

UPDATING AND REVISING THE CONSUMER CREDIT DIRECTIVE
(87/102)
A GENERAL COMMENTED APPROACH

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In European consumers' matters, many horizontal directives apply to the financial services like the Directive on Misleading Advertising, the Directive on Unfair Contracts terms, the Directive on Data Protection, the Directive on E-commerce². Moreover, numerous prudential directives contain dispositions applying to consumers. Nevertheless, the Consumer Credit Directive 87/102, is one of the main, purely consumers oriented – vertical, in the field of financial services -, existing piece of legislation³. This directive has been modified twice, in 1990 (Directive 90/88) and in 1998 (Directive 98/7), mainly to introduce and adapt the computation of a harmonised APR (Annual Percentage Rate). So, before to describe the outlines of the future proposal on which the commission is presently working, it may worthwhile explaining why a decision to revise directive 87/102 was taken.

1 - The rationale of revising and updating the Consumer Credit Directive

Many reasons of different nature are pleading for an updating and a revision of directive 87/102.

(i) - The existence of several directives on the same subject does not simplify the understanding of such legislation. Since several years the Commission has undertaken a simplification process of its legislation. This approach has been reinforced in the Commission's white paper on governance⁴. Consolidating the three directives on consumer credit can be considered as being part of this process.

Moreover, the ECOFIN Council endorsed the Commission communication on E-commerce and Financial services, of February 2001, which includes a "roadmap" for

¹ The opinion expressed in this paper are on a personal basis and do not engage the European Commission

² Directive on Misleading Advertising (84/450/EC) OJ L 250/17, 19.9.1984

Directive on Unfair Contract Terms (93/13/EC) OJ L 95/29, 21.4.1993

Directive on Data Protection (94/46/EC, OJ L 281, 23.11.1995

Directive on E-commerce (200/31/EC) OJ L 178/1, 17.07.2000

³ The Council and the European Parliament should adopt a second one, on distant selling of financial services, in 2002, as a political agreement has been achieved during the internal market Council on the 27 of September 2001.

⁴ « European Governance » White paper, European Commission, COM(2001)428 final, 25.07.2001. Simplification of existing legislation is considered as one of the main objectives.

moving towards home country control on the basis of Community rules⁵. This roadmap aims at enhancing convergence/harmonisation of sector regulation. The Consumer Credit Directive is identified as one of the first opportunities for demonstrating the feasibility of this approach.

In September 2001, in its exploration on how to make progress on the Distance marketing Financial Services Directive, the Belgian Presidency considered that, for the blocking minority of Member States, respect by the Commission of its "roadmap" and priorities would be a *conditio sine qua non* for overcoming the deadlock. This approach permitted to the 27 September 2001 Internal Market Council to achieve a political agreement on this project of a Directive. This agreement insisted on the necessity to adopt several "vertical" directives, of which, explicitly, the Consumer credit one. Therefore, the CCD revision is a politically charged test case.

(ii) - The first draft of the Consumer credit directive was written in 1977. The discussions were long and difficult to arrive to the 1987 agreement, specifically because, at that time, the decision requested the unanimity of Member States. It is probably the reason why article 13.2 of the directive requested the Commission to proceed to a five yearly monitoring, the first one having to be done in 1995. Therefore, the Commission, in 1995, published a report⁶ on the functioning of this directive 87/102 and, another one on directive 90/88⁷, which was put on public debate. Reactions and comments to this report were published in 1997⁸. Clearly, the report touched to all aspects of the directives. The main conclusions were the following:

- Member States, on the basis of the "minimal clause"⁹, did transpose in very different ways many elements of the directive. Some, for instance, extended the scope of the directive to mortgage credit (Austria, Denmark, Germany, and partly Ireland). The importance of these differences could limit and possibly impede cross-boarder activity.
- Many forms of consumer credit, more and more largely used, are excluded from the scope of the 87/102 directive, like overdraft, advance on credit account, certain uses of credit lines and credit card, so called "zero" interest credit, leasing, etc.
- There is neither a definition of credit intermediaries, nor a European regulation of this profession.
- There is a desequilibrium between the rights and the obligations of the consumer and the supplier.
- Last, the report insisted on the necessity to take in account the problems of over-indebtedness in the credit cycle.

