



DTI CONSULTATION ON THE CONSUMER CREDIT DIRECTIVE: UK CROSS INDUSTRY GROUP RESPONSE

The UK Cross Industry Group (CIG), which represents some 30% of the EU credit market, is grateful of the opportunity to contribute to the DTI's consultation process ahead of Council of Ministers negotiations. We have greatly benefited from our involvement with the DTI's stakeholder group and hope that the opportunity to share our views with the Government will continue.

1. OVERALL COMMENTS

Before we reply in detail to your questions, it may help if we comment on the economic and market implications of DG SanCo's (Health & Consumer Protection Directorate-General) original ideas. We accept that changes to the first text (both by the Parliament and in the pipeline) may modify the effects we describe and that any revised text will have to be considered on its merits. Nevertheless, any new text is bound to contain familiar themes. We therefore wanted to ensure that DTI has a clear statement of our position.

The initial SanCo text had two intended outcomes. It would:

- provide a dynamic impetus to the EU economy and
- better protect consumers and so help combat over-indebtedness.

On the former, the thinking was that there would be more cross-border lending. On over-indebtedness, this would reduce because the new law would force lenders to take greater 'care' in lending.

Philosophically, the UK Cross Industry Group supports both anticipated outcomes. We are in favour of boosting economic growth and of reducing over-indebtedness.

Where we differ is in how these ends can be achieved. In fact, our research and analysis strongly suggest that the original text would produce results opposite to those intended and would depress economic growth and increase over-indebtedness.

What does 'a cross-border market' mean?

This is a vital question which the original proposal does not clarify. The text implies a scenario where a lender in State A lends – cross-border – to a borrower

in State B. This thinking sounds plausible. After all, in every other field of commerce and finance, the Commission has aimed for this outcome and usually made it possible. So, for example, a UK citizen should be able to - and can - buy a car (cross-border) from a supplier in Germany.

But the text seems not to address a unique feature of credit - residual risk¹ - that sets it apart from all these other products. Residual risk is the reason why a cross-border market in mass-market consumer credit is unlikely to emerge. The SanCo text assumes that ability to carry out a cross-border credit reference check will be enough to kick-start cross-border lending. In fact, risk assessment and management is much more complex than just referencing.

Take, for example, a large UK lender with a wide UK customer portfolio. That firm is likely to use scoring systems that will assess risk by reference to distinct - and fairly large - 'pools' of customers. For example, the risk profiles of customers borrowing to buy boats will differ from the profiles of those who borrow to buy motorcycles. It is clear from this that if a single French-based consumer contacted that UK lender, the lender would have no way to gauge the risk of lending to that person.

Lenders need also to understand and assess the legal recovery processes which can be used if the customer refuses to pay. Again, a UK lender will know how well the UK processes work and how much they cost to use. But if a Frenchman were to contact that UK lender, the lender would probably have no knowledge of French recovery systems, and so be unable to gauge the cost and ease of legal recovery.

No matter what text is in the Directive - a general 'cross-border' market (in the format previously envisaged by SanCo) is unlikely to develop².

There are perhaps two exceptions. With very large loans, covering the cost of researching recovery systems in the borrower's State will be possible. So for many years, UK citizens have taken mortgage loans from foreign lenders, albeit in fairly small numbers. Also, where language, culture and legal (i.e. recovery) systems in adjoining Member States are alike, cross-border lending (as envisaged) may be feasible. We understand, for example, that such lending does take place on a small scale along borders in the Benelux area.

The commercial implications of going 'cross-border'

UK creditors have long sought out overseas markets and this remains the case. But normally, only scale market entry is commercially viable. Scale entry can justify the high cost of learning about the lending risks in that market, and of assessing the efficacy and cost of recovery processes.

By contrast, for the reasons we set out above, ad hoc cross-border loans usually make no commercial sense. So even if consumers wanted to deal cross-border in this way (through the achievement of 'increased consumer confidence'), lenders would not want to lend to them.

¹ By 'residual risk', we mean the risk that the lender assumes when he parts with his funds against the debtor's promise to repay them in the future.

² We think this would become a realistic possibility only if the legal systems of all the Member States were swept away and replaced with a common structure. This is unlikely to happen for many decades (if at all).

If scale entry is the preferred model, will the Directive as currently drafted assist here? There might possibly be some very marginal advantage³. However, contract formation is a very minor part of the business case for market entry. So the current text would be largely irrelevant to decision-making processes.

