



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.05.1995  
COM(95) 117 final

**Report on the operation of**  
**Directive 87/102/EEC**  
**for the approximation of the laws, regulations and administrative provisions of**  
**the Member States concerning consumer credit**

(presented by the Commission)

## REPORT ON DIRECTIVE 87/102

### I. INTRODUCTION AND SUMMARY

1. On 22 December 1986 the Council adopted a Directive "for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit"<sup>1</sup>. This Directive entered into force on 1 January 1990.
2. Pursuant to Article 17 of this Directive, the Commission must present a report to the Council concerning the operation of this Directive within five years of its entry into effect. This is the purpose of this document.
3. Directive 87/102 was amended by Directive 90/88<sup>2</sup> notably in regard to the mathematical formula and the calculation of the Annual Percentage Rate of Charge. As provided for in this second Directive, the Commission must present in July 1995 another report and a legal instrument concerning the mathematical formula.
4. The consumer credit market has been developing rapidly and actors and techniques changed considerably during the 80s. To put it simply, hire purchase has been ousted by the credit card.
5. The first Community work in regard to consumer credit dates back to 1975. The Commission's proposal dates from 1979. It was finally adopted in 1986. Hence, in addition to examining how it has been applied, it is necessary to verify whether the Directive still corresponds to the objectives for which it was prepared.
6. Since publication of this Directive, the Commission has commissioned a number of studies concerning both transposition of the Directive into domestic law and the functioning of this large market. This report is based on these studies<sup>3</sup>.
7. Moreover, a questionnaire comprising 48 questions was distributed in summer 1994. This questionnaire was addressed to the Member States but also to European associations of creditors, traders and consumers. Other opinions were also invited, mainly from the academic community. The Commission received approximately 50 replies<sup>4</sup>.

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<sup>1</sup> Council Directive 87/102/EEC of 22 December 1986, OJ No L 42 of 12.2.87 p. 48

<sup>2</sup> Council Directive of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ No L 61 10.03.90 p. 14

<sup>3</sup> *Implementation of Directive EEC/87/102 (as amended by Directive EEC/90/88) on consumer credit in the Member States*, Contract B5-1030/91/001783, (October 1991); *The costs of consumer credit in the EC*, Contract B5-1040/92/006629, (August 1993); *Overindebtedness of consumers in the EC member states: facts and search for solutions*, Contract B5-1040/91/011384 (September 1992); *Study on implementation of the minimum clause provided for in Community consumer law*, Contract A0/2600/93/006846, (August 1994); *Evaluation of the Neiertz Law on the treatment of overindebtedness of households*, Contract B5-1000/94/001661 (November 1994) and general studies on transposition and implementation in the Member States of all consumer policy Directives, including Directive 87/102.

<sup>4</sup> However, on 1 January, official replies from three Member States had not yet been received by

8. This questionnaire was very broad and addressed different aspects of the consumer credit market. On numerous points this report does not draw definitive conclusions, but provides information intended as a basis for further discussion.

9. Consumer credit has become an increasingly crucial factor in the economy, allowing a time lag between consumption and its financing. Such a development calls for reflection and discussion. This summary addresses only those aspects of the report on which the Commission already has an opinion.

10. This Directive has been incorporated in the Agreement on the European Economic Area (EEA) and the report covers the 15 Member States of the European Union as well as Norway and Iceland.

### ABOUT DIRECTIVE 87/102

11. The main conclusion of the study of the transposition of this Directive is the considerable extent to which the different Member States draw on the minimum clause (Article 15). In transposing the Directive, most Member States concluded that the protection provided by the Directive should be improved in one manner or another. Hence, while respecting the rules of the Treaty, they went beyond the provisions of the Directive. The report includes a description of these measures for each country.

12. This has created a paradox. The initial objective was harmonisation of consumer protection rules. The minimum level of harmonisation provided for in the Directive has enabled the Member States to supplement the Directive's provisions in order to strengthen consumer protection. Hence, the Directive has only had a modest impact on harmonisation. It has above all provided an impetus and become a kind of floor for consumer protection standards.

13. The Directive was adopted in 1986 before the entry into effect of the Single Act, under which unanimity is no longer required, and before ratification of the Treaty on European Union, whose Article 3(s) provides that the activities of the Community shall include a contribution to the strengthening of consumer protection. Article 129a provides that the Community shall contribute to the attainment of a high level of consumer protection. Finally, Article 100a must in its proposals take as a base a high level of protection.

14. There are various explanations for this. The Directive was proposed in the late 70s, a time when forms of credit other than hire purchase were just emerging. It was transposed in the late 80s, when personal credit had become the rule. It was adopted in 1986, before entry into effect of the Single Act. At that time unanimity was necessary for this type of Directive.

15. The Directive was designed to cover all forms of credit. Nevertheless it is better adapted to traditional forms than to more recent techniques. Likewise, most Member States did not necessarily take into account the particular characteristics of credit cards in

transposing the Directive. This is why the Commission is proposing to amend Directive 87/102 with a view to adapting it to advances in financial techniques and placing it at the level of the average of the Member States.

16. Ireland has not yet transposed this Directive but a bill is before the Dáil. The conformity of the Spanish Ley 7/1995 of 23/3/95, transposing Directives 87/102 and 90/88, has not yet been verified by the Commission.

17. Member States have not encountered difficulties in transposing the Directive into their domestic legal orders because they have systematically used the minimum clause.

18. Article 2 of the Directive contains a long list of exceptions. No Member State has made full use of this list. Hence it is proposed to shorten this list in order to remove the derogations which have not been relied on by most of the Member States.

19. One particularly thorny problem concerns credits for renovating and improving buildings, as well as credits for sites and buildings with or without mortgage. Credits without mortgage are very akin to consumer credits. Credits with mortgages pose different problems.

20. The Commission is considering expanding the Directive's scope to loans for building work not secured against a mortgage and is looking into the advisability of a new Directive on mortgage credit. Purchasing real estate is the most important act in the life of the average consumer. With the single currency and the elimination of the exchange rate risk, cross-border transactions will develop in this domain.

21. Most legislations have a broader definition of the term "consumer" (Article 2). Certain Member States also apply it to small firms. Without going this far, the Commission is considering extending the scope to credits assumed by a consumer with a view to launching a business.

22. As regards advertising (Article 3), the only obligation provided for in the Directive is indication of the annual percentage rate of charge. Various Member States regulate the content of credit advertising. One particular problem is advertising targeted at young consumers. Drawing on the conclusions of a colloquium organised by the Belgium Presidency on this issue, the Commission is considering the preparation of a code of conduct for credit advertising targeted at young people.

23. Article 4 concerns the information which must be provided in the credit agreement. However, the Commission considers that it is necessary to improve the quality of the contractual relationship. To this end it has proposed establishing an obligation on the consumer to provide information and an obligation on the professional to provide advice.

24. The Directive includes a ceiling (20 000 ECU) which may be revised under the terms of Article 13. The revision mechanism would lead to a ceiling of 26 000 ECU. The Commission could propose that this mechanism not be applied - rather, the ceiling of 20 000 ECU should be abolished. Similarly, it is proposed to examine whether the exception relating to credit agreements repayable in four instalments is of interest to the



Member States which included it in their national legislation. (All references to national currencies in this document are expressed in ECU at the January 1995 rate.)

25. Article 6 concerns personal credits in the form of advances on current account. This article could be amended with a view to better coverage of this current practice of providing consumer credit, particularly in liaison with the use of payment cards.

26. As regards bills of exchange (Article 10), the idea is that they be outlawed entirely.

27. Article 12 allows the Member States three alternative systems of surveillance (official authorisation, inspection or monitoring, complaints). All Member States have used the first or second system. Some Member States have added rules on the settlement of disputes. The Commission is considering whether it is necessary to amend this article so as to mandate the creation in each Member State of bodies authorised to receive consumer complaints relating to consumer credit.

28. The Commission also has misgivings as to the way in which certain Member States police the enforcement of national provisions transposing the Directive. One turn of phrase which recurs in the questionnaire replies is "the Ministry has no information on the way in which these provisions are enforced in practice". If the Ministry which is responsible for transposition of the Directive does not know how national legislation actually operates, how can the Commission verify its enforcement on the ground?

#### CONCERNING THE OPERATION OF THE MARKET

29. Several Member States have introduced some kind of cooling-off period during which consumers may rescind certain types of credit agreements. The Commission envisages that such periods should be made mandatory throughout the Union for certain consumer credit agreements.

30. Consumers who fail to repay their debts on time face numerous problems. The Commission is considering the advisability of a code of conduct to avoid abuses. Moreover, consumers who default are sometimes liable to very severe penalties. The Commission will examine how a better balance can be achieved between the parties in such cases.

31. Imperfections in the operation of the credit market sometimes lead to extremely high interest rates. Certain Member States lay down maximum rates for consumer credit. If rules on usury are necessary, they will probably have to be adopted at Community level in the context of the single currency.

32. Theoretically, credit intermediaries are covered by national legislation. However, there seem to be a certain number of practical problems. The Commission intends to organise a study on the problems encountered by consumers in their relations with credit intermediaries.

33. Protection of privacy is a fundamental aspect of consumer credit. When the framework Directive on the protection of personal data has been adopted by Council and Parliament, it will be up to the Member States to apply to the consumer credit sector -

notably as regards credit scoring and credit reference agencies - the provisions of the framework Directive on the protection of personal data.

34. Directive 87/102 does not cover the guarantees which certain lenders require in connection with credit agreements. Provisions have been adopted in several Member States. The Commission is considering whether some of the information obligations provided for in the Directive should also be extended to guarantees.

35. Overindebtedness is a widespread problem throughout the European Union. The Commission will study the various measures which might be envisaged at Community level, with due deference to the principle of subsidiarity. The Commission will investigate possible preventive measures, systems to provide assistance and counselling, as well as national provisions to help the individuals concerned overcome their debt problems.

36. Before the end of 1995, the Commission will present its new Action Plan on Consumer Policy. The present Report reveals certain problems in the functioning of the market for consumer credit and some solutions which might be provided. The discussion is open and all interested parties may take part. Based on the outcome of these discussions and taking into account the principles of subsidiarity and proportionality, the Commission will make known in its new Action Plan which of these proposals will be retained.

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## II. HISTORICAL BACKGROUND

### A. Consumer Credit through the ages

37. The lending of money at interest, better known as 'usury' until recent times, was one of the first indications of and became an essential motor of economic life. The first corpus of law, the Code of Hammurabi (1790 B.C.) regulated such practices and indicated clearly the place of credit at the heart of that society. However, while some societies chose to regulate lending at interest, others forbade it, a pattern followed throughout much of its history. The first condemnation of credit, in the Hebrew Old Testament, and subsequent attempts to proscribe or suppress all interest, in the name of usury, may be considered the consequences both of religious prejudices during the Middle Ages and the application of ancient Hebrew law to an increasingly modern Western society. Aristotle himself criticised credit, on the grounds that 'sterile' money could not naturally reproduce, but it was the Christian (later Catholic) Church which led the campaign against moneylending, basing its opposition on Biblical texts and, later, the writings of philosophers such as Aquinas. The first civil interdiction is found in Charlemagne's *Admonito Generalis* of 789, in which lending at interest is considered to be the principal expression of greed, a mortal sin.

38. Ironically, the history of credit is also that of the development of modern civilisation. In the 12th century, lending at interest became the essential factor for growth and change, particularly in Italy where, by the end of the century, chronic debt had engulfed the ruling classes who, feeling their position to be threatened, condemned credit and profit all the more. By the 13th century the Church also felt itself to be endangered by the growth and diffusion of the new 'money economy' (capitalism). Despite the widening gap between ecclesiastical tradition and the needs of the developing economy, the Church continued its condemnation of usury while, in northern Europe, the Lombards continued to develop new economic systems based on the lending of money. Eventually recognising the necessity of credit, the Church came to distinguish between illegal and legal lending in order to 'excuse' the practices of the merchants. In the 15th century, the Church publicly sanctioned the creation of public institutions (*mont de piété*) where the poor could obtain money at reasonable or reduced rates, a practice which spread throughout Europe, from Italy to Belgium. Partly in reaction to the enthusiasm with which the new Reformation faiths embraced credit as an inevitable part of social life, and partly in response to increased social unrest caused by rural indebtedness, the Counter-Reformation Council of Trent (1545-1564) issued a severe condemnation of credit ('theft'). In the subsequent centuries, scholars continued their consideration of the matter, with the publication in the eighteenth century of works such as Turgot's *Mémoires*, Bentham's *Défense de l'Usure* and Adam Smith's *Wealth of Nations*.

39. By the nineteenth century, the use of credit had become more acceptable, and improvements in living standards and thus industrial development in both Europe and the United States were supported by credit. Particularly in the frontier states of the United States, freed from traditional European attitudes, credit was used as an instrument of family budgeting and the concept of hire purchase developed. To some extent, this remained an exceptional situation - despite its undeniably important social role, credit retained its negative image although whereas in Europe it was the lender who was pilloried, in the United States it was the borrower, for their 'failure'.

40. It was only in the early twentieth century, with the advent of the motorcar in the United States, that the use of credit lost its dual stigma of poverty and prodigality. Credit bureaux were opened and the use of credit was encouraged as its benefits, in terms of the creation of a market, mass production and reduced costs, became evident. Similarly in Europe, the late nineteenth century saw the appearance of large stores and, with them, the purchase of durables on hire purchase. Credit developed rapidly, as did government regulation of usury which, while it regretted the habitual abuse of borrowers' weaknesses, generally chose not to 'interfere' to protect consumers from the consequences of their own actions.

41. Postwar social and economic developments, particularly in the wake of the economic crises of the 1930s, led to a greater interest in protecting borrowers. Changing social habits in the 1950s and 1960s led to a rapid growth in the use of consumer credit, with changes in the sources and types of credit used. Traditional moral disapproval of credit, as seen in the linguistic overtones of the German 'die Schuld' (a combination of the concepts of guilt and fault), disappeared as consumer attitudes changed and credit became a more normal part of their domestic budgeting. After seven centuries, from the first stirrings of capitalism in the Early Middle Ages through the recognition of economic reality of the Middle Ages and the Reformation, the 1960s also saw the end of the Catholic Church's opposition to lending at interest. The stage was now set for a new era in the history of the regulation of consumer credit.

#### **B. The need for regulation on a European level**

42. The first consumer credit legislation concerned credit which was combined with the sale of goods or the provision of services, but as the provision of credit became more common, consumer credit became a merchantable good/ service in its own right and sophisticated techniques were employed to market it to consumers as such. Most national legislation in European Community Member States tended not to deal with consumer credit as a whole but, rather, regulated various aspects of the overall question e.g. limited to instalment sales or to particular goods or services. In addition, as the pattern of consumer credit continued to change, consumer credit increasingly involved new forms of credit for which no legislation existed and for which, therefore, there was little consumer protection.

43. As a result of these developments, consumer credit legislation had to take a broader approach, covering all forms of credit - an approach first used in Europe in the 1974 Consumer Credit Act in the United Kingdom. It gradually came to be recognised that what was needed was legislation covering consumer credit as a whole and not different rules for personal loans, credit cards... However, while most Member States recognised that consumers should have basic rights to information, particularly about the total cost of the credit agreement (though different methods were used to calculate such costs), differences between Member States' national laws had more serious effects on the functioning of the market for consumer credit and the internal market as a whole. Indeed, the very complexity of the new forms and sources of credit was to have implications for the development of policy in relation to credit at European level.

44. The European Commission's programme on consumer protection proposed a harmonisation of consumer credit in an EC context and aimed at the creation of a global framework for credit in general, but particularly consumer credit. This approach was new in

so far as it sought to cover all types of credit available on the consumer credit market (with certain limited exceptions). The motives behind the Directive which was eventually proposed, however, were not so much inspired by consumer protection objectives as by the objective of harmonising the distortions of competition in the Common Market. The differences between Member States' national laws (e.g. on advertising, the form and content of credit agreements, consumers' right of cancellation...) had led to distortions of competition in the Common Market, particularly in border areas, between those grantors of credit who bore the costs of compliance with such regulations and those who did not. The regulation by Member States of certain forms of consumer credit had not only left consumers unprotected and limited their ability to obtain credit in other Member States, but variations in the extent of consumer protection from one State to another had also influenced the nature and volume of credit sought by consumers, perpetuating market fragmentation, limiting the free movement of goods and services and affecting the functioning of the Common Market.

45. One of the tasks of the European Union is the promotion of the harmonious development of economic activities and an accelerated raising of the standard of living of its population. These economic and social objectives, together with those of the Single Market - the promotion of economic growth, an increase in the innovative capacity and competitiveness of industry and enhancement of the general level of prosperity - can only be achieved with the active participation of consumers. To encourage consumers to avail of these benefits, it was necessary to enable them to do so with confidence, secure in the knowledge that they would have the same level of protection as they enjoyed on their national markets.

46. Given the above and the increasing volume of consumer credit, it was felt that the establishment of a common market in consumer credit would operate to the benefit of grantors of credit, manufacturers, distributors and retailers of goods and providers of services as well as to the benefit of consumers. Benefits to consumers would include a wider choice of financial services and institutions and lower prices stemming from increased competition and efficiency. Freedom of choice for consumers is not only a legitimate economic right, but is of crucial importance to the creation and development of a single market as only informed consumers, with full knowledge of the range of products on offer and the various contractual rights and obligations connected to agreements, will benefit from the advantages of healthy competition. The marketplace itself, to work efficiently, needs consumers who know how prices compare and who act on that knowledge. This is particularly true of the financial services market where transparency is essential for healthy competition which, in this sector in particular, is crucial to all other aspects of the Internal Market.

47. While the emphasis was on the economic objectives of the regulation of consumer credit, attention was paid to the social protection element of credit legislation. The development of the Common Market was seen as likely to lead to intensified competition between financial institutions in the national and international consumer credit markets and to an expansion of the market as a whole, with increased pressure from financial institutions on consumers. It was felt that there was a greater need for protection of the consumer entering into credit agreements than cash payment agreements, for two reasons. On the one hand, the consumer in a credit agreement undertakes payment obligations which he can not meet immediately but only over a period of time. This commitment for future periodic payments is undertaken without any certainty that changes in his personal or economic situation (sickness, unemployment, divorce...) will not prevent the discharge of the obligation. On the other hand, the consumer needs money and is thus more inclined to accept the terms



of whoever makes the money available. The consumer thus needs protection, not only from the traditional forms of credit but also from the new forms of credit or those which are newly made available to him.

48. With the above economic and social objectives in mind, the European Commission began its work. The first proposals for the harmonisation of law in the field of consumer credit were drafted in 1974, though it was not until December 1986 that they culminated in a Directive.

49. When the Council of Ministers of the European Communities adopted, on 14 April 1975, the *Preliminary Programme of the European Economic Community for a consumer protection and information policy*<sup>5</sup>, they emphasised five fundamental rights, one of which was the right to protection of economic interests. They urged that first priority should be given to adopting Community measures to harmonise the general conditions of consumer credit and to protect the consumer from unfair conditions of credit.

50. A Working Party was established, made up of governmental experts from the Member States, to discuss the draft proposal. The official Commission proposal was published in March 1979<sup>6</sup> and two years of discussion (on the proposal's legal basis) followed in the European Parliament Legal Affairs Committee. ECOSOC had also been consulted, pursuant to Article 100(2) (since the implementation of the Directive would result in changes of law in several Member States) and gave a favourable opinion<sup>7</sup>, as did the Consumers' Consultative Council<sup>8</sup>. The Committee and the Parliament then examined the proposals, article by article, and even strengthened aspects of the original proposal, most notably by insisting on a uniform method for the calculation of APR<sup>9</sup>. At the same time, opinions were expressed on the draft by business associations, industry, banks and insurance companies, trade unions and consumer organisations, as well as submissions from national associations to the relevant Commission services. Following these consultations, a revised proposal was presented<sup>10</sup> by the Commission and discussed in the Working Party of governmental experts.