⁵ European Commission, Communication to the Council and the European Parliament, 'e-commerce and Financial Services » COM(2001) 66, 7.02.2001

⁶ Report on the operation of Directive 87/102, COM (95) 117 final of 11.05.1995

⁷ Report on the operation of Directive 90/88, Com 96 -79 final

⁸ Brief summary of the reactions and comments, COM (97) final of 24.09.1997

⁹ A directive, which contains a minimal clause, which is generally the rule for consumers' legislation (due to the Text of the article 153 of the Treaty: "The Community contributes to the Member States consumer policies), permits Member States to add, in their national law, to the dispositions of the European directive what they consider necessary to protect their consumers, on the basis of general interest.

(iii) - All these critics are still valid and even more pertinent than in 1995. The nineties have seen a sharp increase in the forms of credit, which were excluded from the scope of the directive, specifically, credit lines and overdrafts.

For instance, the last surveys done by the BIS, Nilson or Visa and Europay¹⁰ show more than a doubling of the number of credit cards and the volume of payments between 1994 and 1999. This means a rate of growth of circa 16 % a year (see table 1,2 and 3). The Credit Card Research Group indicate that the yearly value of spending through the Visa and Europay's credit cards represented 3.3 % of the GDP in 1999.

To give another example, there is no more such a clear distinction between Consumer Credit and mortgage credit. Consumer credit can be used for home loans and certain mortgage credit for consuming purposes. This discussion has been at the centre of the discussions during the negotiations of the Home loans Code of conduct, which were closed beginning of March 2001¹¹.

There is moreover a strong modification in the behaviour of the consumers towards credit. More and more consumers are using credit. Debt is now a common instrument used to maintain a stable level of consumption, compatible with lifetime expected resources, over different stages of the individual or family's lifecycle. Many consumers use debt to shift expenditure from one period of their life to another. In other words as borrowing becomes more attractive (easier and less costly), as consumer expenditure goes more and more towards high prices consumer goods, those who borrow may, less than in the past, have an urgent need of credit to make the ends meet. They generally subscribe a credit to access to a certain level of consumption or to more costly goods or services.

As a matter of fact, the Consumer credit yearly rate of growth is largely superior to that of the GDP (see table 4). The amount of outstanding consumer credit represented 7.4 % of the 2001 GDP. This figure is still much lower than for home loans (which represent 29.3 % of GDP, see table 5), but it still represents a huge amount of money and contributes strongly to economic growth.

Nevertheless, the level of the households' indebtedness varies considerably between member States due to the different behaviour towards credit, but also to differences in the development of the consumer credit market, in the national legal frameworks and in income levels. The low cross-boarders activity in consumer credit (estimated on a basis of very partial figures, from the Central banks of Denmark, France and Netherlands to 2 to 5 % of consumer loans in the past year) is frequently explained mainly by these discrepancies between legal frameworks. Enhancing consumer confidence and the development of a real internal market in this field implies

¹⁰ Statistics on payment systems in the Group of Ten countries, figures for 1999, Committee on Payment and Settlement Systems, BIS, march 2001
The Nilson Report, August 2000

EU Cards, a review of the EU payment cards market, Credit Card Research Group, January 2001

¹¹ "European Agreement on a Voluntary Code of Conduct, on Precontractual Information for Home Loans", 5 March 2001; Recommandation de la Commission du 1^o mars 2001 relative à l'information précontractuelle devant être fournie aux consommateurs par les prêteurs offrant des prêts au logement, (2001/193/CE), L 69/25, 10.3.2001.

therefore a better harmonisation of these legal frameworks and to cut down other obstacles.