An internal market in credit is already here

Our arguments make it seem that no internal market in credit is possible. In fact, CIG contends that such a market does exist and is thriving, but not in the form which had been envisaged. We think the market is being created via cross-border mergers, joint ventures and solus scale market entry (i.e. entry by a business into a market on a solo basis), all of which have been developing rapidly in recent years.

In all these cases, lenders have chosen to enter new markets. But they have done this by electing to set up operations in the target Member State itself. So they have recruited local staff, with local expertise. These employees can guide the business efficiently through the culture, risks and legal systems in that market. And because this is scale entry, it can support paying for professional advice on local recovery systems and tax regimes.

So the internal market in credit exists and is growing. But the form of that market is dictated by efficiency imperatives and by the practical problems in lending cross-border. The overall net effect for consumers will still be positive, since these rationalisation processes will increase efficiencies.

What economic effect is the SanCo text really likely to have?

The thrust of the current text is that lenders take insufficient 'care' with their lending decisions. So lenders have to be directed to be 'responsible' and to 'advise' their customers as to whether the deal is right for them.

Rules like this create a second layer of artificial risks for lenders to cope with. As well as the normal lending risk, the creditor now has to make a second assessment. He has to decide whether his normal lending judgment will also match up to a set of new theoretical standards.

To protect himself, the lender will have to accumulate 'evidence' with which he can defend himself against claims of 'irresponsibility' or 'failure to advise'⁴. Ironically, none of this has much to do with the lending risk itself.

We cannot speak for other Member States, but in the UK at least, these rules would lead to a significant new bureaucratic load. The lender would have to ensure that he had the processes in place to amass a sufficient weight of protective 'evidence'. He would also have to routinely audit those processes to ensure compliance with these new rules.

Credit granting would become more unwieldy and more costly as these new systems were put in place. Over the last 25 years, the UK industry has moved

³ But as we explain later, these are almost certainly outweighed by serious disadvantages in other areas.

⁴ A process one commentator has fairly accurately described as a 'pseudo fact-find'.

forward, making credit granting processes quicker and more efficient. The current text would reverse these developments and undo past efficiency wins.

These new costs and fact-finds would be especially bad news for those on lower incomes who wanted smaller loans or who were higher-risk. Lenders will also be more risk-averse, which will result in more credit rejections.

These 'responsible lending' and 'duty to advise' approaches were central to the analysis carried out by OXERA in its June 2003 study. They concluded that UK GDP would fall by around 0.2% and that 2 million consumers would become increasingly credit-constrained.

So new rules on a similar model would become a deadweight on UK economic growth. And even if there were no direct adverse effects within other Member States, the impact on the UK economy itself would carry through into those other States.

There is also another paradox in all this. Since responsible lending and duty to advise will make lenders more risk-averse, they will be less likely to lend cross-border, because this is riskier than lending into a domestic market.

Market distortion effects

Putting aside cross-border deals, we think this current text will distort domestic markets.

The original thinking was to treat all credit formats in the same way. At first glance, this sounds fair. Aspects of the text severely increase point-of-sale bureaucracy. This will naturally distort the market in favour of running-account (where a contract can run for decades) and fixed-sum credit (where the contract ends when the loan is repaid).

By way of example, under the SanCo text, the *contract formation* compliance costs for three consecutive, two-year loans would be greater than for one credit card running for six years. We argue that a healthy market is one in which different formats compete on broadly equal terms. However, it seems to us that the SanCo text sets up a new regulatory distortion.

Elsewhere, parts of the duty to advise requirements fall disproportionately on products commonly sold at a distance rather than face-to-face, and propose additional bureaucratic requirements when credit limits are increased on open-ended agreements.

With a 'light touch' bureaucracy (as under the existing 1987 Directive) the different credit formats can compete on equal terms. Once the load increases dramatically (as under the SanCo text), bureaucracy inequalities start to skew market function.

So overall, the SanCo text would set up market distortions. The CIG believes that such distortion is bad for competition. Running-account and fixed-term systems should be able to contest markets on a relatively even footing.

Looking at the history of UK credit regulation

To see how these effects can play out in practice, it is worth looking briefly at the history of UK credit laws.