### C. The development and aims of the Directive

51. Differences in law and practice had led to unequal consumer protection in different Member States. The EEC *Programme for Consumer Protection and Information* therefore provided, inter alia, that consumers should be protected against unfair credit terms and that priority should be given to the harmonisation of the general conditions. The starting point for the Commission was that there should be a common approach to the calculation of the true cost of credit to the borrower and to the communication of that information to the consumer. The Draft Directive contained proposals for common rules in these areas, in order to achieve some degree of uniformity and to avoid the fragmentation of the credit market into up to twelve national markets. Among these were the following:

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<sup>5</sup> O.J. No C 92, 25.04.75  
<sup>6</sup> O.J. No C 183, 27.03.79 p.4  
<sup>7</sup> CES 85/80, 31.01.80  
<sup>8</sup> CCC/171/85, 18.09.85  
<sup>9</sup> PE 70.998(final), 21.01.83  
<sup>10</sup> O.J. No C 183, 10.07.84

- that the Directive should apply to every kind of credit available in the consumer credit market, subject to certain limited exceptions - Article 2<sup>11</sup>
- that credit advertisements which contained figures relating to the charge for credit should specify the true cost on an annual basis, expressed as a percentage (APR) - Article 3
- that credit agreements should be made in writing, with a copy to the consumer, stating the essential terms and the APR in percentage terms - Article 4
- that consumers should be entitled to make early repayment and, in such cases, enjoy a reduction in the total cost of the credit granted - Article 8

52. The requirement of unanimity for Council decisions, before the entry into force of the Single European Act the following year, and the diversity of the standards of protection in European countries, meant that the original Commission proposal was watered down, leaving it to the Member States to guarantee consumer protection with regard to:

- the regulation of the repossession of goods - Article 7
- the borrower's rights on assignment of the creditor's rights - Article 9
- the use of certain negotiable instruments - Article 10
- subsidiary liability - Article 11
- effective official supervision of the credit industry - Article 12

while among the provisions which disappeared were joint and several liability and a role for consumer organisations. Member States remained free to adopt or retain more stringent legal rules for consumer protection in this field, as a result of the *Clause minimale* (Article 15).

53. The main difficulties which emerged in the negotiations in the Working Party concerned the scope of the Directive and the problem of services, joint and several liability and the method of calculation of the annual percentage rate of charge (APR). This latter proved so contentious that the elaboration of a common formula was left to a later Directive<sup>12</sup>, amending Directive 87/102. Agreement was reached on the remaining areas and the Directive was agreed by the Council of Ministers, by unanimity, on 22 December 1986. As the adoption of the Directive was the result of a compromise in the Council of Ministers, and as so much time had passed since the original proposal (in a field in which change occurs at a rapid pace), it was felt that its operation should be reviewed five years after the expiry of the period for transposition in order to ensure that the Directive was still 'adapted' to its purposes. This is the purpose of the present Report.

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<sup>11</sup> References to articles refer to the numbering in the final text

<sup>12</sup> Council Directive 90/88/EEC of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ No L 61, 10.03.90

### III. TRANSPOSITION OF DIRECTIVE 87/102

#### A. METHODS OF TRANSPOSITION

54. The transposition of a Directive imposes an obligation with regard to results on the Member States. It does not inevitably mean that a law has to be adopted.

55. We speak of passive transposition when a Member State considers that existing domestic law is already in conformity with the Directive. Hence in France, only Article 8 (concerning early repayment) required a statutory amendment.

56. Active transposition means that the Member State adopts a legal instrument. Most of the Member States opted for this type of transposition, though using very different techniques. Some Member States, such as Greece or Luxembourg, incorporated the text more or less as is. Others, such as Belgium, the Netherlands, Germany and Ireland (where it is still a draft), constructed a body of law on the basis of the Directive, including numerous provisions which are foreign to the Directive<sup>13</sup>.

57. The Directive has had a catalytic effect in several Member States. This is due to the small number of harmonisation provisions in the Directive and the latitude left to the Member States as to how to attain the objectives. The main goals of the Directive are consumer information and transparency of the market. Recent laws have taken into account the rapid development of the credit market and in particular new forms of credit.

58. Examination of inter-country differences shows that the Directive's harmonisation impact has been limited. There are few strict harmonisation provisions in the Directive. On the other hand, as regards the Directive's general objectives, the Member States have sometimes adopted identical rules. A comparative examination shows that common standards have been adopted in most Member States. Hence, differences between Member State rules and between such rules and those of the Directive do not mean that the Directive has been a failure but reflect the impetus generated by the Community instrument.

59. Interpretative transposition makes it possible to mitigate the apparent discrepancies between domestic law and Community law. Pursuant to a landmark Court of Justice ruling of 8 October 1987<sup>14</sup>, it is held that national law must be interpreted with an eye to achieving the purposes of the Directive. Even if the Court of Justice is the ultimate arbiter, the national court also has a role to play in interpreting Community law. In doubtful cases the court must, via the mechanism of preliminary rulings, refer the matter to the Court of Justice with a view to determining the autonomous interpretation which must be upheld. Up to now the Court of Justice has not had to rule on any case concerning consumer credit.

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<sup>13</sup> Chapters VII and IX discuss the application of the minimum clause

<sup>14</sup> CJEC, judgment of 08.10.87, C-80/86 *Kolpinghuis Nijmegen B.V.*, ECR. 1987 p. 3969

**B. INSTRUMENTS TRANSPOSING DIRECTIVES 87/102/EEC AND 90/88/EEC**

**BELGIUM**

- Directive 87/102/EEC: Law of 12/06/91 (published in the Moniteur Belge of 9/07/1991, p. 15203 ff), as amended by the Law of 06/07/92 (published in the Moniteur Belge of 09/07/92)
- Directive 90/88/EEC: Royal Decree of 4 August 1992, published in the Moniteur Belge of 08/09/92, as amended by Royal Decree of 29/04/93, published in the MB of 08/06/93

**DENMARK**

- Law No 398 of 23/06/90 (published in Lovtidende 13/06/90), as supplemented by Regulation No 830 of 10/12/90 and Regulation No 497 of 13/06/94
- Law No 395 of 13/06/90, published in LT 13/06/90
- Regulation No 902 (published in LT of 12/11/92)

**GERMANY**

- Directive 87/102/EEC: Gesetz über Verbraucherkredite, zur Änderung der Zivilprozeßordnung und anderer Gesetze of 17/12/90 - BGBl 1990 I, p. 2840 -
- Directive 90/88/EEC: Erste Verordnung zur Änderung der Preisangabenverordnung of 03/04/92 - BGBl 1992 I, p. 846 of 10/04/92

**GREECE**

- Ministerial Decision  $\phi$ 1-983 of 07/03/91, published in the Greek Government Gazette, Volume B, 172, 21/03/91

**SPAIN**

- Directive 87/102 EEC Ley 7/1995 de 23 de marzo 1995 de Crédito al Consumo No. 7458 BOE N° 7 25.05.95 p. 9370-9375

**FRANCE**

- Directive 87/102/EEC: Law No 78-22 of 1 January 1978, integrated in the new Consumer Code, Art. L 311 ff, and certain provisions of Laws 23/6/89 and 21/12/89.

**IRELAND**

Not transposed - see below

**ITALY**

- Community Law 1991 (Law No 142 of 19 February 1992, Articles 18-24, published in Ordinary Supplement No 36 to the Official Journal No 42 of 20 February 1992)

**LUXEMBOURG**

- Directive 87/102/EEC: Law of 09/08/1993 - Memorial A N° 66 du 24/08/93
- Directive 90/88/EEC: Grand-Ducal Regulation of 26/08/93 - Memorial A N° 80 of 27/09/93

## NETHERLANDS

Law of 04/07/90 + 5 Decisions + 2 Regulations published respectively in Stb. 1990, 395; Stb. 1991, 515, 516, 549, 548, 550 + Stc. 1991, 220

## AUSTRIA

Bankwesengesetz (BGBl 532/93)  
Konsumentenschutzgesetz (BGBl 140/79 in der Fassung 247/93)  
Verbrauchercreditverordnung (BGBl 365/94)  
Allgemeines Bürgerliches Gesetzbuch (JGS 946/1811 in der Fassung BGBl 656/89)  
Gewerbeordnung (BGBl 194/94)

## PORTUGAL

Decree-Law 359/91 of 21/09/91, published in the Diario Da Republica - I Serie-A, p. 4998 ff. of 21/09/91

## FINLAND

Consumer Protection Act (38/78)

## SWEDEN

Consumer Credit Act 1993, as supplemented and amended by Acts 1992/1010, 1992/214, 1993/1214 and 1994/843

## UNITED KINGDOM

Directive 87/102/EEC:

Consumer Credit Act 1974 as last amended by Statutory Instrument 1989, published in SI 1989 N° 1125 of 06/07/89

Directive 90/88/EEC:

The Consumer Credit (Agreements) (Amendment) Regulations, published in SI 1984 N° 1600 of 22/10/84

## ICELAND

Law No 30/1993 on consumer credit as amended by Act No 101/1994

Regulation No 377/1993 on consumer credit as amended by Regulation No 491/1993

## NORWAY

Law of 21 June 1985, No 82

Regulation of 15 July 1986, No 1616

## C. MEASURES ADOPTED AGAINST CERTAIN MEMBER STATES FOR FAILURE TO TRANSPOSE DIRECTIVE 87/102 BY 28/10/94

## SPAIN

Directive 87/102/EEC:

Procedure for failure to communicate

Case C-390/93 Commission v Spain

## IRELAND

Directive 87/102/EEC:

Procedure for failure to communicate  
Reasoned opinion of 20/01/92

### D. PARTICULAR ASPECTS OF THE TRANSPOSITION OF THE DIRECTIVE

60. The application or interpretation of Directive 87/102/EEC by Member States has not given rise to many difficulties. The main problems encountered by Member States have related to the scope of the Directive, to the information which is to be given to the consumer and to the total cost of the credit.

61. As regards the scope of the Directive, some problems were encountered with the term "other similar financial accommodation" (art 1.2.c). In relation to hiring agreements, over and above the cases covered by Article 2.1.b, there has been some dispute as to the extent to which leasing agreements fall within the scope of the Directive, and whether they could be considered as "other similar financial accommodation"? Difficulties were encountered in relation to agreements for the provision, on a continuing basis, of a service or a utility (art 1.2.c), and also the meaning of the term 'exclusively' in Article 11.

62. Some difficulties were also linked to the information which is to be given to the consumer. With regard to changes in existing credit contracts, there is some doubt as to how extensive the changes must be in order to oblige the lender to give information about the annual percentage rate. Moreover, it is uncertain whether the information about credit conditions must be given on the basis of the change alone or on the basis of the new complete credit contract.

63. There also appear to be difficulties in knowing exactly when a bank is obliged to give information, for instance in relation to short-term overdrafts. In the case of private agreements, lenders would appear to have certain practical difficulties in giving customers information about credit conditions.

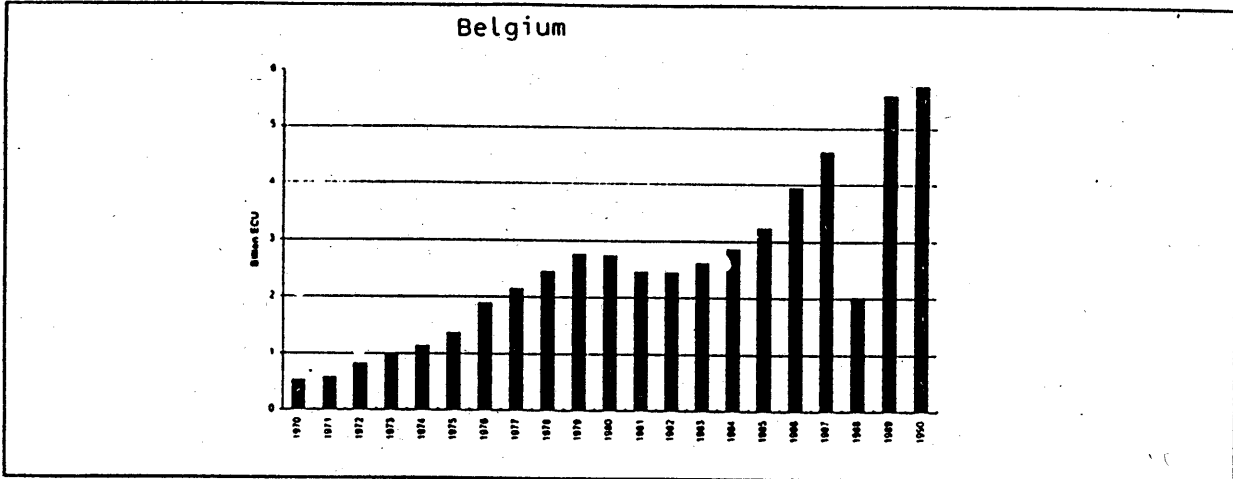
64. As regards difficulties linked to the total cost of the credit, some problems have arisen with regard to the mandatory indication of the total cost in the case of credit agreements with modifiable terms, credit lines and financing in instalments. There have also been difficulties in relation to the effective rate of charge for advances on current accounts. As a question of fact, the duration of the credit and the extent to which the facilities are used are not known.

#### **IV. THE MARKET FOR CONSUMER CREDIT**

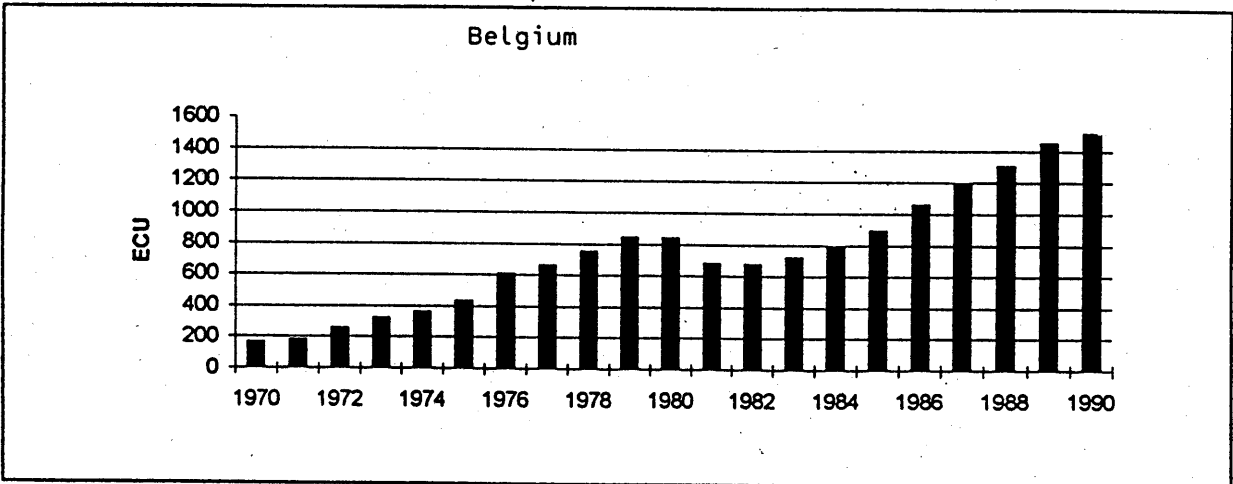
##### **A. Economic Analysis of the Market**

65. The graphs in the following pages indicate the development of consumer credit in the Member States of the EU over the last two decades. The figures have been taken from a report prepared for the Consumer Policy Service of the European Commission: *Overindebtedness of consumers in the EC Member States: Facts and Search for solutions (Centre de Droit de la Consommation 1994)* and from EUROSTAT figures. As in the report, the figures in ECU have been converted at their official exchange rate on 11 August 1992. References to the 'European average' are based on the country data available e.g. four countries comprise the average for 1975 while the average for 1990, the latest year for which such a wide range of information is available, is that of ten of the then Member States (with the exception of Luxembourg and Portugal). This European average has been calculated in the most simple way: the sum of the national amounts divided by the number of households in these ten countries.