(iv) Even if Directives 90/88 and 98/7 allowed resolving many problems touching the computation and the "assiette" of the APR, differences remain between Member States, which still makes cross-boarder comparison difficult.

The annual percentage rate of charge (APR) is that rate which "*on an annual basis, ... equalises the present value of all commitments (loans, repayments and charges, future or existing, agreed by the creditor and the borrower*" (Article 1a of the Directive 87/102). In theory, the APR must include all credit costs. Directives 90/88/EEC and 98/7/EC amending Directive 87/102/EEC provide for a negative list of costs which should be excluded from this basis of calculation. If the APR is to be fully reliable and usable throughout the European Union, ideally it should be calculated by the Member States in a uniform manner incorporating in the same way all the cost elements linked to the credit contract. Yet this is not always the case despite the amendments made.

Directive 98/7/EC leaves the choice between different time parameters, which leads to genuine imprecision in calculating the APR¹². Moreover, there are no hard and fast rules as regards mixed financial products containing simultaneously a credit element and a savings or insurance element (life/mixed).

Generally speaking, the inclusion or exclusion of certain costs has to be re-evaluated on the basis of their economic justification¹³ so as to arrive at a minimum of exclusion of credit cost elements from the basis for calculation. This should bring about a genuine approximation of the national "bases of calculation" and a higher uniformity of calculation, thus enhancing transparency and comparability of offers.

In fact, the problems encountered in proving the "compulsory" nature of insurance's¹⁴ and securities covering reimbursement's risks have prompted certain Member States to regulate beyond what was provided for in the Directive, by using the minimal clause. These countries felt that the consumer, in practice, had no freedom of choice and that the lender, for reasons of caution or commercial profit, preferred to negotiate insurance right away, even if the consumer did not initially want such insurance¹⁵.

(v) Finally it is also important to take in account the opinion of the consumers and the over-indebtedness risks linked to consumer credit. Asked in several successive polls, circa 50 to 60 % of the consumers declare that they had a consumer credit¹⁶. The most

¹² Accordingly, a difference of 0.1 % to 0.2 % may not be significant for small credits (particularly when compared with rates of 200 to 300 % applied by the moneylenders in the UK and Ireland). The same is not true of high amounts of credit repayable in the short term where the difference expressed in monthly amounts can be several euros.

¹³ Excluding costs arising from non performance of the credit agreement

¹⁴ This compulsory nature is the criteria for including their costs in the basis of calculation

¹⁵ Reference should be made to the comparison table published in the Report on the operation of Directive 90/88 op. cit. and to the situation of the USA which has similar legislation and goes further as regards the condition of exclusion than the Directive (USA code, Title 15, section 1605 (b))

¹⁶ Results of the Eurobarometer polls , n° 54, January 2001

recent national studies show that most of the over-indebted persons, even if they may have debts of different nature (gas, electricity, rent...), have, as a general rule, several consumer credits but, very few mortgages credits. And the sociological profile of over-indebted persons has changed over time. Nowadays, most of them are middle class persons aged between 30 and 45. This is mainly due, in most cases, not to a mismanagement of their resources, but to the increasing state of uncertainty both of the occurrence of "accident of life" (specifically unemployment and divorce) and of our predictions of them in our free-market and competitive societies.

Over-indebtedness represents a high cost for all: credit suppliers, consumers and national budgets. Large differences between national social legislation to cope with this phenomenon and protect the over-indebted persons, imply long and costly procedures (up to 8 years) before the debt may be paid back (although very often partially or without interest been paid) and, very often, the debt is finally erased. For banks, this social legislation's differences maybe an obstacle to lend to the consumers of another country or make the operation very risky.

Clearly, the objective of a Credit directive cannot be to harmonise social legislation, which remain in the field of the national competencies (subsidiarity). But as before to be over-indebted, you need to be indebted, several dispositions maybe taken during the credit's life cycle¹⁷, to prevent over-indebtedness and give better cross-boarder tools to the professional to evaluate their risks.