The 1974 Act created a level playing field in credit. Prior to that, UK lenders had faced a number of bureaucratic laws, most significantly, the Moneylenders Acts 1900 and 1927. These restricted advertising, controlled prices and set up complex and awkward contracting processes.

The commercial 'wins' from working round these Acts were significant, and creditors quickly exploited the methods of doing so, with fairly obvious effects on the market. Cash lending by non-banks collapsed⁵ and agency mail order⁶ began a boom period. Check trading⁷ also experienced good growth. Later, finance houses set up (somewhat notional) banking businesses, and applied for certificates from the Board of Trade giving them exemption too.

The overall effect was to distort the market and suppress competition. Certain types of business (most notably banking businesses) had clear preferential treatment, which meant that the law was creating barriers to entry. Banks of the time were highly selective as to whom they served and those who found banks hard to access were pushed towards retail credit systems (hire purchase and mail order).

The Crowther Committee understood the adverse effects on the UK economy and set out to rationalize the law on credit with a view to correcting this:

"We urge that reform of the existing legal tangle is badly overdue, and that liberation of the consumer credit industry from the antiquated provisions, and from the official restrictions, that hobble it will enable it to make an increasing contribution to the efficiency of the national economy and to the standard of living of the public."

The effect of exemptions

The heavy bureaucracy of the SanCo text risks recreating the type of distortion created by the UK's Moneylending Acts of 1900 and 1927. This is especially so with the exempted credit formats which are now appearing in some of the later versions of the revised text⁸. The heavier the bureaucracy, the more commercially valuable an exemption becomes and the greater the market distortion is likely to be.

The emergence of a wider group of exemptions adds even more weight to the DTI's very valid concerns about responsible lending and duty to advise. If either of these duties remains, exempted formats will achieve massive commercial 'wins' over regulated formats. The result will be a market shift to those formats which do not have to comply, since these exempted creditors will be able to ignore both statutory duties.

⁵ Bona fide banking businesses were exempt from the 1900 and 1927 Acts.

⁶ Also exempt, because this was not cash lending.

⁷ Again not treated as cash lending.

⁸ In one or two cases these are justified, such as for example, the partial exemption for overdrafts. In other cases, such as the three-month interest free exemption, there seems to be no logical reason for the exemption (except that it is perhaps already being used on a wide scale in another Member State).

2. SPECIFIC COMMENTS

Chapter 1: Aim, Definitions and Scope

Q1: Do you have any concerns arising from any of the other definitions in this Article?

We agree with DTI that the definition of credit intermediaries is too wide: “habitually act[ing] as an intermediary” brings into scope affinity groups and co-branding partners, who are not actively providing credit but merely introducing consumers to credit providers. We would urge a “light-touch” régime at transposition stage for other credit intermediaries such as high street retailers and motor dealers. Experience has shown that a rigid approach to implementation (e.g. the Insurance Mediation Directive) may have a detrimental effect on industry reducing the number of operators. A consequence of the breadth of the definition is to bring into the scope of regulation some five million home shopping agents, predominantly women in socio-economic groups C2, D & E, whose activities are occasional and for whom the home shopping company as principal already takes responsibility. This would discourage that activity, heighten financial exclusion of both those agents and their customers and not add to consumer protection. Identical problems are found in the case of home credit agents, where again the home credit company takes responsibility for their actions. Charging these two groups with the range of primary liabilities under the Directive would be disproportionate.

We would endorse your call in paragraph 180 for more clearly defined terms in relation to linked transactions. As stated in paragraph 182, the definitions and later provisions related to linked agreements / transactions do not correspond to the definitions understood in UK law and as such are difficult to apply to UK products. For example store cards are included, while credit cards appear to be excluded.

Article 2g – the exclusion of notary fees should be extended to include conveyancing fees in general including a situation where the conveyancer acts for the lender.

Q2: What do you think is the appropriate level of harmonisation for the Directive? Why?

The rationale for harmonisation is to increase cross-border trade. As we explain in our introduction, we think it highly unlikely that harmonisation will produce such an increase in trade. We contend that the internal market is already here, taking the form of cross-border mergers, joint ventures and scale market entry. If there is no cross-border ‘win’, the Government focus should instead be on the damage that harmonisation will cause to the UK economy, and to the watering-down of the existing rights of UK consumers. For these reasons, we agree with the mixed and proportionate approach outlined in the Consultation Paper.