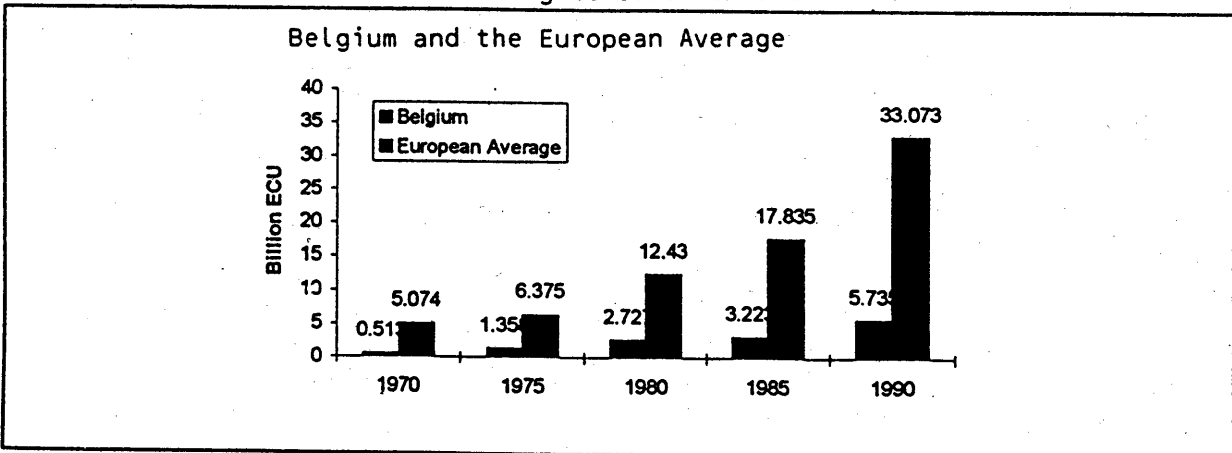
Total Outstanding Consumer Credit



Consumer Credit per Household

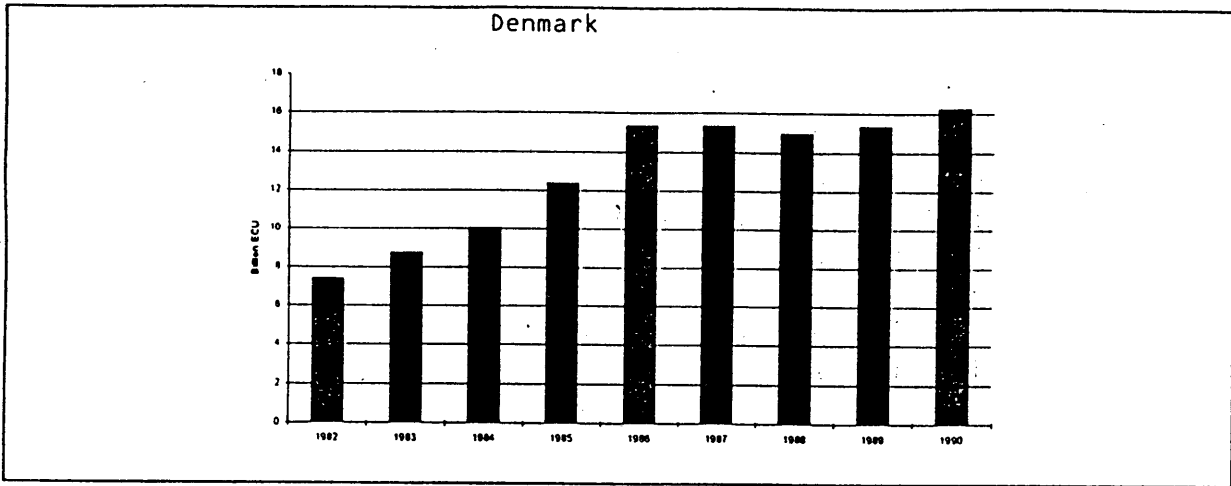


Total Outstanding Consumer Credit

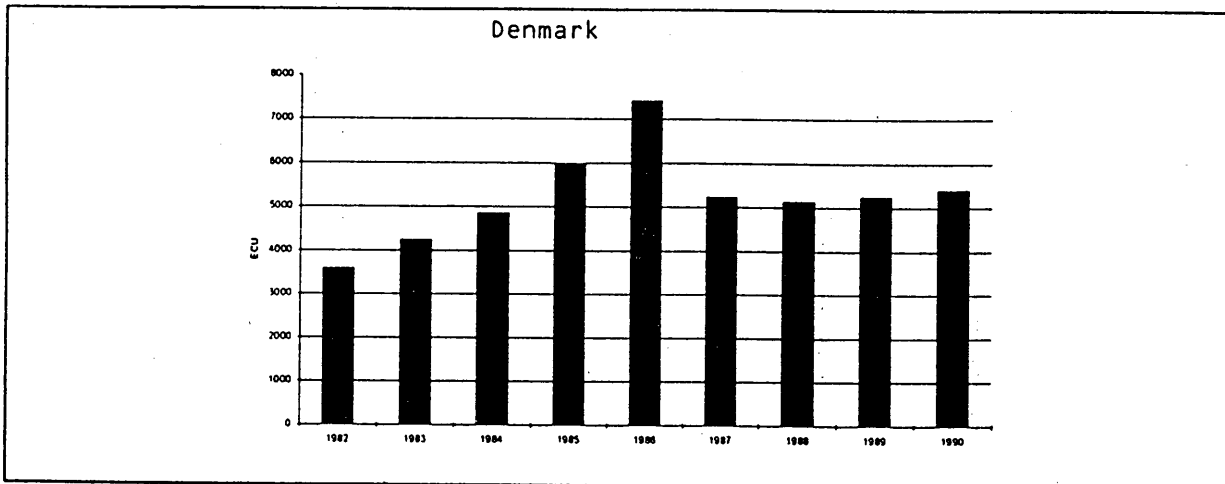




Total Outstanding Consumer Credit

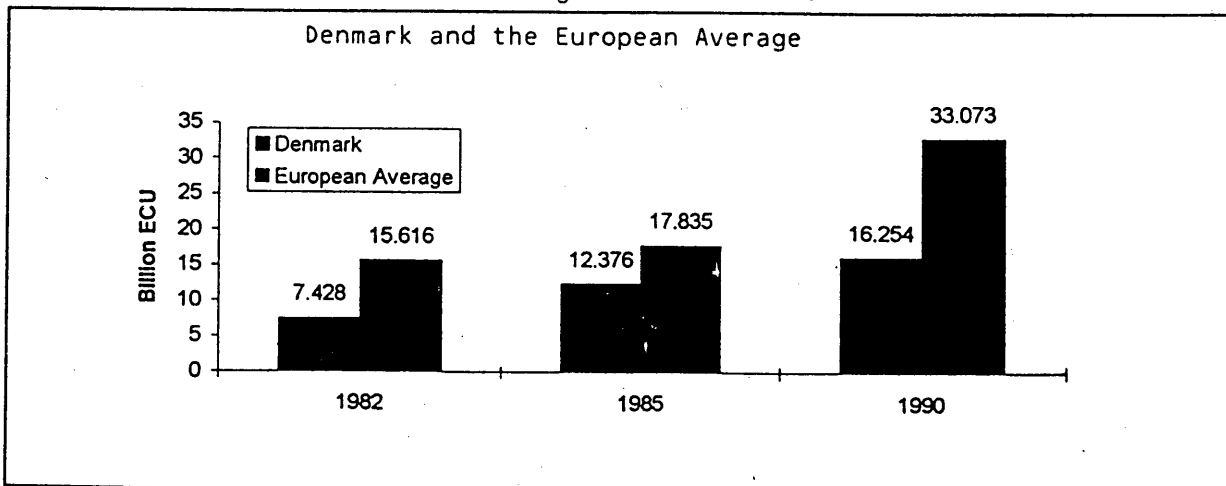


Consumer Credit per Household

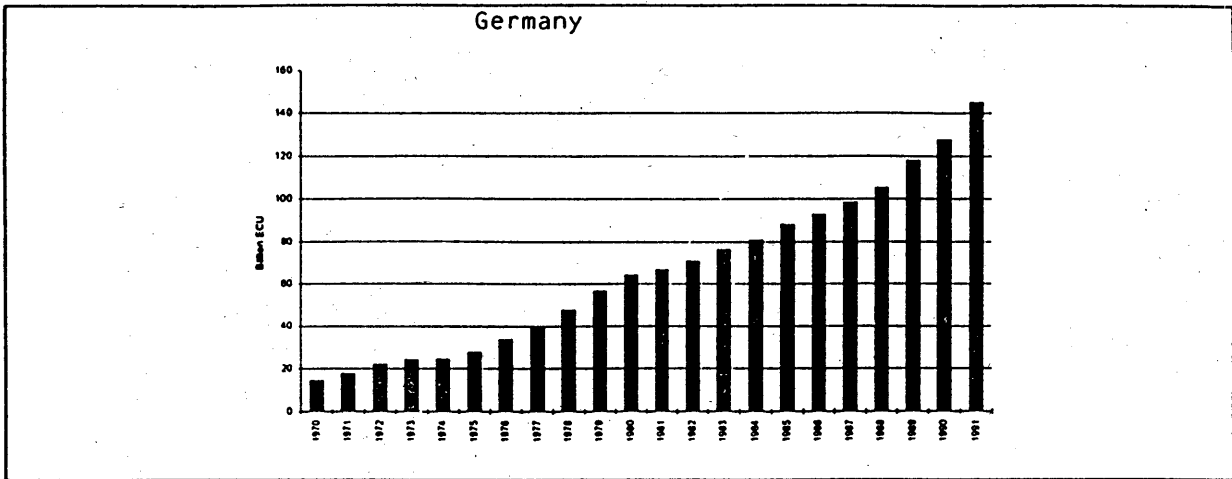


Total Outstanding Consumer Credit

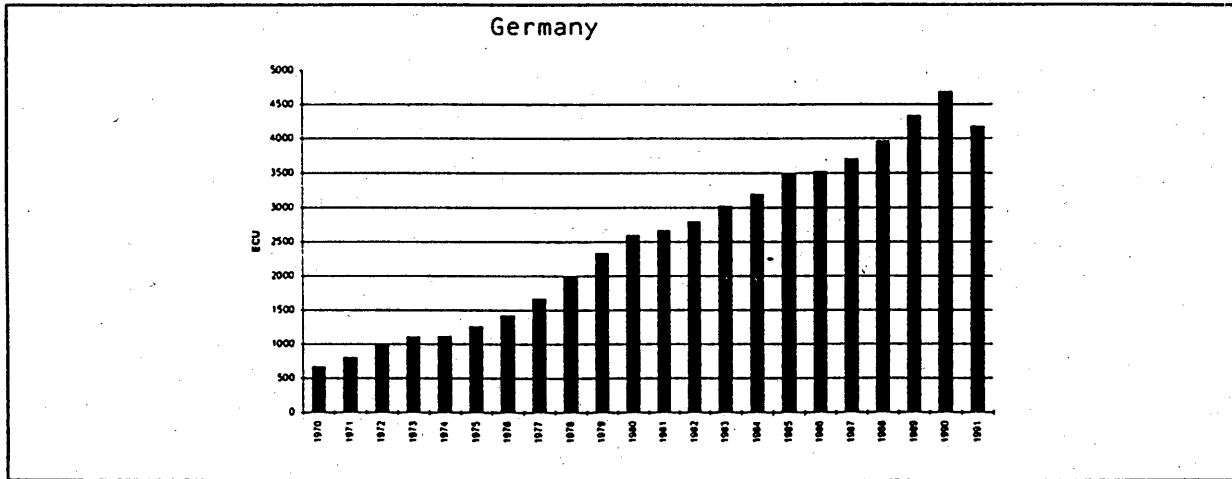
Denmark and the European Average



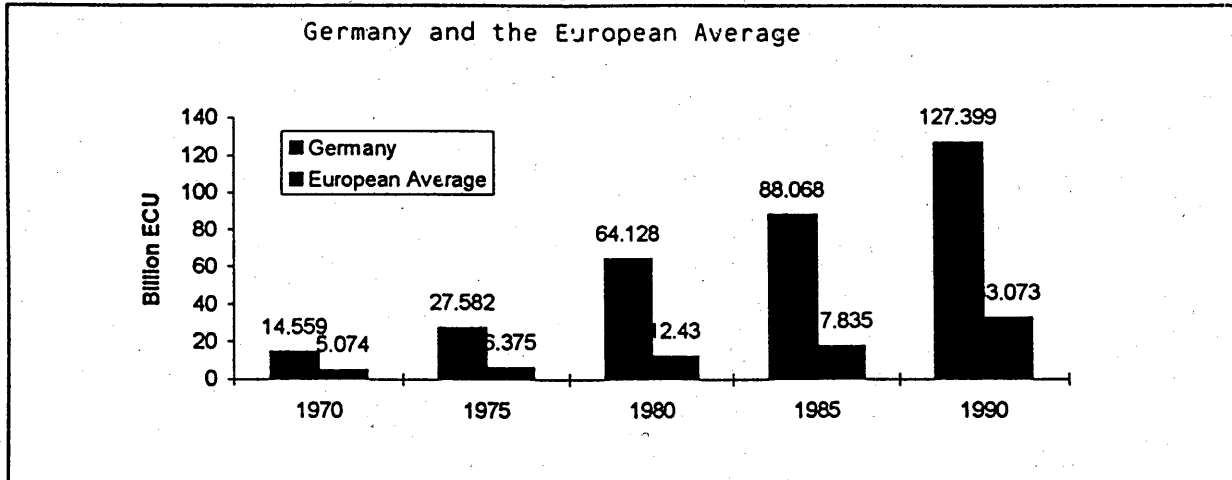
Total Outstanding Consumer Credit



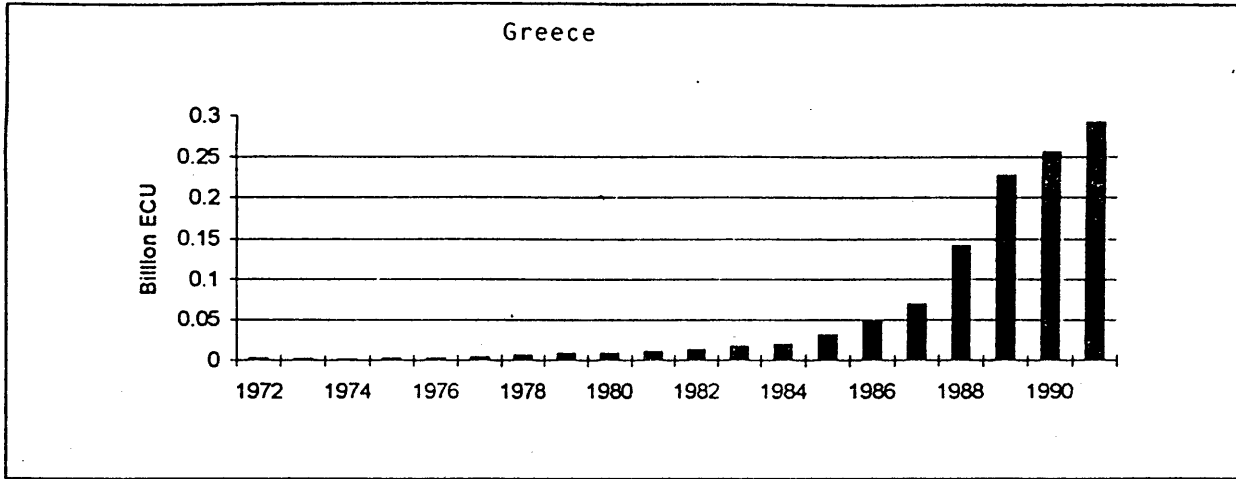
Consumer Credit per Household



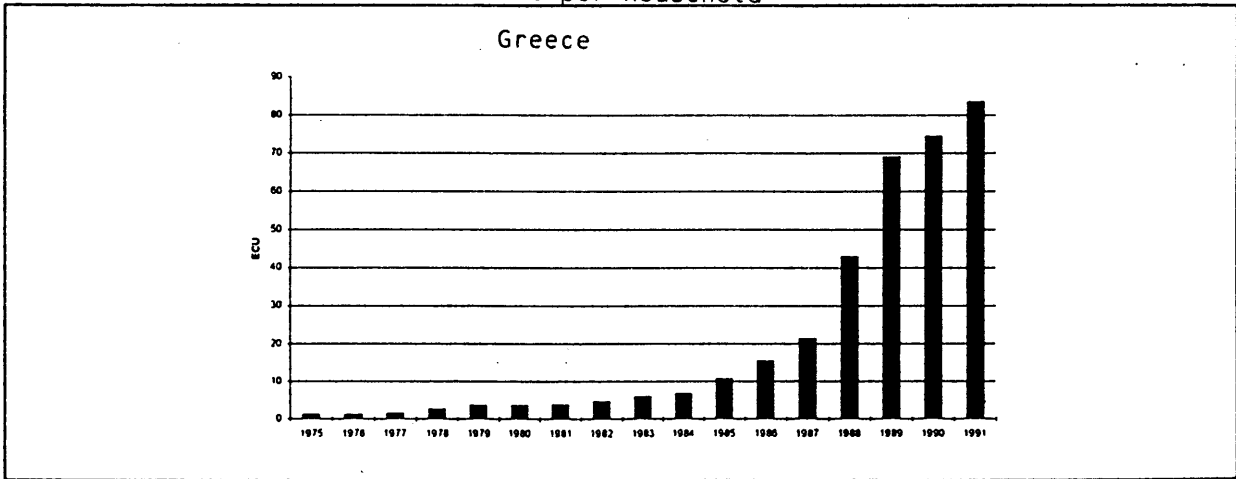
Total Outstanding Consumer Credit



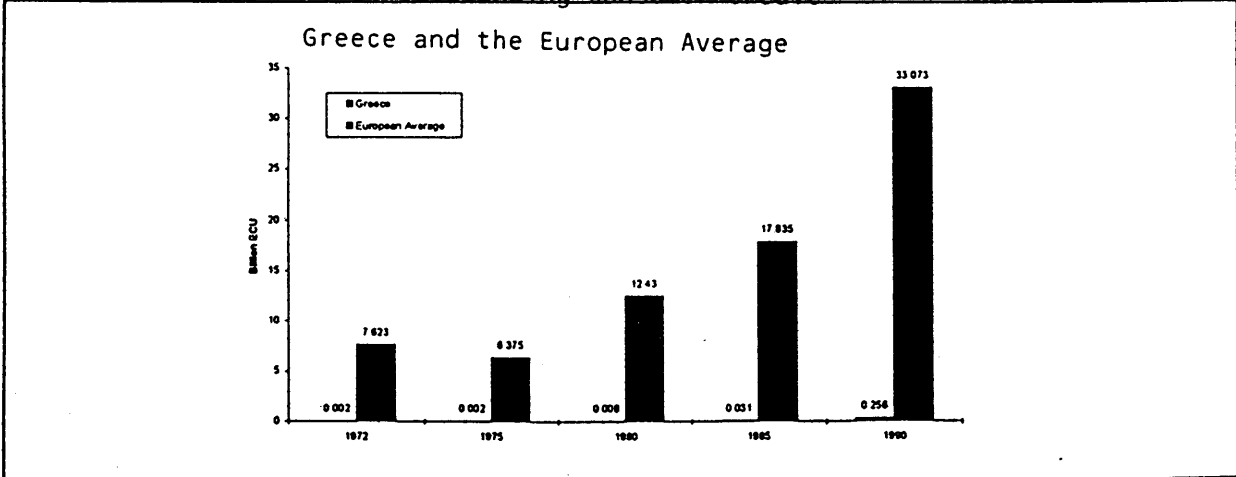
### Total Outstanding Consumer Credit



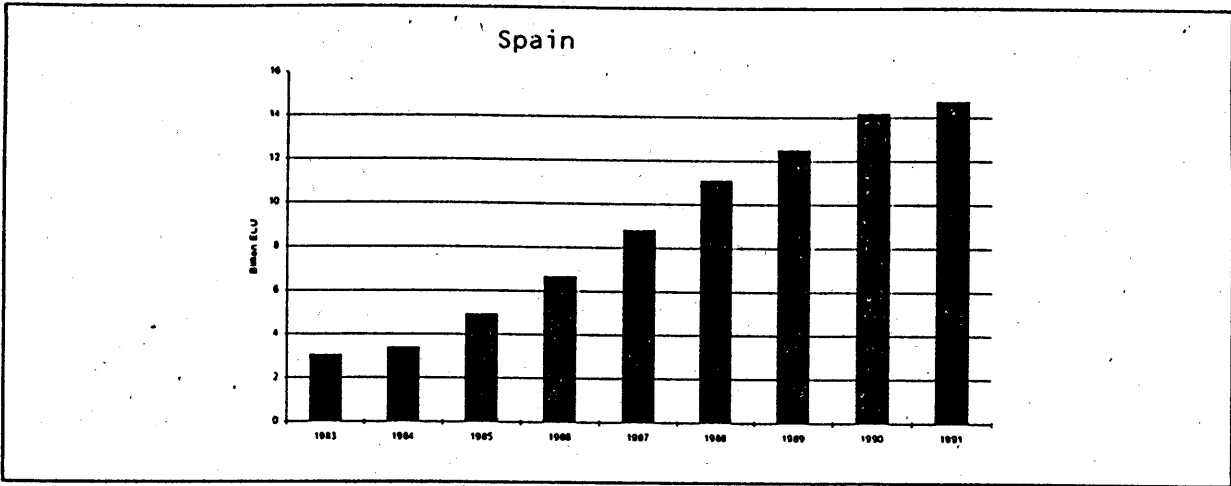
### Consumer Credit per Household



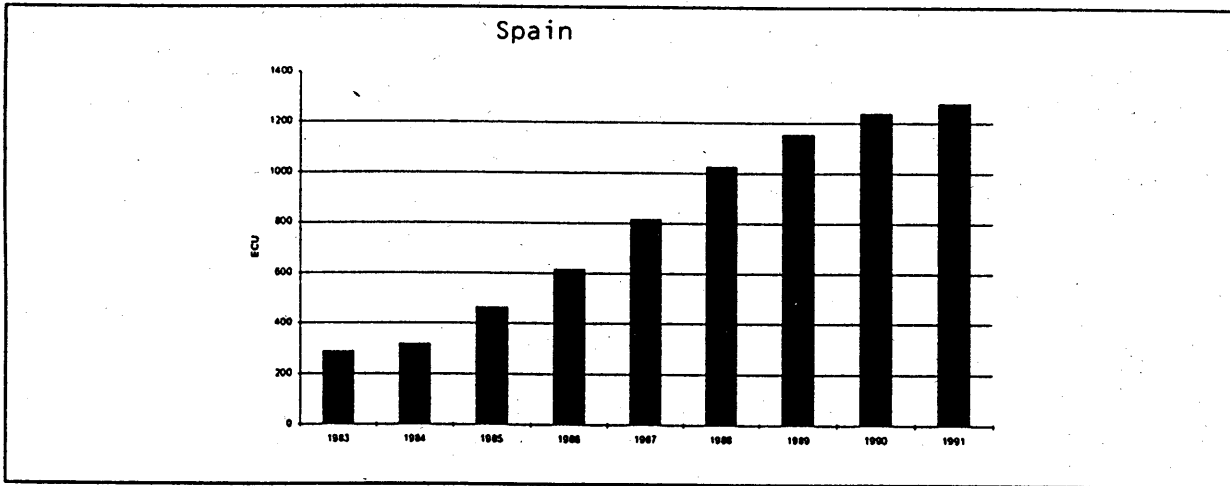
### Total Outstanding Consumer Credit



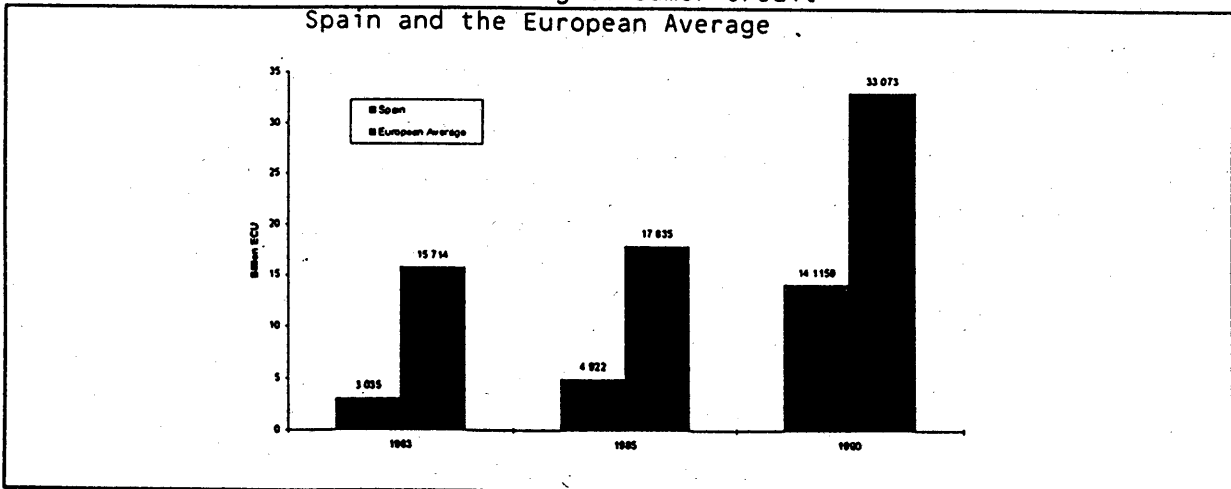
### Total Outstanding Consumer Credit



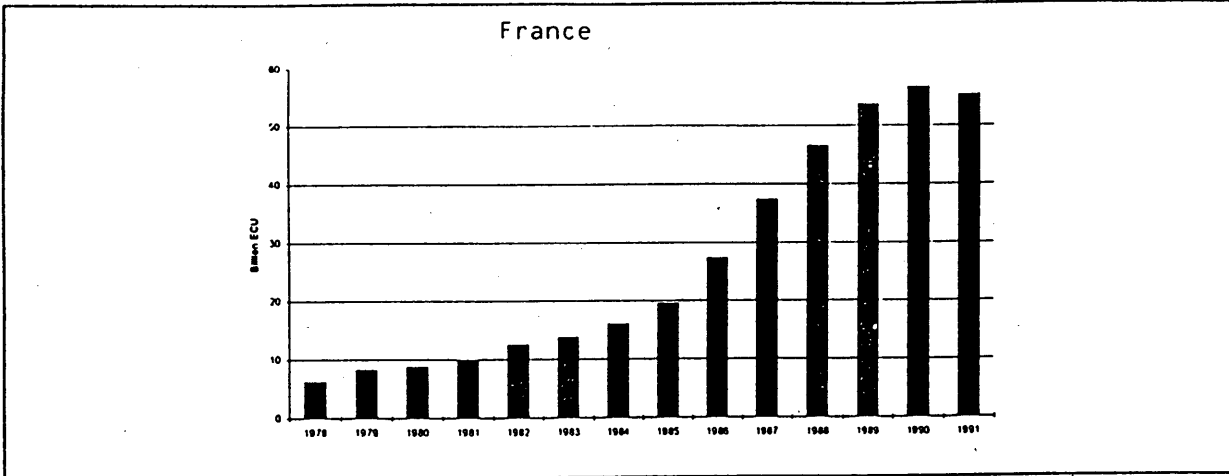
### Consumer Credit per Household



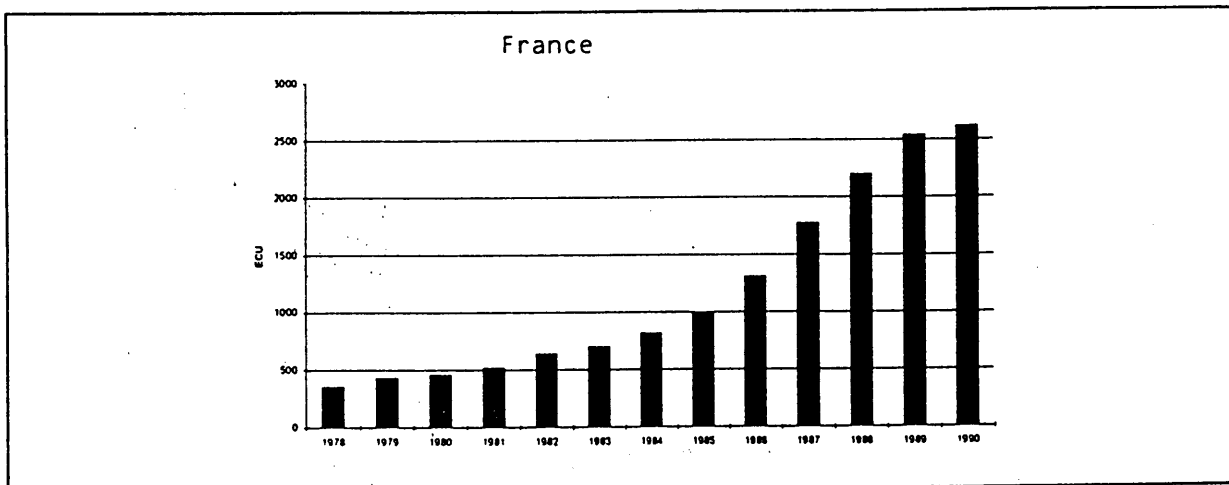
### Total Outstanding Consumer Credit Spain and the European Average