In the various consumer surveys realised since 1997 it appears that consumers are not really satisfied with the general behaviour of banks (see tables 7, 8 and 9), particularly in matter of consumer credit. Here are some of the most interesting answers:

	YES	NO
- Do you think that financial information given by the banks are sufficient	27,0 %	42.4 %
- It is impossible to know the real cost of a credit	50.1 %	37.5 %
- Consumer credit is more dangerous than useful	50.0 %	32.7 %
- It is difficult to gain a dispute against a bank	40.3 %	29.4 %
- Would you favour a European harmonisation	73.6 %	10.0 %

Such answers, which are not changing much from year to year, since 1987, tend worsening. This, in itself, is also a strong incentive to act.

2 - The main lines of the draft proposal

The Council Directive 87/102/EEC on consumer credit established the Community framework for consumer credit in order to contribute to the creation of a common market in credit and to introduce minimum common rules on consumer protection.

As explained above, various Commission reports on the operation of the Directive, subsequently broad consultation of the interested parties, have prompted the Commission to conclude that the Directive was no longer sufficiently in step with the

¹⁷ By credit cycle we intend the life cycle of a credit, from the moment when a consumer think about subscribing a credit to the moment when, either the credit has been reimbursed or the consumer has been put in a over-indebtedness procedure.

situation of the consumer credit market and that it should therefore be revised. The Commission accordingly ordered a series of studies on a range of specific issues¹⁸ and carried out a detailed comparative analysis of all national transposed legislation.

An analysis of the European cross-boarder market in consumer credit shows that there has been only marginal growth in this market. As a result, the legal framework currently in force needs to be reviewed in order to allow consumers and companies to take full advantage of the single market. The revision of the Directive seemed to require:

- An adaptation of the legal framework to the new credit techniques,
- Rebalancing of the rights and obligations of credit consumers and credit grantors alike,
- A high level of consumer protection.

The aim is to promote the development of a more transparent, more effective market providing a high enough degree of consumer protection so that the freedom of movement of credit can take place in better conditions for both suppliers and consumers. In order to achieve these objectives, the revision of the Directive could be carried out applying six main guidelines:

- (1) The redefinition of the Directive's scope in order to adapt it to the new market situation in this area and better tracking of the demarcation line between consumer credits and home loan credits.

Article 2 of Directive 87/102/EEC lists a series of exemptions, which, today, appear to be no longer justified. The new Directive would therefore apply to all forms of credit granted to natural persons for mainly private purposes:

- irrespective of the amount,
- irrespective of the security required,
- And, irrespective of the purpose of the credit, with the exception of that intended to finance the purchase or renovation of buildings.

As was discussed during the negotiations on the "home loan" Code of conduct:

- The difference between the "consumer credit" market and the market in "real estate credit" and "mortgage-backed credit" is becoming increasingly small. The financial techniques used have become virtually identical: fixed or variable rate, the option of one or several instalments, regular periods or reimbursement at the end of the

¹⁸ LEA, M.J., WELTER, R., DÜBEL, A., "Study on mortgage credit in the European Economic Area. Structure of the sector and application of the rules in the Directives 87/102 and 90/88. Final report on tender n° XXIV/96/U6/21 SECKELMANN, R., "Methods of calculation, in the European Economic Area, of the annual percentage rate of charge, Final report 31 October 1995 contract No AO 2600/94/00101; REIFNER, U., 'Harmonisation of cost elements of the annual percentage rate of charge, APR', Hamburg 1998, Project No AO-2600/97/000169. DOMONT-NAERT, F., et LACOSTE, A.-C., "Etude sur le problème de l'usure dans certains états membres de l'espace économique européen, Louvain-la-Neuve 1997, Contrat No AO-2600/96/000260 ; DOMONT-NAERT, F., et DEJEMEPPE, P., "Etude sur le rôle et les activités des intermédiaires de crédit aux consommateurs", contrat No AO-2600/95/000254, 1996 ; BALATE, E., et DEJEMEPPE, P., "Conséquences de l'inexécution des contrats de crédit à la consommation. Etude AO-2600/95/000270, European Commission, rapport final.

contract, straight loan or opening of a credit line, mortgage registration, guarantee, etc.

