>66</sup>

## V. *Sanctions*

As far as the sanctions to be provided for<sup>67</sup> are concerned, Art. 31 requires the member states to “lay down infringements of national provisions adopted in application of [the proposal] and .... [to] take all necessary measures to ensure that these are enforced ...”.<sup>68</sup> According to the “examination of articles” possibilities include penalties as well as the withdrawal of the creditor’s licence.<sup>69</sup> In our opinion it would be necessary to provide for the nullity of contracts or at least of the clauses contrary to the directive’s provisions, as this is the only way to really protect the consumers. The creditor’s duty to pay a penalty, on the other hand, is of no use to the consumer if the latter is still bound to fulfil an illegal contract.

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<sup>63</sup> Art. 33 of the proposal.

<sup>64</sup> Similar provisions can be found in other consumer protection directives (really more than the one mentioned), such as e.g. Art. 15 of Directive 2002/65/EC on the distance marketing of consumer financial services modifying Council Directives 90/916/EEC, 97/7EC and 98/28/EC.

<sup>65</sup> E.g. Art. 6 par 2 of Directive 93/13/EEC on unfair terms in consumer contracts, OJ 1993 L 95/29; Art. 12 par 2 of Directive 97/7/EC on distance marketing, OJ 1997 L 144/19; Art. 7 par 2 of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12; Art. 12 par 2 of Directive 2000/65/EC on the distance marketing of financial services, OJ 2002 L 271/16.

<sup>66</sup> However, par 5 makes clear that for this rule to apply, it is important that the agreement has a close link with the jurisdiction of one or more member states.

<sup>67</sup> It is explicitly stated that circumvention of the application of the directive shall be prevented (Art. 30 par 3), both substantially as well as by choosing the applicable law (Art. 30 par 5).

<sup>68</sup> Art. 30 par 3 of the proposal explicitly admonishes the member states to make sure that the provisions of the proposal cannot be circumvented.

<sup>69</sup> COM (2002) 443 final 28.

#### **D. Concluding Remarks**

The foregoing analysis has shown that many aspects of the proposal constitute a big step towards more consumer protection. Others, however, are problematic and quite a few have been harshly criticized by the credit services sector.

The future will show if all proposed measures will actually pass the co-decision process in the European Parliament; for the time being this is seriously doubted. Having to transpose a new directive into national law could, however, constitute a chance for the national legislators to correct former inadequacies such as the ones discussed above,<sup>70</sup> which would in the future help consumers to access the law more easily.

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<sup>70</sup> Cf. *supra* section II.