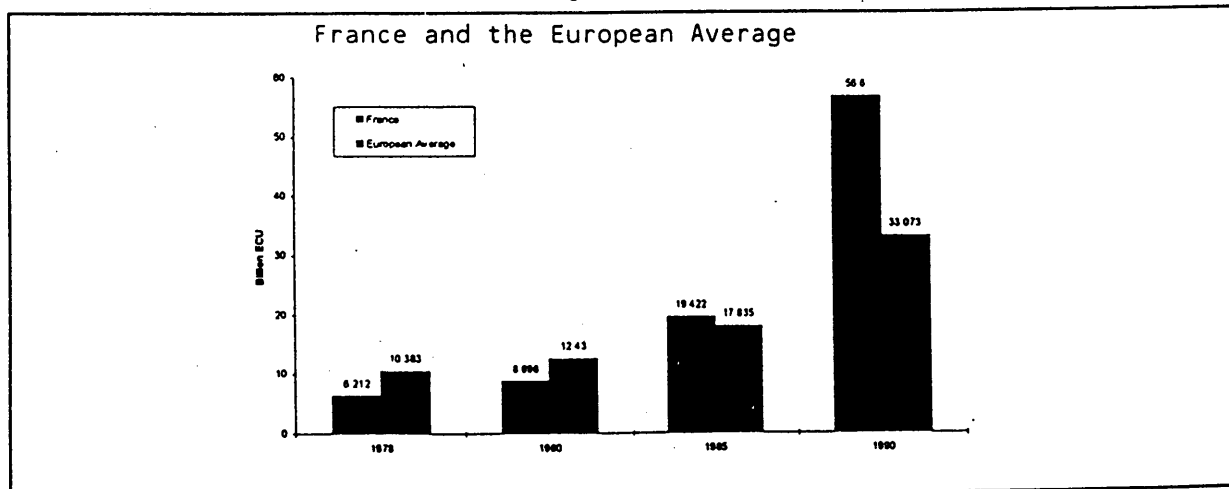
Total Outstanding Consumer Credit



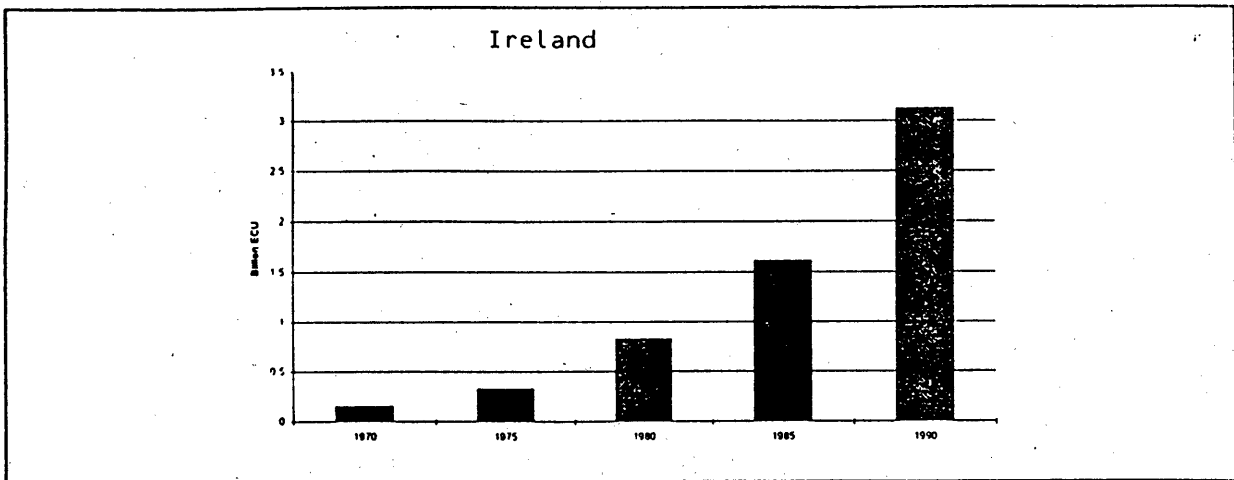
Consumer Credit per Household



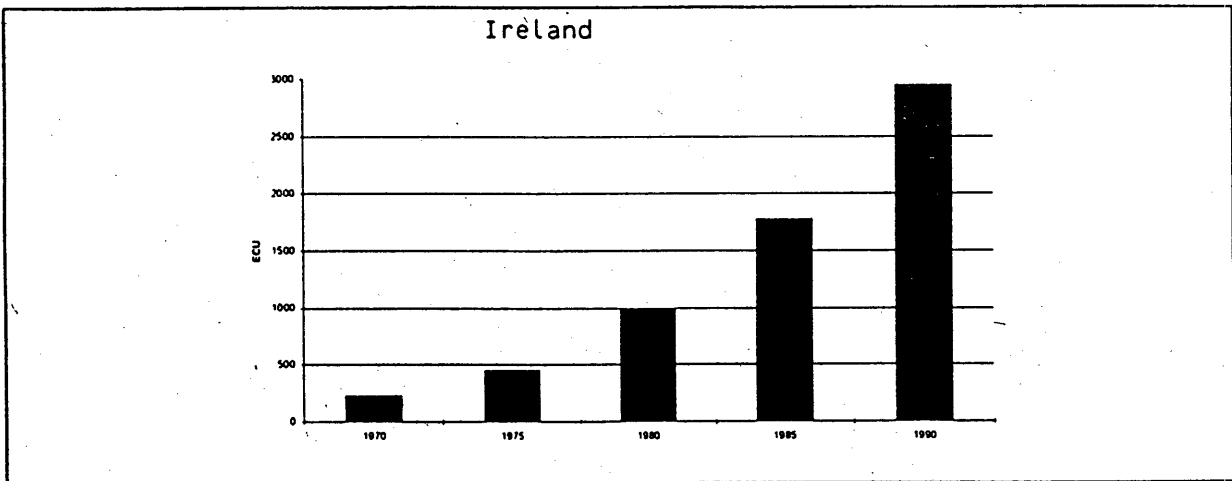
Total Outstanding Consumer Credit



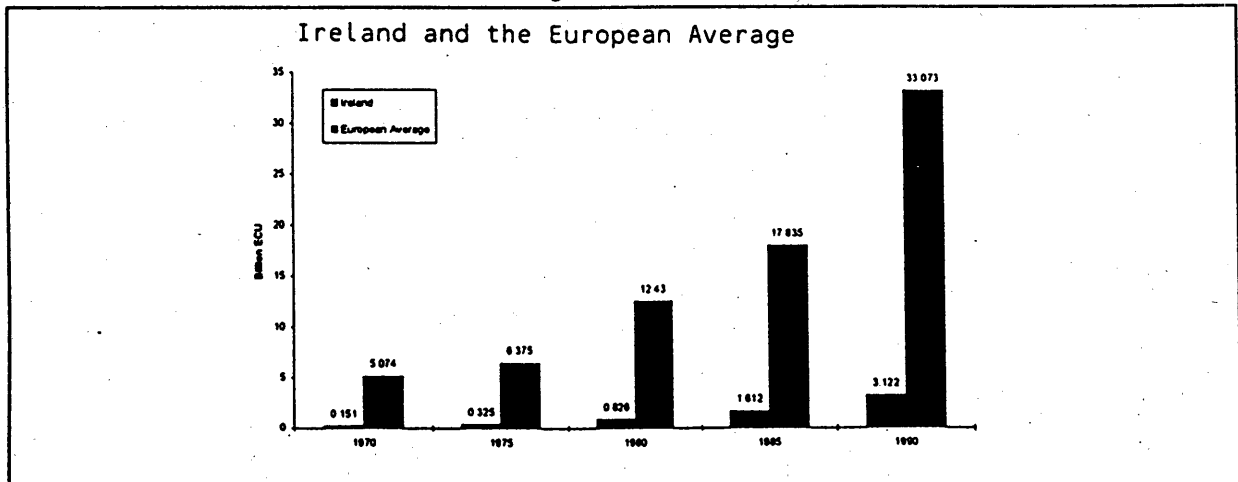
### Total Outstanding Consumer Credit



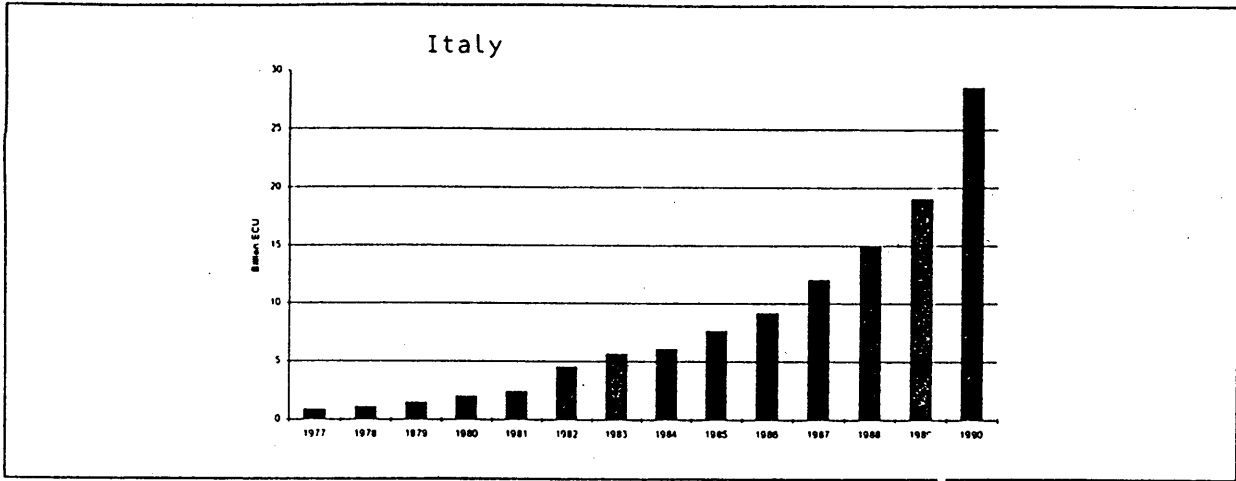
### Consumer Credit per Household



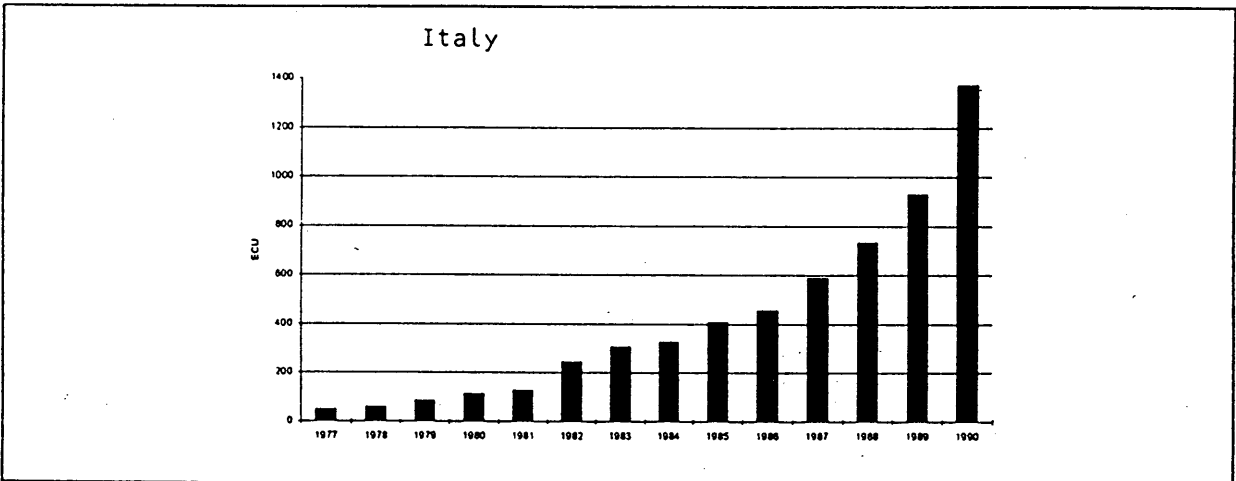
### Total Outstanding Consumer Credit



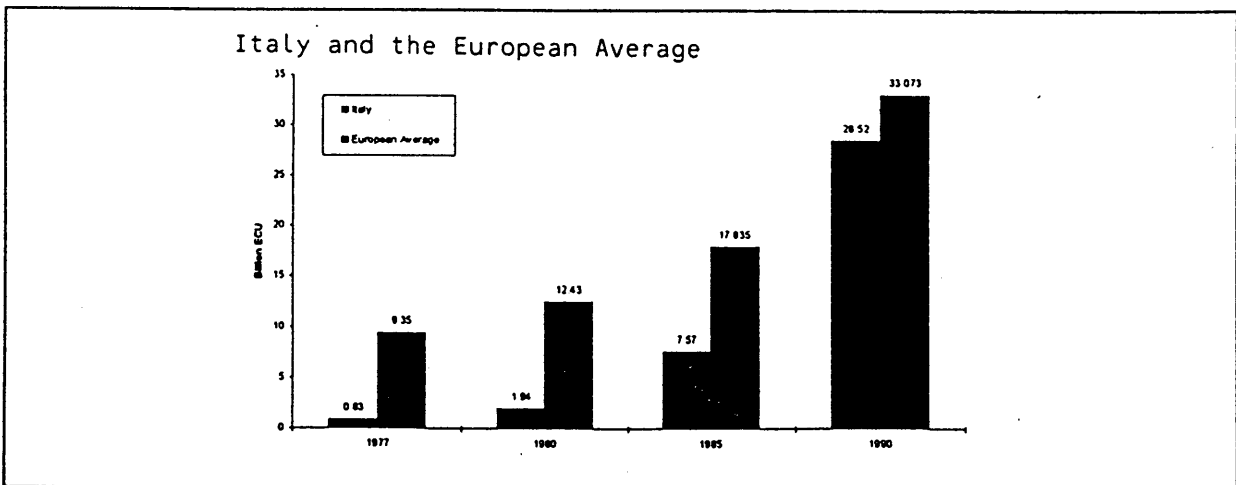
Total Outstanding Consumer Credit



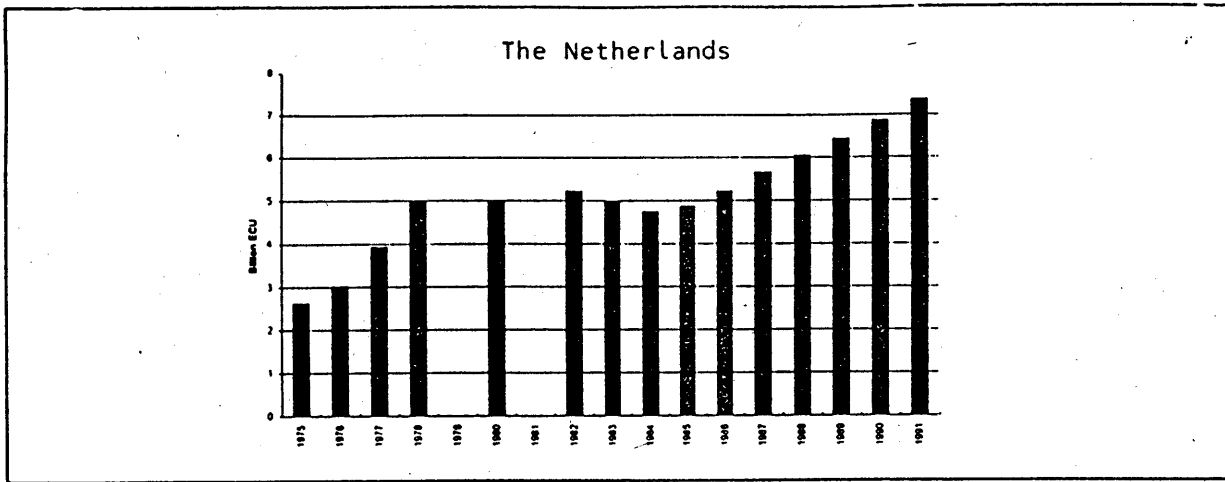
Consumer Credit per Household



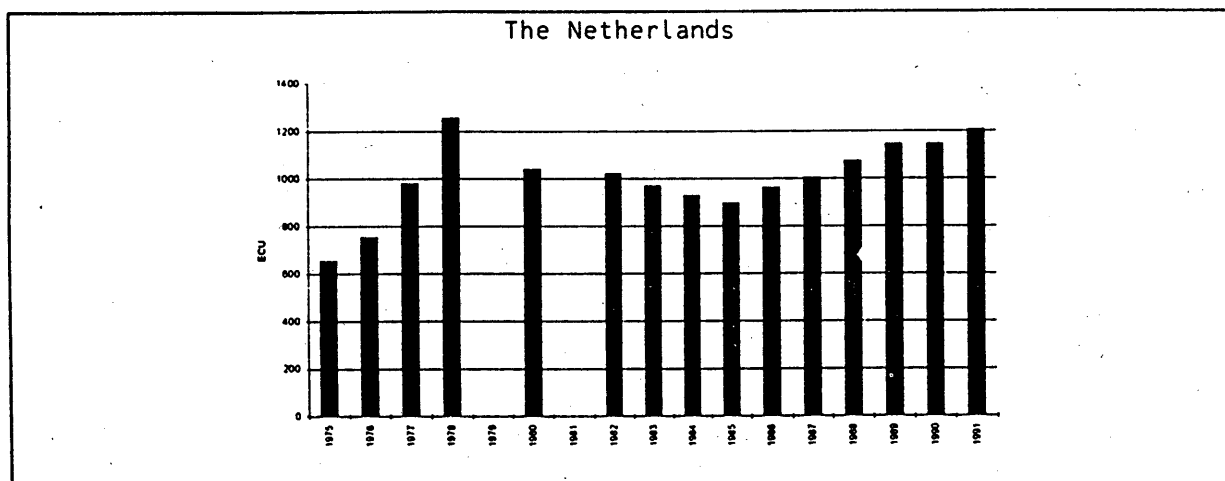
Total Outstanding Consumer Credit



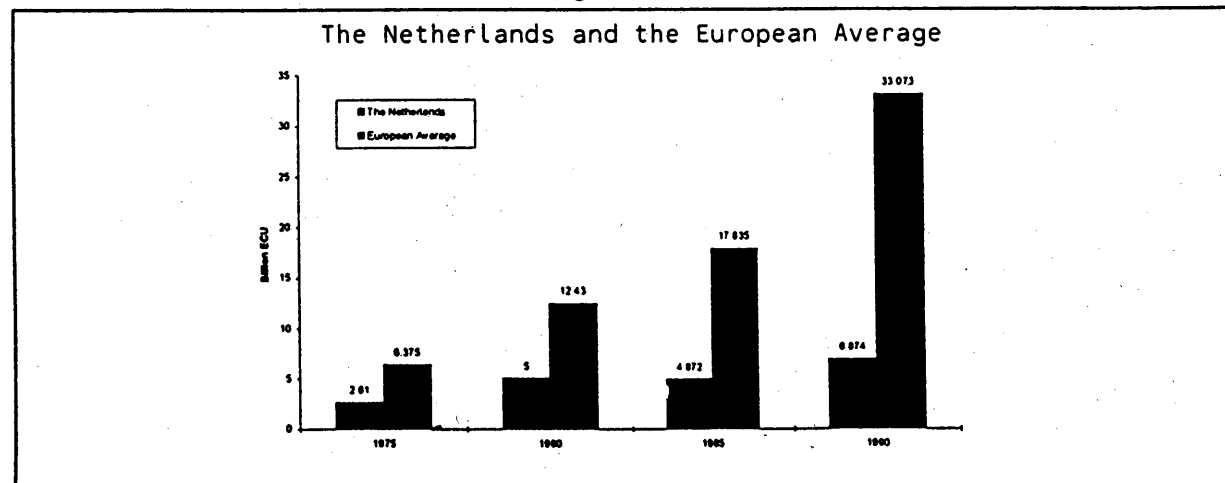
Total Outstanding Consumer Credit



Consumer Credit per Household

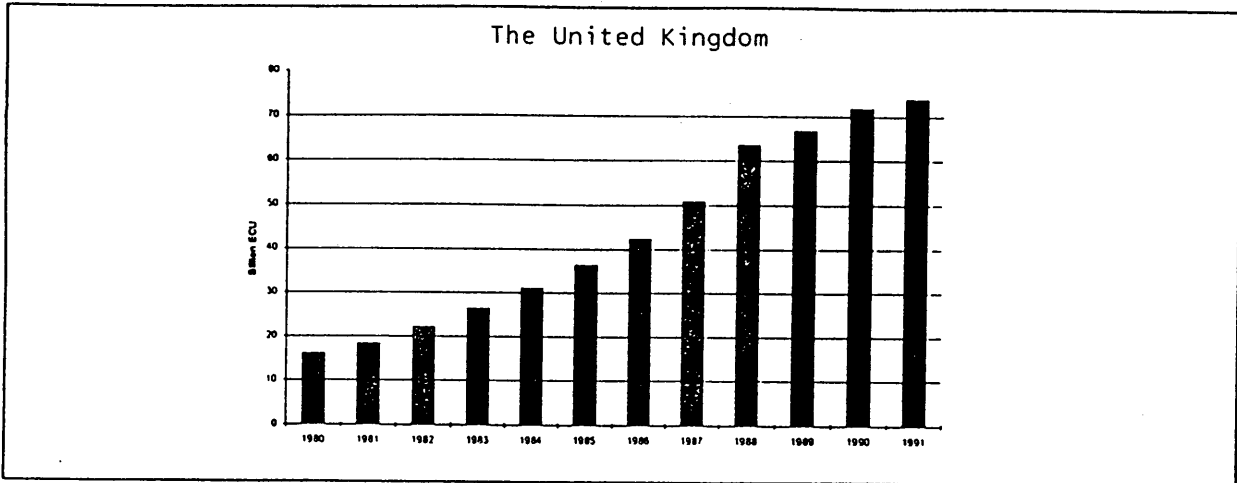


Total Outstanding Consumer Credit

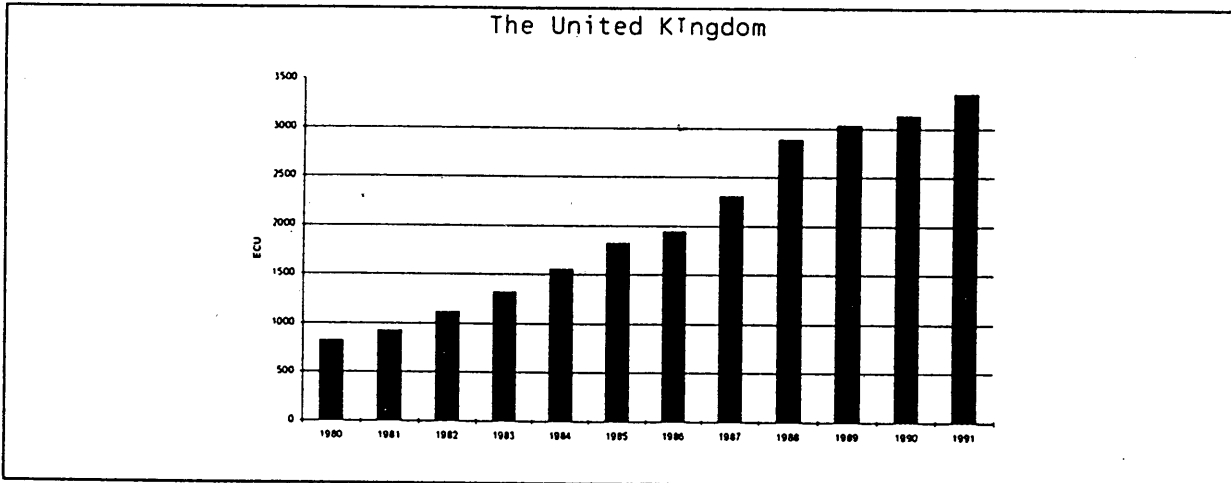




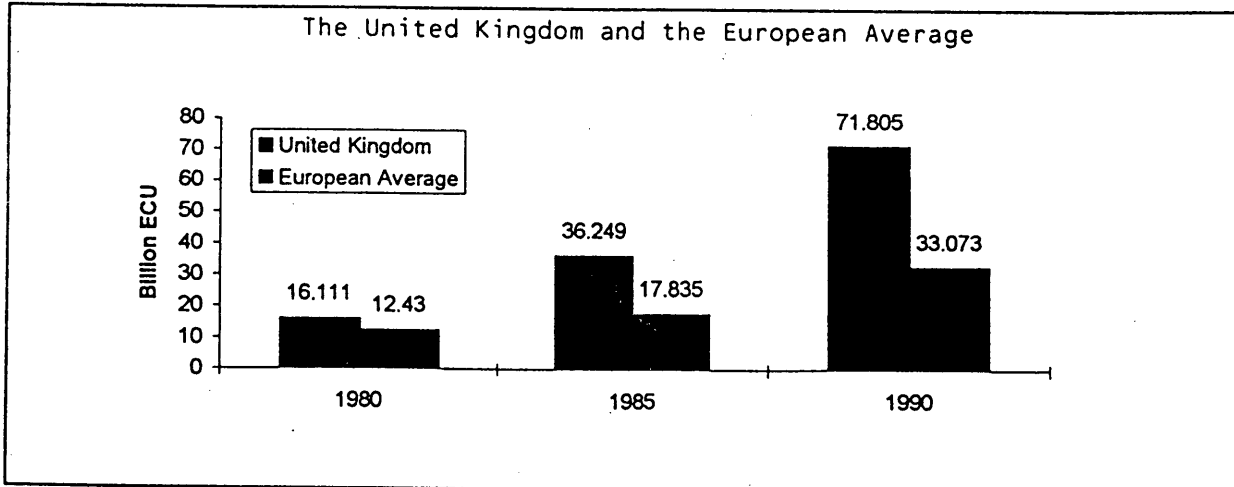
Total Outstanding Consumer Credit



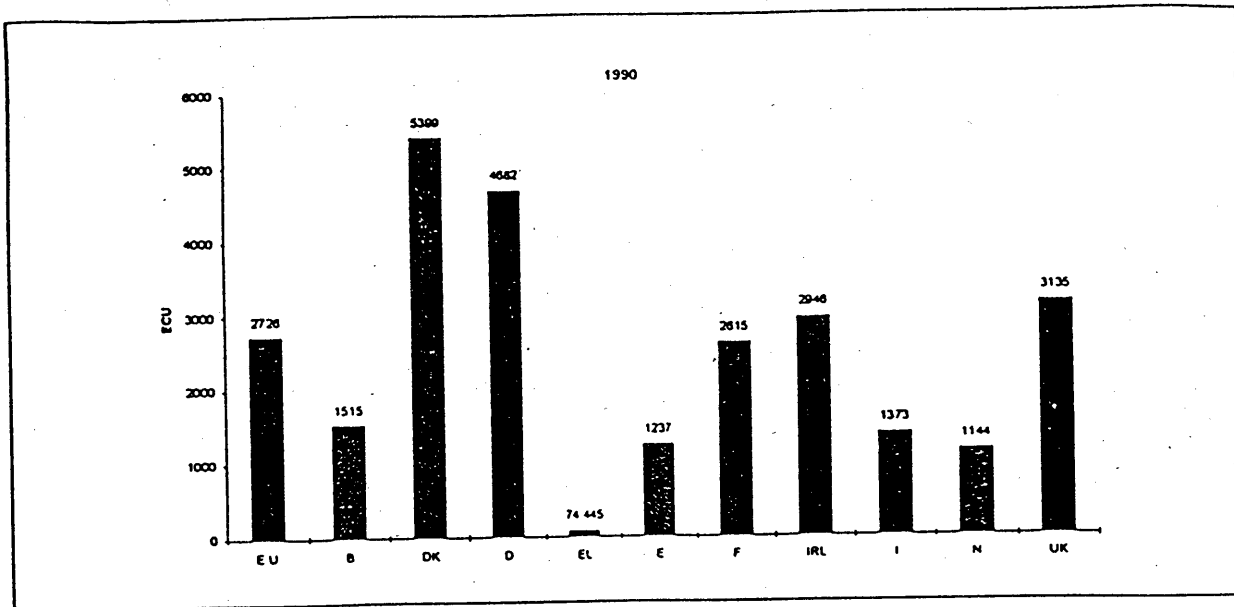
Consumer Credit per Household



Total Outstanding Consumer Credit



## Consumer Credit per Household



66. As is evident from the graphs on the preceding pages, there is a lack of complete data on consumer credit in Europe. While there are specific reasons for this situation in relation to certain countries, such as Luxembourg where the amounts are so low that separate figures are not kept, or Portugal where deregulation of the market was so recent (February 1994) that figures are not yet available, there are other, more general factors which contribute to the difficulties of obtaining comparable data from Member States. Due to the variety of different categories of credit-providers and different forms of credit available, together with the rapid development of the market in the course of the last decade, the Member States themselves frequently have no centralised system for the collection or distribution of such data. As a result, data on consumer credit is often not available to researchers. In addition, the use of differing criteria and methods of collection and evaluation often means that the data is not always comparable.

### B. The socio-economic context

67. Since the adoption of the Directive, consumer credit has been evolving rapidly in a constantly expanding market. The supply-side structure has changed with the emergence of new lenders, such as large distributors and card issuers, the growing involvement of banks,

which for long had neglected this sector, and the role of credit intermediaries. Consumer credit has grown in volume. In most countries, this growth has exceeded that of income and this has led to an increase in the percentage of household income spent on repayments.

68. The techniques used have been developed and diversified at all stages in the credit operation. Firstly, new forms of credit have emerged or expanded, such as revolving credit or advances on current account, formulas which are generally associated with payment cards. The past 15 years have seen a veritable explosion in the number of payment cards in circulation in Europe. This is one of the most striking phenomena. Other forms of credit, such as hire purchase, have remained in the doldrums. For example, the French statistics (Banque de France - Monthly Statistical Bulletin) show that hire purchase sales now account for only 26.9% of the total amount of credit.

69. Deregulation of the financial markets and the increasingly sophisticated and persuasive marketing of personal loans are mainly responsible for these developments.

70. As regards credit techniques as such, major developments include better risk assessment by the creditor and a wider spectrum of precautionary strategies. In granting credit, credit scoring is currently applied to evaluate the risk of the credit transaction - indeed, one characteristic of the consumer credit sector is the growing popularity of databases. These bases are prepared and organised in different ways depending on the Member State. This trend has triggered numerous discussions on the advisability and effectiveness of such bases and their compatibility with the principle of respect for privacy.

71. Credits are rarely granted without a particular guarantee such as a bond or assignment of salary. Finally, several creditors have reorganised their systems of handling complaints.

72. In the wake of the credit boom of the 80s, numerous countries have witnessed a growth in the number of consumers experiencing repayment problems. Despite the absence of detailed, regular and complete statistics relating to overindebtedness, it seems that by and large the number of debtors with payment difficulties is quite considerable, with an upward trend in many countries. Indeed, several countries have recently adopted or plan to adopt measures designed to deal with overindebtedness.

73. Cross-border credit has been growing more thanks to cooperation between financial operators than to particular relations between creditors and consumers. Recent years have seen a growth in the number of alliances, cooperative ventures, takeovers and mergers between different financial operators. On the other hand, the volume of credit transactions between consumers and foreign-based creditors does not seem to have increased very much. Currently, the major barriers are the absence of a single currency, the cost of cross-border transfers and the disparity of legislation relating to debt recovery.