- The mortgage credit is being increasingly used thanks to mortgage techniques, which cover all types of credit, in the area of funding the purchase of consumer goods. This trend involves serious potential risks for the consumer whenever he/she uses his/her home as collateral to guarantee consumer requirements, in the same way as the "equity release" techniques in the United Kingdom. A mortgage can in several Member States, be dissociated from all credit debts and be of undetermined duration. Credit accompanied by mortgage registration as second (or even third or fourth) charge is also used in many instances to refinance consumer credit. There would therefore seem to be no longer any reason to maintain an artificial distinction between "consumer credit" and "mortgage credit".

Therefore, the idea would be to define, as in the "home loan" Code of Conduct, the different forms of credit by their scope (whatever is the security used by the credit grantor to protect against risks): credit for consuming purposes or credit for buying or transforming a home¹⁹.

(2) The inclusion of new arrangements taking account not only of the creditors but also of credit intermediaries.

Article 12(1) of Directive 87/102 offers Member States three options for monitoring the implementation of the Directive particularly as regards credit intermediaries. The report on the implementation of the Directive suggested making the third option listed in this article compulsory. This option stipulated that Member States must promote the establishment of appropriate bodies to receive complaints concerning credit agreements or credit conditions and to provide consumers with appropriate information or advice.

More stringent control of credit intermediaries would entail a number of steps:

- registration of such persons,
- the creation of an access threshold in terms of professional aptitude,
- the option, where required, of suspending or withdrawing their licence,
- making any complaints public.

This would imply that each Member State should register the sellers and/or distribution channels of credit agreements. A formula could be to introduce a common platform for all credit intermediaries. But differences could be allowed as regards the quality and extent of the powers of the credit intermediary and even more so as regards the responsibility of the lender in relation to the intermediary selected or accepted (credit broker, delegated agent, seller). Nevertheless, it is not sure that such dispositions should be part of the consumer directive, but following the example of

¹⁹ The definition included in the « Home loans » code of conduct (see supra) is the following: « a home loan is a credit to a consumer for the purchase or transformation of the private immovable property he owns or aim to acquire, secured either by a mortgage on immovable property or by a surety commonly used in a Member State for that purpose.»

the insurance mediation proposal for a directive, constitute a separate piece of legislation²⁰.

- (3) The introduction of a structured information framework for the credit grantor in order to allow him to better appreciate the risks involved;

The cost of credit is a function of the risk for the lender. This risk is a function of the quality of the information available to the lender (to establish a credit scoring) when deciding to enter into an agreement with the consumer. The information obtained by the lender is therefore essential as regards the operation of the credit market and particularly consumer credit.

The importance of the quality of this information is further heightened in the event of offering credit to consumers established in other Member States. The improvement of information to the credit grantor is thus an essential condition for the creation of the internal consumer credit market, without which the consumer will find it very difficult to obtain credit in another Member State.

Negative records — recording payment defaults — and/or positive records — recording the entire consumer's credit commitments — exist in all Member States. These official records are either private or public. Positive central records — public or private — exist, in a way or another, in Germany, the Netherlands, Austria and the United Kingdom. Belgium has, also, in August 2001, introduced legislation creating an official positive record²¹. In most other countries, such unofficial positive records exist on a purely limited and private basis. Agreements on cross-border exchanges between these central record agencies also exist, e.g. between Belgium and the Netherlands, or between Belgium and Germany.

Certain Member States (e.g. Belgium and the Netherlands) have placed the onus on the lender to assess and verify the consumer's solvency, *inter alia* with the help of a centralised database. This obligation reflects the concern to use a transparent and objective system of assessing the solvency of consumers and, where applicable, the guarantors.