Q3: If you support a targeted harmonisation approach which areas do you think should be subject to maximum harmonisation, which minimum?

We agree with the DTI’s approach.

Q4: Do you agree with the proposed UK Government position with regard to the various scope and specific requirement issues - if not, what would you amend and why?

Secured Lending

We support the Government's position on the exclusion from the scope of the Directive of lending secured against real property. In particular, we are concerned that the application of the Directive to retirement equity release mortgages would be likely to reduce consumer protection and impose a second wave of compliance costs on product providers, only a few years after those related to the establishment of UK regulation in this field in 2004.

100,000 Euro Limit

Any limits tend to be arbitrary. This should be reflective of the volume credit market but should also take account of the systems issues presented in relation to home loans as presently captured within the scope.

HP and Leasing

We have concerns with the scope of HP and leasing within the draft Directive:

- HP may provide for the passing of title and therefore the draft makes no sense;
- the draft definition in Article 3 gives non-UK businesses the chance to opt out of the Directive where there is no *obligation* to purchase but the *option* to purchase is usually exercised. For example, Germany and Austria have personal leasing products which give the lessor the option not to pass title before the final payment (balloon) is paid. In practice this never happens. This would put UK business at a competitive disadvantage. Our proposed solution set out below, would avoid the need to state whether or not there was an option:

<p>The Directive shall not apply to the following credit agreements and where, if applicable, any corresponding surety agreements:</p> <p>b) hire purchase agreements, except where they provide for the title to pass to the hirer eventually;</p> <p>ba) leasing agreements which do not create any obligation to purchase the object of the agreement;</p>	<p>The Directive shall not apply to the following credit agreements nor and where, if applicable, any corresponding surety agreements:</p> <p>b) hire or leasing agreements, except where they allow for the provide that title to may pass to the hirer/lessee at any point;</p> <p>ba) deleted</p>
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Partial Exclusions

In relation to agreements below €300, we support the DTI approach here, subject to its being able to succeed on its arguments relating to 'responsible lending' and duty to advise. If, however, these twin duties were to remain in the text, this would create severe difficulties for those seeking to supply such small loans, since compliance would be out of all proportion to the risks posed by such small credits.

Chapter 2: Information and Practices Preliminary to the Formation of the Agreement

Q5: Will the article, as drafted, assist the development of a cross-border market and consumer protection for credit by making credit advertisements more transparent?

No, we share the DTI's concerns that requiring all standard information to appear in all credit advertising will be to the detriment of lenders who are merely promoting their brand rather than specific products. In this way, it would eliminate an important set of advertisements, namely those aimed merely at 'signposting' the consumer to a particular credit supplier. This form of advertisement has an important role to play in the competitive process.

It is unclear how the assumptions for defining representative examples would be reached. Clearly having recently adapted to the new UK advertising regime, industry is keen for some stability. A model similar to that of the UK would achieve this.

We would strongly oppose the proposed requirement for all credit advertisements to contain an APR. In our view, only where the cost of credit is mentioned, should an APR be required.

Q6: Do you think that a principled approach based on mutual recognition would be appropriate for advertising? If so, what key information do you think should be included in all credit advertising?

Hypothetically, if a lender is to operate cross-border, the ability to advertise is key. Therefore there needs to be a consistent approach across Member States and hence this is an area to be considered for maximum harmonisation. We would support it if the concepts and principles found in the Consumer Credit (Advertisement) Regulations 2004 are used as a model.

Q7: Do you agree with the UK position on contractual information?

We are firm supporters of the principle of transparency and believe that consumers should be given key information by which to inform their buying decisions. We wholeheartedly welcome DTI's position on responsible lending which mirrors the concerns of industry.

We would also like to highlight another reason for objecting to the imposition of a general duty to 'lend responsibly': it will tend to interfere with pragmatic solutions to problem cases. This pragmatism could be especially important if there is a general shock to the system, such as increased unemployment or a large increase in interest rates.

Article 6(2c) of the Directive would require an amortisation table to be produced. FSA research suggests that UK consumers do not use or understand these. This would be a waste of lender resources. (See answer to Q21).

The requirement in Article 6(2h) to mention registration fees, tax etc. goes well beyond the Mortgages Conduct of Business sourcebook (MCOB) requirements and is inappropriate.

Q8: Do you agree with the position on pre-contractual information and in particular the reference to “in good time”?