### C. Payment Cards:

#### *Problems of definition:*

74. One of the major trends in consumer credit is the use of payment cards. This is why this dimension has to be clarified. Respondents were asked if legal definitions existed in their

countries for the following types of card: credit cards, debit cards, charge cards, withdrawal cards, cheque guarantee cards, prepaid cards and payment cards. The responses, and the results of previous surveys in this area, reveal serious confusion with regard to any discussion at European level of payment 'cards': the same term applies to very different products in different countries. The most common example given is that of VISA which, in the United Kingdom and Ireland, is a credit card but in France is usually a debit card, with no 'credit' facility.

### *Situation in the Member States*

75. In an area where, to quote one respondent, 'confusion reigns', the overwhelming majority of countries (11/ 17) have no legal definitions of these cards (Belgium, Germany, Greece, France, Italy, Luxembourg, Netherlands, Portugal, Austria, Finland and Sweden) or only partial definitions - Denmark (Danish Payment Card Act) , France (Article 57§1 Decree of 30.10.85), Ireland (Draft Law on Consumer Credit), Norway (Regulation N° 1205 of 05.10.89) and the United Kingdom (Article 2 Credit Cards (Merchant Acquisition) Order 1990, Article 2 Credit Cards (Price Discrimination) Order 1990, Consumer Credit Act). Some of the countries, however, do have 'practical' definitions, for instance those used in the banking field or defined by industry Codes of Practice. Norway is in the process of drafting definitions for cards in the forthcoming Act on Financial Agreements, and there may be definitions in Sweden as a result of a proposal for new legislation on payment systems (currently with the Payment Systems Committee).

76. Generally, despite the differences in terminology, the functions of the various types of cards do not vary from country to country:

- credit cards

A card which allows customers to buy goods and services on credit, and to obtain cash advances. On receipt of the bill, customers may pay in full or in part (with a specified minimum), and pay interest on outstanding amounts. Examples include VISA (UK and Ireland), cartes privatives (France)

- debit cards

A card which can be used as a means of payment and an ATM card (to obtain cash). The customer's account is debited immediately. Examples include BANCONTACT (Belgium), SWITCH (UK)

- charge cards

A card which allows customers to pay for purchases (and sometimes obtain cash advances). On receipt of the bill, the customer must pay the balance in full i.e. no credit is provided. Examples include DINER'S CLUB, AMERICAN EXPRESS, CARTE BANCAIRE (2/3) (France)

- withdrawal cards

A card which is used to obtain cash or other services from an ATM machine. Sometimes restricted to the (online) ATMs of the issuing bank.

- cheque guarantee cards

Use together with cheques, this card guarantees payment up to a certain amount. In some countries, restricted to certain types of cheques e.g. Eurocheques. In fact, this card has an identity function.

• payment cards

Any plastic card which may be used to pay for goods or services or to obtain cash i.e. most of the above

• prepaid cards

Not yet widely available for financial services, these cards will involve prepayment for goods/ services. Prepaid cards do not involve credit and therefore fall outside the scope of the 1987 and 1990 Directives on consumer credit. The most well known kind of prepaid card is the telephone card. This card is loaded only with telephone units - a prepaid card is loaded with a currency.

### *Perspectives/ Problems*

77. As many cards include facilities relating to a number of the above categories, and as new forms of such cards will appear in the future, any definitions which are chosen should be flexible in order to permit innovation.

### **Problems relating to the use of such cards**

78. The importance of cards, and their use, at European level lies in the continuing creation of the Internal Market. Free movement of the means of payment is a necessary corollary to the other freedoms guaranteed to consumers, without which the Internal Market can not function to the full advantage of all those involved. However, means of payment were in fact shown to be one of the barriers to the completion of this Internal Market<sup>15</sup> and, since 1990, have become a policy priority for the European Commission. This concerns not merely cross-border transfers (on which a draft Directive has been published), but also the cross-border use of cards (in situations where the consumer is himself present in another Member State and uses his card for payment, but also situations where he, without leaving his own State, uses his card to obtain goods/ services from or in another State). Electronic payments more generally<sup>16</sup> are also an issue, and two Commission Recommendations have been published on the subject.