By making such information systematic, subject to a stricter respect of the rules for protecting private data, it would be possible to avoid awkward situations. For instance, to avoid a situation whereby lenders use indirect means which are not so secure and offer no possible control by the consumer as regards the information concerning him, e.g. the use of electoral registers, or partial databases of private information.

The general interest also requires that the collection and processing of personal information on consumers be secured. Transparent records should function within a secure framework respecting the rules on privacy and which allow access to cross-border credit to all consumers, while preserving the certainty that those exposed to the risk of excessive indebtedness will no longer be accepted.

²⁰ Proposal for a Directive to the Council and the Parliament « on Insurance mediation » COM(2000) 511 final.

²¹ « Loi relative à la centrale de crédit aux particuliers » du 10 août 2001, *moniteur belge* du 25.09.2001, pp. 32027 et sq.

The idea would be, at least, to ensure the possibility for any supplier to be able to consult, on an individual consumer basis, such improved databases. Symmetrically, the consumer should be informed about any existing information about him to have the possibility to obtain correction of such information if inaccurate.

- (4) The introduction of more a comprehensive information for the consumer and any guarantors;

Better information to the credit grantor goes hand in hand with better information to the consumer. Transparency with regard to the conditions of credit supply is an essential element for better comparability of products on the market, including those originating in other Member States. It is the precondition for a true free circulation of credit offers.

As the Directive should apply to all credit contracts and the 87/102 should therefore be adapted in order to cover the new forms of credits which have emerged on the market since it was adopted. Financial techniques nevertheless prevail over the typology of the credit agreement and it is therefore important to have provisions to supply first and foremost appropriate information for the consumer as a function of the techniques used. This information should cover amongst other things:

- The interest rate: the consumer must be informed at least of the conditions under which this rate can vary, on how the rate is calculated, on the periods during which it will be applied, etc. Clearly a better-harmonised APR is part of the information necessary for comparing offers and informing the consumer and the guarantor. Its definition must be better harmonised, as well as the definition of the parameters. Moreover, there are no hard and fast rules as regards mixed financial products containing simultaneously a credit element and a savings or insurance element (life/mixed).

Moreover, the concept of “annual rate of interest” is used in Article 6 of Directive 87/102. This concept is not, however, defined. The fact is that when wanting to regulate current account advances, overdrafts, and therefore, more generally, all credit contracts for which the debit interest is calculated after the event, this rate should be defined both on an annual basis and on a periodical basis. The same rate should be able to be applied in all Member States in order to be able to compare statements, to check interest claimed for the period specified, etc.

- The repayment arrangements: it is important for the consumer to know if he will have to repay on a regular basis, in one go, by paying limited instalments for a certain period and a large sum at the end, in cash or in kind.

- The withdrawing arrangements: equally important is to know if the consumer can draw on the sums made available once or several times, in a staggered or a repetitive way, is there a clean-up requirement, etc.

- The amortisation table: To know the interest rate is crucial for comparing offers. But amortisation tables permit to program clearly one's budget and therefore should be given to the consumer for all contracts for which interest and charges are fixed and calculated beforehand.

The fate of people other than the consumer who stand as guarantors is a matter of concern to a number of Member States. These persons currently fall through the net of Directive 87/102/EEC. On the one hand, it could be considered that the scope of the Directive could be extended to cover the guarantees annexed to credit agreements and the persons who provide them. On the other, there would also be a rationale to cover the case of people acting for a purpose which can be considered outside their commercial or professional activities and who are asked to provide a guarantee for a credit agreement not covered by the terms of this Directive. These guarantors — for example, the parents of a businessman starting up in business — act as consumers. Therefore, it could be thought useful to provide them with information and protection identical to those they would receive if the credit were a consumer credit agreement in the strict sense of the term.

In the same line of idea, a person providing personal security or real security could be, at least, informed of the existence of credit agreements and default by the main creditors. Guarantee contracts could, following this option, include a minimum of data, indicating in particular the “amount guaranteed”, which can relate only to the sum in principal of the credit agreement and the arrears interest which may be due by the consumer, excluding any other indemnity or penalty. It could be considered abnormal for the guarantor to pay non-performance charges incurred by the consumer.