It is unclear what is meant by “in good time”. Whilst it may work for distance sales, it would be unworkable for face-to-face business e.g. would they be required to walk round the block for 15 minutes?! This would inconvenience and irritate consumers. It would also run counter to the system recently introduced under UK law (which has been the subject of intense consultation), where the pre-contract disclosure was clearly intended to be part of a seamless process.

If delay is built into the system, it will skew the market in favour of running-account credit, damage the retail sector and disadvantage those who do not have running-account facilities. “In good time” should be replaced by “before” (as per the Consumer Credit (Disclosure of Information) Regulations 2004).

It is also hard to see why such a delay is necessary if the consumer also has rights enabling him to withdraw from the contract.

We therefore strongly disagree with the assessment at para.92 that “in good time” would be “a step forward for consumers.”

Q9: Do you agree with our position on a duty to advise?

Very much so. It would not only be unacceptably intrusive to the consumer but would delay the application process and would impose costs on lenders. As we explained earlier this change would also have significant macro-economic effects.

We agree that this article should in preference be deleted. However if it remains, the DTI should ensure that, in particular, the following aspects of the duty to advise provision are removed:

- the subjective ‘advantages and disadvantages’ requirement - which also encourages consumers to abdicate responsibility.
- the ‘purpose of the credit’ - which hinders unrestricted-use credit such as credit cards.
- requirement to consider all types of lending product - which favours single product lenders.

Any requirements applicable to credit card limit increases should take account of the provisions of the new 2005 Banking Code (welcomed in the TSC’s 2nd report and the Government’s response to it). Current practice, which the credit card industry believes to be the best indicator of ability to repay involves: 1. monitoring account behaviour and 2. credit scoring (via a recent database check).

Any requirement to update financial information may potentially disadvantage monoline providers and any provider who does not have a current account relationship with the customer.

Q10: Do the extra requirements of the Article cause lenders and borrowers any difficulties?

DTI will be aware that the Consumer Credit Act 1974 (CCA) does not require APR to be provided in respect of overdrafts given its inadequacies as a comparative tool. This logic should also be applied to CCD, especially given that the industry has already estimated the cost of full CCD implementation for overdraft products as £250 million – with no demonstrated/ tangible benefit, the cost-benefit analysis has demonstrated that it is entirely cost loaded.

Further, APR is a problem for overdrafts on packaged products - the way the current UK APR regulations deal with running account credit would mean that the benefits 'fee' for a packaged account would be counted in the APR calculation. This would distort the cost of credit as very high APRs for modest overdraft limits would result. For most customers it is the benefits package that they want not the overdraft facilities.

The overdraft requirement to compel information provision "before the agreement" is unnecessary and should reflect the more flexible approach in the CCA.

Q11: Do you agree with the UK approach to Credit Unions?

No comment.

Q12: Do you have any comments on how the proposal contained in Article 7 can be amended so that the consumer clearly benefits and is not exposed to exploitation?

Again, our response relates to the outcome of the DTI's attempt to remove the responsible lending and duty to advise duties. If these are removed, the rationale for the Article 7 exemption (for new loans to prevent legal action) largely falls away, since the remaining requirements are insufficiently onerous to cause problems and would allow lenders to continue as now. In this way, consumer protection would not be compromised.

Chapter 3: Database Access

Q13: Do you agree with the UK position on Databases?

Yes, we agree with the DTI's position in paragraph 116. We would not want the provisions on the type of information to be held on databases to be too restrictive. We would suggest modifying article 8(1) as follows:

*"In the case of cross-border credit, each Member State shall ensure access for creditors from other Member States to **relevant** databases in that Member State under ~~non-discriminatory conditions~~ **the same reciprocal terms as creditors within that state.**"*

This would underline the reciprocal nature of the arrangement.

Q14: We would like to know of any concerns you may have arising out of this Article, including any concerns about the costs of implementation.

We agree fully with paragraph 117 in your paper with one minor but important qualification. In the context of face-to-face contacts the lenders' agent or representative can be placed in physical danger if they are required to tell a customer face-to-face that they have been declined. Any requirement should therefore not have to be "immediate."

We agree that Article 8(2) should be removed, since this ground is covered by the Data Protection Directive. Article 10(2n) requires consequential amendment. Article 6(2j) needs to clarify that the information source is the credit reference agency.