79. Consumers have experienced problems with the use of some of the new forms of card which have appeared on the market. From the point of view of inter-operability of the various card systems, a consumer travelling to another Member States who wishes to use his ATM card may face several problems, the first of which is finding a machine which will accept his card. In addition, consumers may find themselves unable to withdraw more than a certain sum within a set period. Consumers who use their cards at home do not escape without problems either - increasingly, retailers are using 'dual pricing', whereby consumers paying by card are charged higher prices. This practice arises out of the relationship between the card-issuers and the retailers (i.e. the commission/ charges levied) and has been regulated in certain countries e.g. Denmark and Norway, where legislation guarantees that the retailer does not bear the cost of the use of the card. The issue is important for consumers in order that they know, in advance, the price of the good, regardless of the means of payment which they choose to use, and is particularly acute in cross-border situations.

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<sup>15</sup> *Making payments in the internal market* COM (90)447 final, 26.09.90

<sup>16</sup> *Europe could play an ace: the new payment cards* COM(86)754, 12.01.87

80. The discussion on the allocation of costs in regard to payment cards has triggered a debate on the involvement of traders in credit distribution. Historically, traders paid high commissions (5 to 10%) to the suppliers of credit cards for each transaction involving these cards. The argument was that the trader also benefitted from the operation because it enabled him to make a deal, and it was taken for granted that he should also foot part of the bill. The arrival of immediate debit cards turns this reasoning on its head. Some traders' representatives consider that credit is a private matter between the consumer and his bank and that therefore it should not affect the payment made to the trader. This fundamentally calls into question the allocation of costs in connection with the use of these cards.

81. Fraud is another aspect of payment cards which may raise problems for consumers. This arises where the consumer's card is stolen and used, with the confidential code in the case of certain cards. In addition, consumers are increasingly offered the facility of paying by credit card over the telephone. As this practice may leave the consumer open to risk of abuse, the Commission proposed to regulate this in the draft Directive on Distance Selling<sup>17</sup> which is currently under discussion.

82. Another problem which has arisen in relation to the use of cards for payment is that in certain countries such payments are revocable while in others they are not, and also the issue of secondary or subsidiary liability, as seen in Article 11 of Directive 87/102.

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<sup>17</sup> Amended proposal for a Council Directive on the protection of consumers in respect of contracts negotiated at a distance (distance-selling), COM(93)396 Final, 07.10.93

## V. EXISTING COMMUNITY POLICIES/ PROGRAMMES AFFECTING CONSUMER CREDIT

### A. Need for a Community Policy

83. Information for consumers is essential if they are to enjoy the benefits of the Single Market. For this reason, the Second Commission Three Year Action Plan in the field of consumer policy, *Placing the Single Market at the service of European consumers*, emphasises that information and improved concertation are priorities. The Sutherland Report<sup>18</sup> also emphasised the need for an information strategy and other measures to respond to consumer uncertainty and, similarly, the Commission Communication of May 1993<sup>19</sup> aimed to ensure greater efficiency in the dissemination of information on the internal market.

84. A lack of information on the part of the consumer places them at a disadvantage vis-à-vis other market operators, restricts competition and prevents freedom of choice. Only consumers with full knowledge of the range of products on offer will benefit from the advantages of healthy competition. Thus the fullest possible consumer information and education are important building blocks for the single market. This is particularly necessary in light of the sheer volume of changes in legislation, standards and procedures required in order to achieve the single market - the expected wider choice of goods and services on the market will in turn, create a growing demand for information.

### B. Situation in Member States

85. The different cultures and traditions of consumer organisation in the various Member States have led to different forms of consumer representation throughout the European Union. Different government departments have responsibility for consumer protection, ranging from the Ministries of Economic Affairs, Industry, Labour or Trade, to the Ministry of Health or Environment, with powers occasionally being shared with other Ministries or official bodies or with regional authorities. Still other countries have entrusted consumer policy and the protection of their interests to Ombudsmen or Consumer Institutes. In Spain and Portugal, the protection of the interests of consumers is enshrined in the Constitution.

86. In addition to the establishment of Government Ministries dealing with consumer affairs, consumer organisations have been founded in the Member States. In some states, the information provided by such organisations reaches a large audience, whether they contain the results of comparative test or general information for consumers. The number of organisations involved in consumer information in the different Member States varies greatly, from single institutions to dozens of organisations.

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<sup>18</sup> *The Internal market after 1992 - meeting the challenge*, 26 October 1992 - Second Three Year Action Plan 1993-95, COM(93)378 final, 28.07.93, para 24

<sup>19</sup> *For better coordination and strengthening of information and communication policy on the internal market*, 5 May 1993 - Second Three Year Action Plan 1993 - 95, COM(93)378 final 28.07.93, para 24

### C. Commission Assistance for national projects

87. While the Commission's general information and education programmes incorporate consumer policy aspects, the Commission has also taken action in specific fields in order to better inform consumers. These have included regulations on labelling of products, transparency of procedures (particularly in the field of financial services) and support for comparative testing and price surveys which help the consumer to obtain an overall picture of the market. The Commission has encouraged media coverage of consumer problems and rights, has supported consumer organisations' training and information programmes and has supported the establishment of consumer information and advice centres in cross-border areas, administered by consumer associations and/ or local authorities. The number of such centres is to be doubled over the next three to five years. As part of the follow-up to the Green Paper on Access to Justice, a pilot project has been established, financed by the European Commission, to follow cross-border consumer complaints. Sixteen consumer organisations are involved in bilateral centres in Belgium, Denmark, Germany, Spain, France, Italy, Luxembourg and Portugal.

88. An example of Commission-supported public relations / media campaigns is the WORLDCOM project (1992-93), a campaign to inform consumers about the rules which would affect them as a consequence of the completion of the Internal Market, concentrating on 10 subject areas. Consumer credit was one of the ten topics<sup>20</sup>. Comprehensive information packs were prepared on each of these subjects and disseminated through briefings in each Member States (usually by a member of the European Parliament), press releases and background notes for editors, and leaflets for dissemination to the general public. Experience from such campaigns and other ongoing efforts to generate information indicates that the public is generally receptive to messages about the benefits of the Single Market and their rights, but that the message must continue to be disseminated. To this end, projects are being developed for an advertising campaign in the mass media throughout the Union, in order to communicate the message directly to a mass audience. As consumers become more aware of their rights, there will be increased demands that their national governments implement the relevant EU legislation, this indirectly ensuring stricter compliance with such rules.

89. Consumer credit is but one of a number of fields in which the Commission is pursuing this policy of increased information for consumers. As well as the projects mentioned above, the Commission has also assisted national and Europe-wide projects dealing specifically with consumer credit.

#### The development of CALS & CADAS

90. A project was begun by Institut für Finanzdienstleistungen (IFF) of Hamburg in the mid-1980s, with the backing of the European Commission and in cooperation with other organisations, to develop an international computer/ database system presenting legislation and case law on consumer credit in a format which would allow debt counsellors and consumer advisers in various countries to check the financial situation of a consumer, to perform

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<sup>20</sup> Travel and Tourism, Product Safety, Medicines, Cosmetics, Food labelling, Advertising, Unfair Contract Terms, Banking, Insurance and Consumer Credit



calculations on different forms of consumer credit and to check the soundness of claims made against consumers. This project produced several programmes and databases, including

- CALS (Computer Assisted Loan Services) an expert system for credit and debt counselling
- CADAS (Computer Assisted Debt Advice Services) a budget and financial counselling service, developed from debt counselling services

91. With European Community funding and in cooperation with the German Federal Justice Ministry, advice structures in German consumer advice centres were developed between 1983 - 1987. These centres began to use computers to collect legal information on jurisprudence and legislation, with a view to its distribution; to help consumers to calculate their finances and credit situation and to gather information from consumers in order to conduct statistical evaluation as part of a campaign to reduce usurious rates and practices.

92. As a result of contacts with other European consumer organisations which revealed differing levels of indebtedness and government involvement in different Member States of the European Community, it was decided to develop a common action to establish protection for consumers on a European level, in relation to consumer credit. This cooperation began in 1990, with the support of the Consumer Policy Service of the European Commission, with the extension of the CALS and CADAS programmes to France and Belgium. This cooperation involved a variety of organisations and institutions, including the Région Wallonie and Centre Droit de la Consommation (Belgium), the Institut National de la Consommation (France) and the Arbeitsgemeinschaft der Verbraucherverbaende (Germany). Since consumer protection is organised in different ways in different Member States, it was decided to develop parallel and identical forms and structures in the different countries. The aim of this cooperation was to reinforce the efforts of existing organisations working in the field and to coordinate them on an international level, to develop structures based on the experiences of other Member States and also to collect data in the different Member States.

93. After the adaptation of the programmes to the French and Belgian legal and administrative systems, the scheme was extended to the United Kingdom in 1992. Birmingham Settlement Money Advice Services (BSMAS) worked with IFF to adapt CADAS to UK conditions, translating and rewriting as necessary (September 1992 - September 1993), while in Ireland the Free Legal Advice Centres (FLAC) worked on the compilation of a database of Irish legislation and case law on consumer credit (September 1992 - May 1993)<sup>21</sup>. In the second phase of the project, Birmingham Settlement aims to integrate the CADAS and CALS software, as the two packages are complementary, and to assess appropriate UK welfare benefits calculation software in order to assess the extent to which that software can be integrated into CADAS. The system is to be tested in three pilot centres in order to assess the practicalities involved in the use of CALS and CADAS and their wider application.

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<sup>21</sup> Phase 2 of the Irish project has been delayed pending the enactment of the Consumer Credit Bill, presently before the Dáil, which will transpose Directive 87/102 and Directive 90/88, as the system will need substantial updating to take account of these developments

### Application of CALS and CADAS

94. The main functions and areas of application of CALS and CADAS are with regard to information and calculations. In relation to any consumer credit agreement, CALS can calculate and verify the amount of credit and can verify the legality of the credit agreement according to the relevant legislation. APR is calculated by the method used in Directive 90/88 (or, in the case of Germany and France, by the different national methods presently in use). In addition to a database function (texts and commentaries on relevant legislation), CALS may also be used to rationalise repetitive work such as form (standard) letters, enables comparisons and analysis to be carried out and incorporated into such texts, and enables the formulation of instalment plans, both simplifying and speeding up the advice process. By gathering empirical data from those who use the system, CALS also becomes a storehouse of information on the usual practices and strategies of lenders and the most common problems experienced by consumers. This information should lead to increased transparency on the market by revealing patterns of lenders' behaviour, helping to equalise the relationship between consumers and lenders.

95. CADAS can be used to check interest rates, thereby helping consumers to avoid extortionate credit agreements, but its main role is in managing household budgetary data in order to prevent debts, in enabling households not to unwittingly overcommit themselves, and in debt management, by enabling the user to consider a number of possible repayment plans. It is also of assistance in the preparation of an 'economising', stable household budget, and in providing information on how to apply for certain welfare benefits. As with CALS, the data collected may be collated for statistical purposes, and may be used as a tool to lobby for changes in a Europe-wide credit market.

#### **D. Europe-wide projects - FIS International**

96. There are plans to extend the CALS and CADAS systems to other Member States and also to connect existing national systems, with central coordination by IFF in Hamburg, to enable cross-border situations to be checked. The originators of the projects envisage the reinforcement of international cooperation, increased exchange of national information and the implementation of common actions on the basis of the common information system. To this end, the European Commission is supporting the FIS (Financial Information Services System) International project (Phase 1 February 1994 - February 1995) under IFF coordination.

97. IFF developed a database, originally for Germany alone, containing information from diverse sources (legislation, jurisprudence, press and journal articles, published rates...). As CALS and CADAS were extended to other countries, they in turn began to gather such information in databases and the FIS (Financial Information Services System) International project aims to create and coordinate a databank of information on the financial services sector and indebted consumers. IFF obtained Commission funding for the first phase of the project (February 1994 - 1995), to cover their coordinating role. Other participating organisations are INC (France), the Office of Consumer Affairs (Ireland), Recht & Beleid, Leiden (Netherlands), Birmingham Settlement (UK), Arbeiterkammer Wien (Austria) and CDC (Belgium).

98. In this report we have discussed the CALS-CADAS example to show how information, aid and advice for consumers in the domain of consumer credit can be realised. It is only an example, and other very effective aid and counselling systems exist in several Member States.

99. In the United Kingdom, a pilot scheme was launched in March 1993, in cooperation with the credit industry, by West Yorkshire Consumer Credit Counselling Service (CCCS) in Leeds. The scheme provides free and independent advice to people with debt problems, using trained counsellors and a software system for calculation of repayments. All negotiations with creditors are handled by the CCCS, and customers who agree to a Debt Management Programme make a single monthly payment to the CCCS which then allocates the agreed proportions to the creditors. Modelled on a US and Canadian system, (in the USA and Canada, money advice is largely funded by creditors), the service aims to be self-financing through levying a charge on the creditor, of 15% of the managed reimbursement, in order to fund the counselling service. Supported by Barclaycard, GE Capital, Registry Trust, CCN and Equifax, the system has been welcomed by the Office of Fair Trading, as well as most of the larger creditors and trade associations. To date, over 94% of customers have maintained regular payments and there are plans to franchise the system throughout the United Kingdom.

## VI. THE OPERATION OF DIRECTIVE 87/102

### A. SCOPE

#### A.1 The consumer

##### The principle

100. The consumer is defined as "a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession".

101. This definition comprises two cumulative criteria: the consumer must be a *natural person* acting for purposes *outside his profession*.

102. The same definition had also been used in other Community texts, such as Article 13 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters<sup>22</sup>, Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations<sup>23</sup>, and the Directive of 20 December 1985<sup>24</sup> to protect the consumer in respect of contracts negotiated away from business premises.

103. This definition gives rise to a difficulty in interpretation: can the consumer as covered by the Directive include persons who are acting both for private and for professional purposes, such as persons who use a motor car both to ferry their children and in the course of business?

104. The draft proposal for a Directive on consumer credit<sup>25</sup> spoke of "a natural person not acting *predominantly* in a commercial or professional capacity". The Giuliano and Lagarde report on the Convention on the law applicable to contractual obligations (which has the same definition of consumer as the Directive) states that "if such a person acts partly within, partly outside his trade or profession the situation only falls within the scope of Article 5 if he acts primarily outside his trade or profession"<sup>26</sup>

105. The Court of Justice of the European Communities has ruled on several occasions in regard to the notion of consumer. In *Di Pinto*<sup>27</sup>, the Court held that a trader may claim that the Directive to protect the consumer in respect of contracts negotiated away from business premises is applicable only "if the transaction in respect of which he has been canvassed lies outside his trade or profession". In *Shearson Lehman Hutton*, the Court held that the term consumer applies only to final private consumers who are not involved in commercial or professional<sup>28</sup>. Following this logic it would appear that the need for protection

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<sup>22</sup> OJ No C 189, 28.7.90, p. 2

<sup>23</sup> OJ No L 266, 9.10.80, p.1

<sup>24</sup> OJ No L 372, 31.12.85, p. 31

<sup>25</sup> OJ No C 80, 27.03.79, p. 4

<sup>26</sup> OJ No C 282, 31/10/80, p.23

<sup>27</sup> Case C-361/89, ECR 1991, I-1189

<sup>28</sup> CJEC, Case C-89/91, ECR 1993, I-139

disappears once the consumer is partly acting with mixed objectives<sup>29</sup>. This interpretation of the term "consumer" is also that of the Directive on unfair terms in consumer contracts<sup>30</sup>. Article 2b defines the consumer as "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession".

#### Application by the Member States

106. A variety of solutions have been adopted: certain Member States have transposed the text verbatim, whereas others have developed or expanded the circle of beneficiaries. Certain Member States extend protection to legal persons (Denmark, France). Credits with mixed objectives are not always excluded.

107. The definition in German law includes persons who enter into a credit agreement with a view to launching a business. The Danish law applies to credits which are mainly intended for non-professional purposes (Article 1). In the Netherlands, protection is extended to all natural persons, except for credits relating to goods used exclusively for professional ends. In Belgium, the law will not apply whenever private use is secondary to professional use. French law excludes only agreements which serve to finance a professional activity. In the United Kingdom, there are proposals to remove all business lending and hiring from the scope of the 1974 Consumer Credit Act, thus restricting the scope of the legislation to the consumer who is an individual, a sole trader or a partnership<sup>31</sup>.

#### Perspectives

108. The various Community texts define consumers in a restrictive manner, on the basis of the case law of the European Court of Justice. The Member States have a far broader definition, which radically alters the scope of their legislation. Without going so far as the Member States that apply their legislation to small businesses as well, the Commission is considering an extension of the scope to consumer credits whose purpose is to launch a business.

### **A.2 The creditor**

#### The principle

109. A creditor is defined as a natural or legal person who grants credit in the course of his trade, business or profession, or a group of such persons.

#### Application in the Member States

110. Most of the Member States have taken over the definition contained in the Directive. France specifies that the professional's credit transactions must be "customary" on his part.

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<sup>29</sup> See also paragraph 344 *infra*

<sup>30</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ No L 95, 21.4.93, p.29

<sup>31</sup> *Consumer Credit Deregulation: A review by the Director General of Fair Trading of the scope and operation of the Consumer Credit Act 1974* (OFT, London, June 1994), pp. 28-34

This would appear to restrict the scope of the Directive, contrary to its spirit, because the definition in the Directive in no way limits the scope to protection only of credit transactions which are customary on the part of the creditor. The Danish law applies to credits granted by non-traders provided the contract has been drawn up or concluded by a professional intermediary.

### **A.3 The credit agreement**

#### *The principle*

111. The credit agreement is defined as an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation.

112. The clear objective of the Directive is to encompass all forms of consumer credit, no matter how defined.

#### *Application by the Member States*

113. Most of the Member States have adopted the definition contained in Article 1(2) (c) of the Directive. However, German legislation applies only to credit agreements and not to the promise, while the Directive refers explicitly to cases in which the creditor commits himself to granting credit.

### **A.4 The exemptions provided for in the Directive**

#### **A.4.a Agreements for the provision of services**

#### *The principle*

114. Article 1 (2) (c), second sentence, excludes from the scope of the Directive "agreements for the provision of a continuing basis of a service or a utility, where the consumer has the right to pay for them, for the duration of their provision, by means of instalments...".

115. Agreements covered by the exemption are for example those which provide for payment of an insurance premium staggered over a 12-month period, contracts for the supply of energy, contracts relating to tuition fees or charges for the use of public transport to be paid in instalments.

#### *Application by the Member States*

116. Most countries have included this exemption; only Germany and France have not mentioned it explicitly in their legislation.

### Perspectives

117. The application or non-application of the Directive to services of this type gives rise to various problems:

- a) in countries which have transposed the Directive as is, suppliers of services such as marriage bureaux or maintenance firms consider that their services are exempt;
- b) the Cor de Cassation in France has ruled that payment of tuition fees in instalments is not a credit transaction, although the French law applies to "sales or provision of services whose payment is deferred, staggered or in instalments" (Article 2 (2) of the Law of 10 January 1978 as amended by the Law of 23 June 1989).

118. These problems raise the question as to what constitutes the essence of a credit transaction. What distinguishes a credit transaction from a spot transaction is the existence of a time lag, namely the time that elapses between the advance accorded by the creditor and repayment by the borrower. Following this reasoning, the staggered payment of fees to lawyers, architects or builders is not considered to be a credit transaction, since each payment corresponds to an actual performance. When the cost of a service consists of a lump sum whose payment is staggered over time, the question as to whether it is a credit transaction or not is not easy to resolve.

#### **A.4.b Real estate credit**

##### The principle

119. The Directive does not apply to credit agreements intended for the purpose of acquiring or retaining property rights in land or in buildings or for the purpose of renovating or improving a building (Article 2 1). Credit agreements or agreements promising to grant credit, secured by mortgage on immovable property, insofar as these are not already excluded under Article 2.1, may be exempted from the application of the provisions of Article 4 and of Article 6 to 12 (Article 2.3). However, Member States may exempt from the provisions of Article 6 to 12 credit agreements in the form of an authentic act signed before a notary or judge (Article 2.4).