The question raises to know if a creditor ought not to be allowed to call upon the guarantors before he has confirmation of default by the main debtor.

- (5) A more equitable sharing of responsibilities between the consumer and the professional.

Several dispositions, following the conclusions of the 1995 report on the Consumer credit, could be thought of in this regard:

- The sales methods. The national regulations banning door-to-door selling and other sales techniques, and cooling-off periods, are very varied. Several Member States prohibit certain forms of unsolicited approaches and even provide for a total ban on canvassing the consumer for credit agreements at home and at work. A better harmonisation could be put in place.

- Maximum rates and usurious rates. Several Member States have introduced a system of maximum rates and/or usurious rates. The 1995 report revealed major differences of approach across the Member States and expressed the Commission’s hope that the debate on usury could be addressed at the Community level.

- The supply of credit. It is up to the consumer — and to the consumer alone — to use his credit as he/she thinks fit and in conditions which are completely clear. Any restrictions by the lender on the availability of or on the right of drawing on the sums should be justified by the lender. These restrictions should be transparent and should not be a means of surreptitiously remunerating the lender or the intermediary or pressurising the consumer to enter into an agreement without his being aware of all the conditions of cost or repayment. Such restrictions could be examined from the point of view of unfair contracts terms. For instance, a clause obliging the consumer

(as a condition for drawing on credit amounts) to pawn all or part of the capital borrowed or to use all or part of it to establish a deposit or to purchase capital goods or other financial instruments.

- Joint and several liability of the lender and the supplier. A substantial number of disputes arise between consumers and the suppliers of goods and services funded under a credit agreement. Drawing on the rules of common law, the Commission, in its initial proposal for a Directive 87/102, considered giving the consumer the option of taking action directly against the lender without being obliged to first institute proceedings against the supplier of the goods or services. This approach is based on the notion that the signing of a contract of supply of goods or services is conditioned by the existence of a credit agreement. This generates a certain form of "joint and several liability" between the supplier of goods and services and the lender, and holds a number of legal implications for the later.

The formula ultimately adopted in Article 11 (subsidiary liability) is the result of a compromise. It stipulates that in certain circumstances the consumer can request payment from the lender if the complaint against the supplier is justified and the latter does not indemnify the consumer. The transposition of this article has nevertheless given rise to a certain volume of ineffective legislation in some Member States. In others, particularly France, Germany and the United Kingdom, the legislation has gone well beyond the principle set out in Article 11.

The examination of these models may justify the request to streamline the conditions set out in Article 11(2) of the 87/102 directive. One possible solution could be to drop the word "exclusively" contained in the text (art.11.2, b)²². Moreover, if it were deemed to be appropriate to harmonise, it would then be necessary to opt for a clearly defined system, and not an incomplete or hybrid system, which would not work in practice. If there were no case for excluding other proposals or arrangements, it would nonetheless be necessary to opt for clarity and optimum protection for all credit agreements.

(6) The improvement of the arrangements and practices for processing payment incidents by the professionals, both for the consumer and for the credit grantor.

- Forestalling the risks of default: insurance. It is in the interests of the lender and the consumer alike to head off the risk of payment default. The insurance described in Article 1a, 2.v of Directive 87/102/EEC is the most appropriate instrument in this respect. But, clearly the insurance is a cost for the consumer and an advantage (risk protection) for the lender. When compulsory, the cost of insurance should be incorporated in the APR. However, when this insurance is optional this is not done. This situation generates artificial distortions to competition. In fact, despite its optional nature, the consumer often tacitly subordinates the agreement of the lender to the taking out of insurance. The current situation could therefore be considered as not satisfactory. The main reasons for this are:

– It is extremely difficult to distinguish between the situations where insurance is optional and those in which it is compulsory;

²² The text of article 11.2,b reads as follows: « The grantor of the credit and the supplier of the goods or services have a pre-existing agreement whereunder credit is made available **exclusively** by that grantor of credit to customers of that supplier for the acquisition of goods or services from that supplier » (...)