Chapter 4: Formation of Credit and Surety Agreements

Q15: Would lenders have systems difficulties in providing the personalised information currently required by the draft Directive?

We agree with DTI's observations on information overload.

In relation to amortisation tables, there would be substantial costs (and for home shopping and home credit agents, insuperable practical difficulties), in including such tables tailored to each individual loan. The result would be an upward pressure on the cost of credit with no discernable benefit.

We also have a further concern in relation to home shopping and home credit agents. We think it inappropriate (for reasons of data protection and personal safety) to include their name and address in the credit agreement. They are, after all, not contracting companies. If they were not deemed to be credit intermediaries (see our comments elsewhere), then this would not be a requirement.

Q16: Please provide any specific comments you might have on these extra items of information that the Directive proposes should be included in credit agreements.

Regulators continue to acquire information into agreements which the majority of consumers do not read now which risks information overload. Adding even more information in the future will not improve the transparency of documents or aid consumer protection.

We agree with the point made in paragraph 129 concerning the lack of clarity. However, we would not support providing the information via a leaflet or durable medium as the consumer is already swamped with leaflets.

Q17: Do you agree that the UK should argue for the inclusion of all of the above information requirements in the Directive?

Yes, apart from the headings, tax relief and payment allocation requirements. It ensures a level playing field if all competitors in EU markets have to have systems which have the same degree of sophistication as the UK systems built to handle these information requirements.

Q18: Do you agree with the UK position on right of withdrawal?

We are concerned that a right of withdrawal will lead to lenders being reluctant to release funds to shops and motor dealers until the period has expired. This is to the detriment of consumers who require goods urgently and will again skew the market towards running account credit. Ideally, we would like to see the option for the consumer to waive this right (as in Ireland) or for compensation to be paid for depreciation of the goods (as in Germany).

If the concept of a right of withdrawal is non-negotiable then we welcome the Government's insistence on a provision making repayment by the customer a pre-condition of cancellation. There should be no provision for the return of the goods or paying by alternative means. Any provision which allows the customer to return the goods creates distortion between customers using linked credit and all other customers. However, this still does not work for hire purchase, conditional sale or credit sale where there is only one combined credit and supply agreement. Alternative solutions need to be considered:

- (i) the cancellation of an HP or similar agreement should only lead to the cancellation of the credit not the supply of the goods.
- (ii) There would be no right to cancel but a right to pay the total amount of credit without indemnity within 14 days.

Chapter 5: Annual Percentage Rate of Charge and Borrowing Rate

Q19: Do you agree with our policy to seek maximum harmonisation on the subject of APR on the basis of the policy suggestions outlined?

Yes. Maximum harmonisation of APR calculations should improve the chances for UK companies to be competitive across Europe. Ideally we would like to see EU requirements mirroring those adopted by the UK following the introduction of the Advertisement Regulations.

With regard to the assumptions for credit cards it is unclear whether the UK and EU requirements align. Terminology may need to be more clearly defined to assist in interpretation e.g. "constant capital balance" (paragraph 146) and "for a given period" (paragraph 160).

We would refer to our response to Q10 in relation to the APR on overdrafts.

Q20: Given that we aim to retain the current provisions relating to the calculation of APRs for HP transactions, are there any difficulties associated with this proposal and if so what are they?

We are not aware that the UK has HP products which specify “a number of dates.” This therefore appears not to apply. If the DTI believes that it will apply, this will create a significant bureaucratic load and would appear to cut across the notion of early settlement rebate of charges. In short, we find the rationale of this concept difficult to understand.

Q21: Do you agree with our policy to resist the requirement that the new APR and amortisation table must be given when borrowing rates are varied?

Yes. There is no demand for it (FSA research has shown that there is no appetite for amortisation tables) and it is unnecessarily burdensome for lenders. For variable rate products it will be costly to send out amortisation tables every time the APR changes.

Chapter 6: Unfair Terms

Q22: Do you support the inclusion of these terms in the Unfair Contract Terms legislation? If so, why?

No. The Unfair Contract Terms Directive provides adequate consumer protection and there is no evidence of consumer detriment to justify additional protections in the areas identified by this article.

Chapter 7: Performance of a Credit Agreement

Q23: Would you prefer to see maximum or minimum harmonisation in this area? Why?