##### Application by the Member States

120. In most Member States consumer credit law does not apply to real estate credit secured by mortgage. However, in several Member States consumer credit law partly or wholly applies to real estate credit earmarked for renovating or improving a building (Belgium, Denmark, France, Luxembourg, the Netherlands, the United Kingdom). Several Member States have specific legislation relating to mortgage credits. In the United Kingdom there is the specific problem of consumer credits secured by mortgage. This type of credit can constitute a trap for consumers.

##### Perspectives

121. Different sets of rules may apply to one and the same operation, namely the financing of the purchase or renovation of a building, depending on particular circumstances in

individual countries or even within a given country. Given this diversity, a minimum of Community harmonisation in regard to mortgage credits and real estate credit might not be a bad idea. If the consumer finances renovation work with the aid of an earmarked credit, the Directive does not apply. But if it is financed by a personal loan it does apply. This situation is inconsistent. Purchasing a dwelling is the most important consumer act in a consumer's whole life. The paradox is that Community legislation exists in regard to consumer credit but not in regard to real estate credit. The Commission is considering expanding the Directive's scope to loans for building work not secured against a mortgage and is looking into the advisability of a Directive relating to mortgage credits.

#### **A.4.c Hiring agreements**

##### The principle

122. The Directive does not apply to hiring agreements except where these provide that the title will pass ultimately to the hirer.

##### Application by the Member States

123. In several Member States the legislation also applies to contracts with a purchase option.

124. The wording of this article has created problems for certain Member States because in many countries it is not clear in law that the title has to be transferred to the hirer until this has in fact taken place. For example, this applies to hiring with a purchase option. Until the purchase option has been exercised, nobody knows whether the title will be transferred. Hence the wording of this article is out of touch with economic reality.

##### Perspectives

125. Actual practice and case law in countries which are most advanced in this domain show that hire-purchase arrangements are generally such that the value of the bailed good depreciates to zero over the duration of the contract. If a vehicle has no economic value at the end of a hire-purchase contract, the difference between purchasing the property and non-purchasing thereof is practically non-existent. This is why it is necessary to remove the exemption contained in Article 2 (1) (f), in order to cover contracts with a purchase option.

#### **A.4.d Free credits**

##### The principle

126. The Directive does not apply to credits granted without any charge. Payment of interest is a characteristic of credit agreements but is not a *sine qua non*.

##### Application by the Member States

127. Several Member States have not included this exemption (Denmark, France, Belgium, etc.) and also regulate free credit. Likewise, advertising of credits of this type is regulated in several Member States.



## Perspectives

128. Free credit has long been an apple of discord. Opponents point to the unfair and misleading nature of this advertising ploy, arguing that there is no such thing as a free credit. Like all products, credit has its price. It is dangerous to let the consumer believe that credit can be had for nothing. The attractions of interest-free repayment charges may lead consumers deeply into debt. Since the seller will recover the cost of his credit via the selling price, it is unhealthy to penalise clients who save first and pay cash down.

129. The advocates of free credit insist on issues of principle: if the credit is truly free, why oppose a practice which benefits the consumer? A ban would involve discrimination vis-à-vis other advertising techniques. National positions differ on the issue of free credit. The debate must go on and hence any Community initiative in this sphere would be premature.

### **A.4.e Opening of credit lines**

#### The principle

130. The Directive does not apply to credit granted in the form of advances on a current account (Article 2(1)(e)) by a credit institution or financial institution, other than on credit card accounts. In the case of overdrafts, certain information must be provided to the consumer (Article 6):

- the credit limit, if any;
- the annual rate of interest and the charges applicable from the time the agreement is concluded and the conditions under which these may be amended;
- the procedure for terminating the agreement.

131. This information may be communicated orally, but must be confirmed in writing. If the annual rate of interest is changed during the contract period or if the charges are altered, the consumer must be informed forthwith. This information may be given in a statement of account or in any other manner acceptable to the Member States.

132. In the case of tacitly accepted overdrafts extending beyond the period of three months, Article 6 (3) of the Directive provides that the consumer be informed of the annual rate of interest and the charges applicable and of any amendment thereof. The Directive on unfair terms in consumer contracts<sup>32</sup> imposes further obligations on the parties involved in credits of this type. Point 1 (j) of the Annex to this Directive outlaws any terms enabling the seller or supplier to alter the terms of a contract unilaterally without a valid reason which is specified in the contract. However, point 1 (j) is without hindrance to terms by which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately (point 2 (b)).

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<sup>32</sup> Footnote 30 *supra*

133. A credit line is a banking innovation whose availability to consumers has progressively been extended in tandem with the growth in consumer credit. This type of credit may be defined as providing the borrower with a permanently available sum of money (possibly limited in time), which can be renewed.

134. One of the essential characteristics of a contract for a credit line is that the consumer may draw on the credit in accordance with his needs. Flexibility in use and repayment explains why this facility has become so popular.

135. Article 6 of the Directive applied to advances on current accounts other than credit card accounts, which were governed by the stricter rules of Article 4. The application of the Directive to credit lines not covered by Article 6 has not always been satisfactory. This type of credit is available in many variants and goes under many different names: revolving credit, permanent credit, renewable credit, free credit, etc.; it may be accompanied by a bank card, a client card or a multi-function card; a time limit may or may not be fixed, there may be requirements concerning periodic repayment, etc. In an earlier chapter (Chapter IV) we examined the range of possibilities of this type of credit.

#### Application by the Member States

136. In view of the importance of the issue it is useful to take a look at how the Member States have transposed these articles of the Directive. In Germany the provisions have been eased for credit agreements under which a credit institution gives the consumer the right to an overdraft up to a given sum; in this case there is no need for a written contract and obligatory particulars, if no charges other than interest are billed and if they are not required for a period of less than three months. However, the consumer must be provided with certain information before concluding such a contract (the credit ceiling, the rate of interest at the time of conclusion of the contract etc.). With regard to overdrafts for a period exceeding three months, the consumer must be informed of the annual rate of interest, charges, as well as any changes thereto; this may take the form of a statement of account.

137. In England, the Director General of Fair Trading has the discretionary power, under Section 74 of the Act, to exempt certain types of agreements from the provisions of the Act. The main purpose of this is to exempt overdrafts on current accounts from the documentation requirements, and there are proposals to further widen this discretion to cover other categories of agreements<sup>33</sup>. In the Netherlands, advances on current accounts are not covered by the law if they do not exceed a three-month period and if after this date the bank requires repayment.

138. Belgian law exempts credit lines which are repayable within a three-month period for amounts less than 1 200 ECU. Specific rules apply to credit lines. Special rules also apply in France governing revolving credit granted in the form of an advance on current account or credit cards. The courts have ruled that if the rate of interest is not specified (tacit overdraft), the rate to be applied is the legal rate. Hence as a result of case law the rules are more stringent than those set out in the Directive. In Portugal, if the overdraft may be extended for a period of more than three months, the consumer must be informed of the

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<sup>33</sup> *Consumer Credit Deregulation: A review by the Director General of Fair Trading of the scope and operation of the Consumer Credit Act 1974*, (OFT, London, June 1994) p. 53-57

annual rate of interest and the charges applicable, as well as the conditions under which the rate of interest and charges may be modified. The Danish Consumer Credit Act applies to credit lines.

139. In Germany, credit cards are not expressly covered by the law, but neither are they excluded. In the case of credit cards where the consumer has the option of repaying the debt in instalments, in addition to the contract concerning the car as such, a credit agreement is concluded which comes within the scope of the law. Hence only credit cards which merely offer the client the opportunity of deferred settlement are unaffected by the law. In the United Kingdom, application of the Consumer Credit Act to credit cards depends on how the card may be used (client cards, bank credit cards, payment cards etc.). In the Netherlands, such cards are subject to the law if they offer a credit accommodation. Otherwise the law does not apply to them. In Greece, credit cards are considered to be a "subcategory" of consumer credit and credit may be granted up to a limit of 110 ECU. In Denmark, the Payment Cards Act applies to credit cards.

### Perspectives

140. Several difficulties must be pointed out. If a purchase is financed via a credit line, there are two (or more than two) distinct operations: on the one hand, the contract for a credit line and, on the other, the use made thereof by the consumer, which may be repeated.

141. These two operations - the conclusion of a contract for a credit line and the purchases or withdrawals made - are not necessarily close in time. For example, a consumer may apply for a credit card and not use it for two years. Hence, in such cases it is very important to know at what stage the information must be provided.

142. Since the Directive links the information to the credit agreement, it is necessary to know whether, legally speaking, opening a credit line constitutes the only credit agreement or whether each use of the credit gives rise to a distinct credit agreement. The answer depends on the legal tradition in each Member State. Hence, in France and Belgium it has long been recognised that opening a credit line constitutes a credit agreement (departure from the principle of the real character of a loan in the Civil Code) and that purchases and withdrawals made in this context are only in performance thereof. Hence, application of the Directive's rules means that the consumer must be informed at the time when the credit line is granted.

143. By contrast, in Germany the credit agreement depends on the withdrawal of the money that is lent. Hence, every purchase or withdrawal must be considered as a credit agreement in its own right. As use of the term "if possible" highlights, German legislation does not specify the way in which the information must be communicated each time the credit facility is availed of.

144. Hence, the well-nigh literal transposition into domestic law of the definition of a credit agreement used in the Directive leads to fundamental divergences. Currently, the volume of credit lines is growing rapidly. Will this lead to a situation in which a duly informed young consumer could enter into one or more credit line agreements, accompanied by cut-price credit cards and favourable conditions, for an unlimited period, but would not have to receive any information thereafter?

145. To address this risk, more rights should be granted to the consumer at the time he uses the credit. Currently, the only provisions adopted concern changes to the rate of interest. However, one of the big snags is the lack of information on the cost of credit. To render renewable credit attractive, creditors (such as car dealers and hi-fi vendors) allow the borrower to choose the monthly repayment instalment. This will therefore form part of the borrower's monthly budget. Unfortunately, the customer may not necessarily know the date on which the repayments come to an end, given the way the instalment is set. Hence, revolving credit creates the illusion that one can shoulder debts more easily because of the low monthly repayments.

146. The Directive is also silent on the relationship between the opening of a credit on a current account and the use of a credit card. The most widespread card system in Europe involves direct access via the card to the current account and the attached credit line. The Directive does not exempt credits arising from use of credit cards but only those under which the credit must be repaid within a period not exceeding three months.

147. This type of system escapes control in two ways:

- a) either the legislator considers that a card is not a credit card unless the credit to which it provides access is part of the same agreement; in this case most cards are de facto exempt from the rules or
- b) because credits obtained in this way must be repaid within three months.

148. Netherlands law has taken the reality of such credits into account, which are often repayable in less than three months: the bank must choose between the recovery of the amount due after three months and extension of the credit. In the latter case, the credit fully comes within the scope of consumer credit law. Most national laws restrict themselves to requiring that the credit repayable within a period of less than three months.

149. Given the development of new forms of credit which encourage consumers to get into debt and indeed are increasingly associated with overindebtedness, moderation is called for, while ensuring that such options remain attractive.

150. This is why the Commission proposes specifying the rules governing the use of credit cards, while retaining Article 6 in its present form, which does not cover credit lines linked to a card. These changes should concern the information concerning costs, criteria for determining the minimum amounts to be reimbursed and the repayment schedule. The links between the purchase agreement and the credit line agreement should also be analysed (in relation with Article 11 and the discussion concerning the cooling-off periods).

#### **A.4.f Contracts that are exempted as a function of their value (Article 2 (1)(f))**

##### The principle

151. Article 2 (1)(f) exempts credit agreements involving amounts less than 200 ECU or more than 20 000 ECU. Otherwise, as regards the lower limit, the red tape overhead would make it very difficult to obtain small loans. Credits for large amounts are considered more as credits for investments in durable goods than as consumer credits. Since the danger of

impoverishment or thoughtless commitment on the part of the creditor is smaller, protection is also not so vital.

152. Article 13(2) of the Directive states that the Council, acting on a proposal from the Commission shall, at five yearly intervals starting in 1995, examine and, if necessary, revise the amounts in the Directive in the light of economic and monetary trends in the Community.

In order to take account of inflation since 1987, the limits in Article 2(1)(f) would require adjustment of the bands to 260 and 26000 ECU.

#### Application by the Member States

153. There are a great variety of national provisions. Many Member States do not lay down a financial floor or ceiling or stipulate amounts which are different to those in the Directive, or only partly submit these credits to their law. Certain states set higher maximum or lower minimum limits while others, such as Ireland (draft law), Austria and Finland choose not to have either minimum or maximum levels. In Finland, certain national provisions do not apply to loans under 200 ECU and there are special rules on early repayment of amounts over 20,000 ECU. Other states chose no minimum (Belgium, Netherlands) or no maximum level (Denmark).

154. Of the respondents, only the French and Luxembourg authorities see no call for reform<sup>34</sup>. All the others felt that some reform was necessary. In some cases this was said to be because of inflation and devaluation (Greece), or in order to maintain the real value of the limits set in 1986. To date, only the United Kingdom has suggested actual changes to the amounts laid down in the Directive<sup>35</sup>, proposing the increase of the upper limit for small agreements from £30 (40 ECU) to £150 (200 ECU), and of the upper limit from £15,000 (20,000 ECU) to £25,000 (c. 30,000 ECU) in order to revalorise the levels set in the 1974 Consumer Credit Act.

155. In the majority of cases, it was felt that the maximum limit, in particular, should be increased or removed since there are more and more examples of goods which are purchased on credit and whose price exceeds the existing upper limits. It is therefore proposed that the limits should be, at a minimum, revised upwards, as proposed by Belgium, Netherlands, Portugal, the United Kingdom and Norway, or preferably removed altogether as has been done by Denmark, Ireland (draft law), Austria and Finland and proposed by Greece, some French respondents and Sweden.

#### **A.4.g Contracts excluded as a function of their duration**

##### The principle

156. Short-term credit agreements, i.e. contracts that provide that the consumer must repay the credit within a period not exceeding three months or by a maximum number of four payments within a period not exceeding 12 months, are exempted.

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<sup>34</sup> The French Association of Banks has called for the "removal of Articles 2 and 4"

<sup>35</sup> *Consumer Credit Deregulation: A review by the Director General of Fair Trading of the scope and operation of the Consumer Credit Act 1974*, (OFT, London, June 1994)

### Application by the Member States

157. Most of the Member States have not transposed this exemption as it stands: some have ignored it, while others have modified it.

158. The Commission proposes examining whether the derogation relating to agreements concerning credits repayable in four instalments is of interest to the Member States which have included it in their national legislation.

#### **A.4.h Loans at advantageous rates**

##### The principle

159. A Member State may, in consultation with the Commission, exempt from the application of the Directive certain types of credit which fulfil the following conditions:

- a) they are granted at rates of charge below those prevailing in the market and
- b) they are not offered to the public generally.

160. The purpose of this provision is to allow the Member States to exempt from the application of the Directive certain forms of credit which are of a non-commercial nature.

161. The conditions mentioned in the Directive in this connection are cumulative. Moreover, the text of the Directive does not refer to the rate of interest but to the rate of charge.

### Application by the Member States

162. Three countries have opted for the exemption of certain types of credit at advantageous rates: Belgium, the Netherlands and Germany. Belgian law gives the executive the latitude of not applying certain provisions in the case of credits granted at Annual Percentage Rates of Charge (hereafter: APR) which are lower than those prevailing in the market, provided they are not offered to the public generally. A recent Royal Decree exempts from certain provisions credits which have a social objective and which are granted by associations of persons or public institutions of a non-profit-making nature, and with annual percentage rates of charge which are lower than those prevailing on the market and are not offered to the public generally<sup>36</sup>.

163. The German and Netherlands laws also contain this exemption. The Netherlands law exempts contracts concluded at a rate of interest which does not exceed the legal rate of interest and is not offered to the public in general, while the German law exempts only credit agreements concluded between an employer and his employee at a rate of interest lower than that prevailing in the market. The Irish bill contains a provision similar to the German one.

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<sup>36</sup> Royal Decree of 05.09.94, Moniteur Belge, 17.09.94, p. 23639

## B. ADVERTISING

### The principle

164. The Directive contains only one obligation: the annual percentage rate of charge must be included, by means of a representative example if no other means is practicable, in any advertisement in which a rate of interest or any figures relating to the cost of the credit are indicated.

### Application by the Member States

165. Numerous Member States have introduced specific rules. Because the decision to avail of credit is partly conditioned by advertising, the national legislators generally favour more informative advertising, either by mandating that certain information be provided or, on the contrary, by introducing certain prohibitions.

166. In Belgium, France and Luxembourg, certain particulars must be included: the form of credit to which the advertising relates, particular or restrictive conditions to which the credit may be subjected etc. The content of advertising is regulated in some countries (Belgium, France, United Kingdom). Hence, for example, three Member States regulate advertising for free credit. The Irish bill bans advertising for credit targeted at minors.

### Perspectives

167. In certain Member States it seems that advertising by credit intermediaries does not always comply with the legislation in force.

168. The specific rules adopted by the Member States are designed more to prevent unfair advertising. The Directive of 10 September 1984 on misleading advertising<sup>37</sup>, as initially drafted, contained a section on unfair advertising<sup>38</sup>. Unfair advertising was defined as advertising that "influences or is likely to influence a consumer [.....] in any other improper manner". The focus was on advertising that discredited competitors in any form, the unfair appeal to sentiments of fear, discrimination on the grounds of sex, race or religion, and exploitation of the credulity and similar "psychological weaknesses" of the consumer. The section on unfair advertising was abandoned during the discussions. However, one of the recitals of the 1984 Directive states that "at a second stage" unfair advertising should be dealt with on the basis of appropriate Commission proposals. This second stage has not yet been "constructed". The concept of unfair advertising is to be found in certain Community texts. Hence, Article 16 of the Directive on cross-border television<sup>39</sup> is a model application of this notion with regard to a particular category, in this case minors. In the credit field the fairness of certain forms of advertising may certainly be called into question, such as ads which encourage the consumer to live on the never-never or pander to such needs, ads which

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<sup>37</sup> OJ No L 250, 19.09.84, p. 17

<sup>38</sup> OJ No C 70, 02.03.78, p. 4 and the amended proposal, OJ No C 194, 01.08.79 p.3

<sup>39</sup> OJ No L 298, 17.10.89 p. 23

emphasise the easy, rapid or free nature of the credit, advertising which employs such turns of phrase as "accepted even if refused elsewhere", "even if unemployed", etc.

169. The Irish bill prohibits advertising for credit targeted at minors. A similar rule applies in the United Kingdom. In Austria, the public authorities and the banking sector have drawn up a code of good conduct relating to advertising, according to which Austrian banks abstain from encouraging young people to get into debt and to avail of overdraft facilities.

170. In a similar vein, several Member States regulate certain trade practices which exploit the consumer's vulnerability, such as:

- the ban or regulation of doorstep selling and telephone canvassing for credit transactions
- the ban on unsolicited dispatch of credit devices. This rule is in line with the Recommendation of 17 November 1988<sup>40</sup> concerning payment systems, and in particular the relationship between card-holder and card issuer, point 5 of whose annex stipulates that "no payment device shall be dispatched to a member of the public except in response to an application from such person".

171. In November 1993 the Belgian Presidency organised a colloquium on "The young European consumer: responsible actor or vulnerable target". The conclusions focused particularly on unfair advertising targeted at young people in regard to financial services and specifically in regard to credits and payment cards. A self-regulatory approach was proposed. The Commission wishes to take up this idea and is considering whether the preparation of a code of conduct relating to credit advertising targeted at young consumers is necessary.

## C. INFORMATION

### The principle

172. Article 4 provides that the written agreement must include a statement of the APR and a statement of the conditions under which the APR may be amended. Moreover the Directive contains a list of contractual terms which Member States may require to be included in the written agreement as being essential.

### Application by the Member States

173. Most of the Member States have included all or some of the particulars referred to in the annex to the Directive. Certain Member States stipulate that supplementary information must be provided.

### Perspectives

174. Professionals and consumers have very different views. Professionals consider that consumers receive sufficient information, or even that they are "overinformed" and pay scant

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<sup>40</sup> OJ No L 317, 24.11.88



attention to the information they actually get. Some professionals consider that the consumer's attention should be drawn to his obligations, and notably the obligation to supply in good faith all the particulars required of him when he submits an application for credit. Certain Member states already have provisions in their legislation to cover such circumstances (Belgium, Denmark, Portugal, Finland), whether as breaches of contract or good faith or fraud. The majority of respondents, however, felt either that there was no need for specific penalties or that existing provisions were sufficient. The reasoning included the French view that rather than penalisation, the authorities should concentrate on preventing the difficulties in the first place.