- When the insurance is compulsory or unavoidable, the consumer does not often have a real choice of insurer. This shortcoming with regard to choice can have significant implications with regard to the overall cost of the credit to the consumer and can provide additional profit to the lenders.

Therefore, it could appear necessary to clarify this situation to achieve a better comparability of the offers including insurance costs. An alternative solution could be to generalise the use of a portfolio insurance of the credits of a lender. This would permit to cover, not the individual risk of a debtor, but to cover the global risk weighting on the lender portfolio for the profit of the debtor. This insurance should cover only risks which cannot be covered by life insurance's, e.g., risks with a high level of uncertainty both in their occurrence and their prediction, like unanticipated long spells of unemployment or incapacity, unexpected divorce and which cannot be fully insured contractually. Such an option remain highly complex to achieve

- Non-performance of contracts. The problems stemming from non-performance concern both credit agreements and security contracts, and involve late payments, tacit or unauthorised overdrafts and also total non-performance.

Generally speaking, it could be coherent that all charges and the rates applicable in the event of non-fulfilment of contractual obligations would feature in the credit agreement. Member States should also be invited to ensure that there is a balance between the rights and obligations of the two parties concerned.

There is a certain rationale to think that tacit or unauthorised overdrafts, a factor of excessive debt and a real danger for lender and consumer alike, should as a general rule, be filtered out. Clearly, exceptions or a period of tolerance could be considered. In this event, the rate applicable to the excess should be calculated in a harmonised way and its communication to the consumer should always be guaranteed. At the close of such possible period, any persistent tacit excess, taking due account of a new appreciation of the client risk, should be regularised by means of a new credit agreement or, if necessary, it should be possible to terminate the contract.

A number of arrangements concerning non-performance contracts could be considered:

(i) As regards the procedures involved:

- The principle of a prior formal notice (which presupposes that there can be no automatic termination), leaving the consumer a reasonable period to make up the shortfall or request rescheduling of his debt, could be adopted.
- Both the consumer and the guarantor should be able to have promptly at their first request a free and detailed breakdown.
- The creditor should first approach the consumer, formally request payment and confirm that there is default before turning to the guarantors.
- Certain debt collection actions should be considered as illegal²³.
- A better control by the courts should be introduced in the context of repossession of goods²⁴.

²³ See in particular Article 46 of the Irish Consumer Credit Act and Article 39 of the Belgian law.

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(ii) With regard to the charges which can be claimed in the event of default of payment:

- In certain Member States only interest on overdue payments can be applied, excluding all other charges (except legal charges).

However, the rules on non-performance and the methods of debt collection vary from one country to another. In Belgium, for instance, the majority of cases of non-performance are resolved by applying the procedure of direct transfer of remuneration by registered letter to the employer, pension fund, etc., while in France this procedure would need court action. The cost structure is therefore different.

- Over-indebtedness. A directive concerning harmonisation of national legislation on credit agreements is not the appropriate context for a general solution to the problem of over-indebtedness, as this problem is a multifaceted one. However, insofar as there is no doubt whatever that consumer credit, particularly in its modern forms, is increasingly a major contributory factor to over-indebtedness, preventive steps, inside the credit cycle, could be proposed. In particular, prevention can be improved through arrangements such as those envisaged by making the partners involved more responsible; by making provision, for instance, for a framework for databases; introducing if necessary a system of portfolio insurance covering certain “events of life”, etc.

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The hearings organised by the Commission in July 2001, with all stakeholders (Member States, professional and consumers) and the following writing contributions, will certainly permit to better weight the various possible lines of action, which the 1995 report put and the subsequent works on the various specific subjects in light.

²⁴ See Report on the operation of Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit – COM (95) 117 final of 11.05.95, paragraph 184 to 188. Summary record of reactions and comments, COM (97) 465 final of 24.09.97, No II.5.