We too strongly wish to see an indemnity based on actuarial principles and the introduction of a deferment period which reflects the proposed changes to UK legislation. Unless this change is insisted on, those who settle early will be unfairly subsidised by those paying to term.

We support the proposition in paragraph 174 that under a payment protection insurance product, in the event of early payment of the loan and consequent mid term cancellation of the payment protection insurance, the insurance company should provide a refund of premium to the consumer. We recommend that insurers are permitted to calculate the refund for mid-term cancellation on the same basis that they earn the premium [for life insurance this may differ from the actuarial method].

Q24: Do you agree with our position on assignments of rights?

We fully agree with the DTI's position on the retention of rights.

However, we disagree strongly with the concept of notification. If the consumer continues to deal with the same entity, even though there may have been a technical "behind the scenes" assignment, we can see no reason for the debtor to be notified of the assignment. If notification has to be made, this will create huge administrative problems and extra cost in the context of the normal bulk assignments of credit books effected for financing purposes. Such assignments help the market to function more efficiently.

The existing position in English law on the requirement of notification of assignment before enforcement by the assignee in its own name (found in section 136 of the Law of Property Act 1925, differentiating between legal and equitable assignments of e.g., debts) should inform this provision. Making them costlier would be to the detriment of consumers.

Adopting too narrow an approach, for example, with a carve out for securitisations only prevents innovation and market developments through other special purpose vehicles (SPVs).

Q25: Do you support our policy to maintain current UK law and retain the provisions contained in the 1987 Directive?

Yes. However if these proposals are implemented, care should be taken to ensure that insurance policies linked to endowment mortgages are not captured inadvertently. This would clearly not be the intention of the Commission.

Q26: Would you support our approach of maintaining joint and several liability as set out in the UK?

We broadly support joint and several liability. though the DTI will be aware that some concepts are currently under challenge.

Q27: Do you agree with a minimum harmonisation approach in this area?

Yes.

Chapter 8: Specific Credit Agreements

Q28: Is there any need for this Article? If so, in what circumstances should it be retained?

There is no need for article 22. A three month notice on the consumer's part is meaningless. It is for the creditor to exercise their right for repayment of an open-ended agreement and a minimum period is entirely reasonable. However, the principle of stopping credit by demanding repayment is central to responsible lending and preventing a consumer from incurring further indebtedness.

Is the three month period exhaustive i.e. can the lender not terminate the agreement for a breach of contract?

Furthermore, we agree with the requirement for the explicit prior approval of the borrower on credit card agreements would disadvantage the customer.

The second paragraph of article 22 refers to fixed-term agreements in an article specifically on open-ended agreements. Also, how is "long duration" defined?

Chapter 9: Performance of a Surety Agreement

Q29: In view of the differences between the Article and UK law do you agree we should seek minimum harmonisation?

Yes, there are a number of problems with the article:

- Three years is arbitrary in the case of fixed term lending (which is often 5 years and longer in this market) and inappropriate for open-end credits where the key consumer protection is an annual review and reminder of continuing liability. Restricting guarantees to three years will seriously damage the flow of credit to, young people, women and the socially excluded.
- The key consumer protection is a requirement for creditors to be reasonable and to give time for repayment. Forcing a creditor to wait for three months before making orderly arrangements is potentially more costly to the consumer providing surety and uncertain for the creditor (who will have little protection from a guarantor absconding). In these difficult circumstances, it is best for all parties to reach speedy and reasonable agreements.
- The essence of a surety is that the guarantor assumes the obligations of the borrower in the event of a default. The value of this to the consumer is wider access to credit. Restricting the amount that can be guaranteed will seriously damage the flow of credit to, young people, women and the socially excluded.

Guarantor liability should be the same as for the principal debtor and include interest which article 23(3) fails to do. There is no need to refer to arrears in the total amount of credit as it is already included in this definition.

Chapter 10: Non-Performance of a Credit Agreement

Q30: Are there any problems with applying this requirement to running account credit?

We endorse the concerns expressed by the Government alerting the consumer prior to suspension of the account. There are problems with suspending drawdown: a debtor might make himself scarce, and in the meantime could continue to run up debt, which in turn hampers a lender's attempts to lend responsibly.

With regard to Article 24.1, disproportionate measures should not be interpreted in a way that might interfere with the normal processes of secured lenders for taking possession of a property following default. Such interference would limit the availability of loan finance and increase its cost.

Article 24.2(a) allows the lender not to send a default notice to the borrower in the case of fraud. However, it also states that evidence must be provided. In the case of suspected fraud this could alert a borrower and work against successful prosecution.

Q31: Do you agree that a minimum harmonisation approach to default and enforceability is appropriate?

Yes because of the concerns outlined in the DTI's paper.

Q32: Do you think that this Article provides adequate regulation for unauthorised overdrafts?

Agreed overdrafts would be excluded by Article 3.3. Article 25 therefore covers unauthorised overdraft ('tacit') facilities and credit cards only, i.e. where the lender is an involuntary creditor. As such the requirement to rectify "where necessary, through a new credit agreement" is potentially unwelcome as the lender should not be forced to provide a credit agreement, where credit may not have been granted in normal circumstances. Immediate moves to enforce the debt should always be allowable to prevent debtor over-commitment. "Significant" requires qualification.

Chapter 11: Registration, Status and Control of Creditors and Credit Intermediaries

Q33: Do you think that this Article is strong enough to protect consumers in an open internal market? Or do you think that such light requirements will upset the balance of competition and level of consumer protection?

Yes we agree with the latter point. We support the UK licensing system. The UK Government should press for a similar model throughout the EU. We favour a licensing system that is proportionate and risk-based.

However, we would refer you to our earlier comments on credit intermediaries: if groups such as home shopping agents, home credit agents, affinity groups and co-branding partners had to be licensed, this would not enhance consumer protection, but would damage the viability of the industries that use these systems.

Q34: Would it be more appropriate to introduce a passporting system similar to the banking Directives, where creditors or intermediaries would have to fulfil passporting provisions demonstrating that they are 'fit' before they lend cross-border?

Passporting is only viable if licensing and control systems in Member States are broadly similar.

Q35: Is there any reason why credit intermediaries should not be required to divulge whether they are an independent broker, or work with one or more clients?

Requiring credit intermediaries to divulge such information would in many instances be unworkable unless the definition of credit intermediary was narrowed so as to exclude the groups mentioned in our answer to Q1. It would also be unworkable (and possibly anti-competitive) in a retail situation.

Q36: Would you agree that the instances when a credit intermediary can charge a fee should be limited? If so, do you agree with the conditions above?

The ability of both the broker and the lender to charge a fee is absolutely fundamental to some credit markets. There is nothing inherently wrong in both fees and commissions being paid to a broker provided:

- the broker makes his status clear to the consumer at the time of the transaction (e.g. if he is tied to the lender)
- any fees paid by the consumer are fully transparent and are known before the conclusion of the contract
- The broker fee should not be "excessive" (in line with FSA requirements)

Also in the UK:

- broker fees are included in the credit agreement as they are reflected in the APR and also the new CCA Regulations required all items of the charge for credit to be listed in the agreement.
- broker fees are refunded under the CCA if the matter does not complete (save for £5)

Article 29c(ii) prevents an intermediary from taking a fee from the consumer if a fee is taken from the lender. This goes against current regulatory practice in the UK with regard to mortgages. The FSA requires transparency about fees but does not prohibit fees being levied from both sides. We believe that this provision places a restriction on intermediaries that is not justified by UK experience.

Section C: Regulatory Impact Assessment

Q37: Do you agree with the assumptions, figures and impact assessments made in this RIA - if not, please provide as much supporting evidence as possible.

We welcome the findings of the cost-benefit analysis the Government has produced. Research conducted on our behalf by Oxera, an independent UK consultancy, found that the original proposal would have very serious implications for economic growth, reducing UK GDP by 0.2% and UK consumer spending by 0.6%. We are unaware of impact assessments for other Member States (and do not believe that the Commission has carried out such an exercise) but believe that it will have a similar effect on their economies. Even if only the UK was affected there could be a knock-on effect on other EU economies.

We would call on the Commission to conduct an RIA on the forthcoming modified proposal.

3. CONCLUSION

We particularly welcome the Government's analysis on the duty to advise / responsible lending provisions, including the findings of DTI economists. This draws the same conclusion as the research that we commissioned from OXERA notably that many of the Directive's provisions would damage the UK's dynamic credit industry, its economy and the interests of its consumers. We also support your efforts for the provisions such as advertising and early settlement to mirror as closely as possible the UK reforms.

4. CIG CONTACT DETAILS

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22 April 2005