175. Consumers often find it hard to understand the terms of credit agreements. It is true that such agreements contain non-trivial technical aspects. However, the terms of such agreements fall within the scope of Directive 93/13 on unfair terms on consumer contracts<sup>41</sup>, Article 5 of which provides that "in the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail"<sup>42</sup>.

176. From the consumer perspective, it is argued that better information would allow better use of the credit, and hence reduce the risks of overindebtedness. The creation of specialised services could help achieve this objective.

177. It is also proposed that the professional be made responsible for providing advice, as in the case of Belgian law. The attraction of this approach is that it is based on a principle which is quite widespread in the European Union, viz. the obligation of the professional to provide information to the consumer. The Belgian legislator has adapted this principle to the specific needs of consumers in the credit field. The professional's duty to provide advice, incumbent both on creditors and intermediaries, is the corollary to the consumer's obligation to furnish information. In France, the court may take into account the information available to the creditor when granting the credit, i.e. whether the lender could reasonably have expected the consumer to be able to meet his obligations. In other states (Norway and Sweden) which do not yet have similar regulations, discussions have taken place on the subject.

178. Creditor and credit intermediary must provide the consumer with all information necessary, in a precise and exhaustive manner, depending on the credit agreement in question. The information to be provided by the professional must relate both to the economic and legal aspects of the planned transaction. Professionals must identify the optimum type and amount of credit taking into account the consumer's financial circumstances at the time the agreement is concluded. On the basis of this information the creditor may only make an offer in respect of which he is reasonably sure that the consumer will be able to meet the obligations arising from the agreement. Credit transactions are risk transactions. The legal onus on the creditor is to take necessary and sufficient means to evaluate the attendant hazards. These standards of behaviour are not exclusive to credit providers but are expected of all professionals.

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<sup>41</sup> Footnote 30 *supra*

<sup>42</sup> OJ No L 95, 21.04.93 p.31

179. The penalty for failure to meet these obligations resides in the court's power to waive all or part of the interest on arrears and to reduce the consumer's liabilities to the cash price of the good or service or to the amount borrowed, without prejudice to other common law sanctions. The existence of many concurrent loans, a history of defaults, rescheduling of loans, inadequate particulars, precarious financial circumstances - all these are indices which may lead to the conclusion that the creditor or intermediary has been remiss. These particulars must be compared with the information provided by the consumer.

180. The Commission proposes including in the Directive a mechanism designed to improve the quality of the contractual relationship. The consumer should be obliged to provide information, i.e. to communicate all particulars necessary for a credit transaction at the request of the creditor. On the other hand, it should be incumbent on the professional to provide advice, which means that he must seek clarification on the borrower's circumstances and duly inform him.

#### **D. THE FORM OF THE CONTRACT**

##### *Principle*

181. Apart from the obligation that the contract must be in writing (Article 4), the Directive makes no mention of standardisation of the form of consumer credit agreements. Proponents of such standardisation argue that it could facilitate the creation of a cross-border market for credit, and increase the level of information for consumers, although some argue that this is better achieved at national level than at European level.

##### *Application by Member States*

182. Some countries have already moved in the direction of standardisation. In France, there has been quasi-standardisation by means of models and in the Netherlands the Ministry of Economic Affairs provides standard contracts. In Norway, in collaboration with the Consumer Ombudsman, organisations have established standard contracts in certain spheres, while in Greece, credit card agreements have been standardised. In Austria, the subject-matter of consumer credit agreements is largely harmonised and in Italy, work is being done on a voluntary level.

##### *Perspectives*

183. The majority of respondents to the Questionnaire opposed the standardisation of consumer credit agreements. Among the reasons given were that such standardisation would prevent innovation and adaptation as the market and products continue to evolve; that it would reduce the range of choice for consumers by stifling freedom of contract and competition; that standard forms would be unsuitable for the many different kinds of credit and credit transactions which exist; and the different legal basis of agreements under different national laws. Generally, the benefits of standardisation were seen to be outweighed by the difficulties involved.

## **E. THE OPERATION OF THE MAIN ARTICLES**

### **Article 7      Repossession of Goods**

#### **Principle**

184. Member States are to lay down the conditions under which goods obtained by credit may be repossessed and they are to ensure that, in these cases, repossession does not entail unjust enrichment<sup>43</sup>. To this end, account should be taken of the amount repaid, the depreciation of the value of the goods and the value obtained by the consumer during his period of possession.

#### **Application by Member States**

185. Some Member States availed of the minimum clause in their implementation of article 7, with the result that the level of protection offered to consumers differs from state to state. Among those features common to several states are the following:

- restrictions on the period in which repossession may be commenced e.g. time limits (the Netherlands) or percentages of the price paid beyond which repossession is not permitted (the Netherlands) or is not permitted without a court order (Belgium, Ireland (draft) and the United Kingdom);
- conditions for the commencement of repossession e.g. default on a set number of consecutive payments, totalling a certain percentage of the total price (Germany and the Netherlands);
- a condition that the consumer must have been endangering the goods or preparing to leave the country... (Sweden, Norway and the Netherlands).

186. Other States require the agreement concerning repossession to be in writing or a notice period to be given before commencement of repossession (UK). In the Netherlands, repossession is prohibited if 3/4 of the price has been paid. In Greece, some or all of the amount paid may be withheld if it has been agreed between the parties that in the event of default, these are to be treated as rental charges. Some countries have chosen to compensate the lender for the loss of use of the goods (while in other countries repossession is uncommon since used goods are of little interest to lenders). Whatever the solution that has been chosen by individual Member States, the regulatory value of Article 7 amounts to little more than a Code of Conduct - to ensure that conditions have been laid down under which repossession may occur, and to ensure that in such cases unjust enrichment does not occur.

#### **Perspectives**

187. While, generally, national measures are reported to function well, problems have been reported in certain instances. Norway reported that in the case of 'voluntary' repossession (e.g. for breaches of contract), the price of the good is frequently estimated too low thus providing the lender with an unintended economic gain. In such cases, more precise provisions for the estimation of the price of goods are required. In Sweden, problems have

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<sup>43</sup> The European Parliament's amendments during the second reading, accepted by the Commission, attempted to expand the protection so that where the consumer had paid more than one third of the price of the goods, repossession could only be effected by court order. The Council refused to modify the Common Position.

arisen when the system was not used - the system is voluntary on the part of the lender, who can choose instead to make his claim in court.

188. It would be advisable if courts were given the power to review the financial (and other) circumstances of consumers before making orders for repossession of goods.

## Article 8 Early repayment

### Principle

189. Where a time for repayment has been fixed in the agreement, the Directive gives the consumer the right to discharge his obligations before that date. The consumer is, further, entitled to an equitable reduction in the total cost of the credit<sup>44</sup>. It is, however, left to the Member States to decide the amount by which the total charge for the credit is to be reduced in those circumstances.

### Application by Member States

190. Certain Member States already had rules on early repayment. Indeed, the difference between these rules was one of the reasons that no common rules could be agreed. Certain features, however, are common to the legislation of several Member States e.g.:

- Some Member States have laid down a formula for the calculation of the rebate (while others have nominated the institution responsible for its formulation);
- Generally, charges are to be paid only for the duration of the credit. Some countries, however, permit extra charges in relation to mortgage loans, in order to compensate the credit institution involved;
- Generally, no penalty is to be levied for early repayment. However, some countries allow (limited) sanctions to be charged, provided that this is clearly stated in the original contract;
- Some countries require the consumer to give specific notice of his intention to repay early;
- Other conditions are sometimes attached e.g. that the amount of the repayment should be a multiple of an instalment...

191. Certain states have extended this right to mortgages (Germany, Ireland (draft law), Sweden<sup>45</sup>), including mortgages with fixed interest rates, although extra charges may be levied in the case of early repayment of a mortgage loan, in order to compensate the credit institution for the loss of interest on the remaining period. It should be noted that mortgage institutions are obliged by Swedish law to minimise these costs by reinvesting the prepaid sum as favourably as possible.

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<sup>44</sup> An essential condition indicated in Annex 1, 1(iv) of the Directive

<sup>45</sup> Regulation 1994:30, Financial Supervisory Authority, on the early repayment of mortgage loans

### Perspectives

192. While most respondents did not feel that there was a need for reform of the provisions covering early repayment, or that they did not have sufficient experience of its operation to comment, certain proposals for reform did emerge:

- that 'equitable reduction' should be defined, either by setting a percentage or a formula for its calculation. For the Director-General of the Office of Fair Trading (UK), a system of settlement calculation on an actual reducing balance basis is felt to be preferable to the rule in S.78 of the Consumer Credit Act
- that the system of early repayment in the case of fixed rate mortgages should be examined
- that, generally, consumers need more information about their rights in this area.

193. In the run-up to economic and monetary union, these provisions concerning early repayment will be particularly important. On 1 January of Phase III of EMU, the rates of change will be fixed for all currencies participating in this stage. For certain countries this will probably mean a reduction in the rates of interest, and moreover repayment will no longer be in national currency but in ECU. Hence, it is important that the consumer should be able to rescind an ongoing credit agreement ahead of schedule in the context of a change of monetary unit.

### Article 9 Assignment

#### Principle

194. The consumer is guaranteed that if the creditor's rights are assigned to a third person, the consumer will be entitled to plead against that person any defences which were available to him against the original creditor (including set-off, if that is permitted by the Member State). This provision is intended to protect consumers against the practice whereby terms were inserted in sales agreements to the effect that the consumer would not be entitled to plead the same defences against the assignee as against the original creditor - such terms are now prohibited.

#### Application by Member States

195. All of the Member States have legislation covering this subject (some of which is copied verbatim from the Directive), usually giving assignees the same rights and duties as the original creditor, or making null any attempt to have the creditor waive his rights against the assignee.

#### Perspectives

196. Generally, it appears that Article 9 is not often relied upon, either because assignment itself is uncommon, because delays in the national legal systems discouraged its use, or because of lack of experience of the legislation. Those States which do have experience of its application are generally satisfied, and reported that existing provisions function well, with no need for reform at this time.

197. Securitisation techniques are becoming increasingly popular in several Member States. The idea here is to augment credit institutions' own funds, by allowing them, via a third party, to place on the credit market their claims against their clients. For creditors, the main advantages are improvement in the structure of their balance sheets, reduction in the cost of credit and a wider range of financial products. This should not alter the legal relationship between the consumer and the creditor who signs the credit agreement. Management of the agreement by the assignee (the person who collects the claims and sees to their performance) should not impinge on the consumers' rights vis-à-vis the original creditor.

## Article 10                      Bills of Exchange

### Principle

198. The background to Article 10 was the desire to protect the consumer against unfair practices in relation to bills of exchange, promissory notes or cheques. In some countries, it was common practice for the seller of goods on credit to require the consumer to provide *security* for the performance of his obligations under the contract by giving the seller a negotiable instrument which the seller could then present for payment if the consumer defaulted on the contract. This led to the unfortunate situation whereby the consumer, if he declined to pay under the contract of sale e.g. because the goods were not delivered or were defective, would be obliged<sup>46</sup> to pay on the negotiable instrument if the seller presented it i.e. he was obliged to enter into a second contractual obligation. In other cases, the seller might negotiate the instrument to a third party who would then present it for *payment*. Unfair practices also existed in relation to the use of such instruments as means of payment, with consumers at risk if third parties obtained them.

199. The original Commission proposal wished to ban the use of bills of exchange or promissory notes as either payment or security, and to prevent the use of cheques as security, but failing agreement in Council, it was left to Member States to 'ensure that the consumer is suitably protected when using those instruments in those ways'.

### Application by Member States

200. At the time of the adoption of the Directive, six Member States already prohibited (or favoured the prohibition of) the use of such instruments in connection with consumer credit. At present, the majority of the Member States of the EEA prohibit the use of such instruments or would favour the introduction of such a prohibition with regard to letters of exchange. The use of such instruments is prohibited completely in Belgium, Denmark, Germany, France, Luxembourg, the Netherlands and the United Kingdom. Sweden has prohibited the use of these instruments in consumer credit sales. Other countries have chosen different methods e.g. Austria which prohibits the use of bills to order, although the legal validity of the letters of exchange is not affected (as is the case also in Sweden), while Norway and Finland prohibit the use of means of payment which may limit the rights of consumers.

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In some countries, it is a criminal offence not to pay on presentation of such instruments e.g. cheques

201. Other Member States have not prohibited the use of such instruments but have instead chosen to authorise their use, provided special protection is given to consumers using them. Countries in this category include Ireland (draft law) which provides that any rights conferred on a consumer by the proposed legislation would not be prejudiced by the existence of a bill of exchange; Italy, which authorises such instruments provided there are specific provisions to protect consumers; Portugal, which lays down procedures for the use of the instruments, in the absence of which (and where the consumer is not at fault) the professional will be liable to third parties.

202. In Spain, where Directive 87/102 has not been transposed, the use of these instruments is authorised, without any specific protection for consumers, while in Greece (which opposed Article 10 from the outset), the use of promissory notes and letters of exchange has not been prohibited, nor are there any specific provisions for the protection of consumers.

203. Only four respondents (Greece, Ireland, Austria (provided consumers are sufficiently protected) and the UK) expressed the view that they should not be prohibited (for security or payment). Reports indicate that the volume of consumer credit payments made by such methods is, in any event, minimal.

204. Respondents gave little information on specific measures for the protection of consumers - most felt that the prohibition of such instruments was in itself sufficient protection. Some States only prohibit these instruments where they restrict the rights of the consumers (e.g. to invoke defences against a third party who has received the instrument). The main breaches reported are in relation to time-share (Norway and Sweden), the main areas where bills of exchange are actually used; and where banks use them to achieve early repayment (Portugal).

### Perspective

205. As most Member States have either themselves already gone further than the wording of Article 10, or have expressed their support for further measures, it is proposed to generalise their prohibition.

## Article 11

### Principle

206. Article 11 establishes the link between the credit agreement and the sales agreement. If there is a legal bond between the grantor of credit and the supplier of the goods or services, to what extent should this have consequences if the supplier of the good or service defaults on his obligations?

207. This was one of the most heatedly discussed points in the run-up to the Directive. The initial text of the proposal included the provision of section 75 of the British Consumer Credit Act by establishing joint and several liability between two suppliers in the event of default or incomplete performance of the main contract. The text that was finally adopted provides for subsidiarity liability when the credit has been provided on the basis of a "pre-existing agreement" whereunder credit is made available "exclusively by that grantor of credit to customers of that supplier".

### Application

208. Most of the Member States have transposed Article 11 as it stands. However, several countries have emphasised the ambiguity of the use of the term "exclusively" (Article 11 (2)(b)). The Austrian authorities have pointed out that this article is inapplicable if "the supplier, if only on an occasional basis, proposes another creditor".

209. The Member States which have gone beyond the provisions of the Directive have adopted one of three models:

- France has introduced the notion of "linked credit". A linked credit exists when the document concerning the offer of credit indicates the use (earmarking of the credit).
- Germany has introduced the notion of an economic unit. An economic unit exists when the creditor has been assisted by the vendor in preparing or concluding the credit agreement.
- The United Kingdom has abided by the principle of joint and several liability for contracts which are the subject of an "arrangement" (Articles 12b and c CCA). This has been the subject of acrimonious debate and the Office of Fair Trading has recently published a report on this rule<sup>47</sup>.

210. Most of the discussions on this Article have focused on credit cards. If a card belonging to a network, such as Visa-Mastercard-Eurocard, may be used to purchase goods from a trader, a "pre-existing agreement" must exist between this trader and the card issuer. Is this pre-existing agreement covered by Article 11 of the Directive? Only the Greek and British authorities have opted for this interpretation. In the other Member States it seems that the use of credit cards does not fall within the scope of subsidiary liability.

### Perspectives

211. Two types of problems must be addressed:

- What kind of credit agreements should trigger liability (of whatever kind) on the part of the creditor?
- What kind of liability should this be?

212. To answer these questions, it is necessary to recall why this particular form of protection was introduced. When a consumer purchases a good on credit, must he continue to repay the credit if the supplier defaults and, by virtue of the "prior agreement" creating a business link between the supplier and the creditor, the latter is in a position to obtain repayment of the sum which has already been paid to the supplier? If not there is a justification for the creditor's liability in transactions which constitute an "economic unit" (German wording).

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<sup>47</sup> *Connected Lender Liability: A review by the Director General of Fair Trading of Section 75 of the Consumer Credit Act 1974* (OFT, London, March 1994)



213. As regards the first point, it goes without saying that the link between the two agreements provides the consumer with real additional protection which is not afforded to consumers who pay cash down or on the strength of a personal loan. If one considers the cross-border aspect of credit card payments, this would mean that the card issuer is liable for all transactions anywhere in the world. Hence, American legislation limits this liability to transactions conducted within a radius of 100 miles of the consumer's place of residence. Nevertheless, for clarification's sake it would seem necessary to remove the word "exclusively" from the text of Article 11.

214. As regards the second question, the nature of the creditor's liability depends on national legal traditions concerning liability and exonerating circumstances. Hence, harmonisation in this area seems to be a pretty remote prospect.

## **Article 12                      Implementation/ Sanctions**

215. Article 12(1) of the Directive gives Member States three options of supervision of the implementation of the Directive:

- a) a requirement that persons offering credit or offering to arrange credit agreements shall obtain official authorisation; or
- b) a requirement that persons granting credit or arranging for credit to be granted shall be subject to inspection or monitoring by an official body; or
- c) the promotion of the establishment of bodies to receive complaints concerning credit agreements or conditions and to provide information to consumers in this regard.

216. While only Belgium, Ireland and Norway chose to use all three options, the majority of States chose to use a combination of the options e.g. the United Kingdom, which chose option (a) but where options (b) and (c) are in fact contained in the enforcement powers of the Office of Fair Trading. All Member States have chosen to use, as a minimum, either the first or second option.

217. In their implementation of the various options, some Member states chose to require authorisation for the activities of intermediaries, either by the same body or, as in Germany, by different bodies - the Federal Supervisory Board for the credit sector and the Trade Authority for credit brokers. Other Member States chose to establish a monitoring system, as in France. Others, such as Denmark and the Nordic states, combined these options with the establishment of independent consumer complaints bodies - the Danish Financial Services Complaints Board or the Nordic Consumer Ombudsmen - while in other States such as Germany, this role is taken by the Administration itself through subsidising the Verbraucherzentralen.

218. Article 12(2) provides that the authorisation referred to in option (a) is not necessary where such persons satisfy the definition given in the First Banking Directive<sup>48</sup> and are therefore authorised in accordance with that Directive. Under the terms of this Directive and

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<sup>48</sup> Council Directive of 12/12/77, OJ No L 322 17/12/77

the later Second Banking Directive<sup>49</sup>, therefore, financial institutions, need only obtain a single authorisation.

219. The Commission is considering whether it is necessary to make mandatory rather than optional the creation in each Member State of bodies authorised to receive consumer complaints concerning consumer credit. All that needs to be done is to change the wording of Article 12.

### **Sanctions**

220. Generally speaking, the Directive does not lay down sanctions for infringements of its provisions. Only Article 12 foresees administrative sanctions on persons granting credits or on credit intermediaries.

221. All the Member States provide for sanctions for non-compliance with the consumer credit laws. These sanctions are of three types:

- **civil** sanctions: annulment of the credit agreement or only of the contravening terms; reduction in the borrower's obligations to the nominal amount borrowed, reduction in excessive interest on arrears; reduction of excessive indemnities, non-recognition of guarantees when the creditor has not fulfilled all his obligations, cancellation of the contract and repayment of the balance due in the case of consumers who have not fulfilled all their obligations (for example consumers who have provided false information);
- **penal** sanctions for infringements of provisions which the Member States consider essential, such as those concerning mandatory particulars in the credit agreement, bans on certain practices (for example canvassing), and the maximum rate of interest;
- **administrative** sanctions such as withdrawal or suspension of authorisation to exercise the activities of creditor or credit intermediary. These may be set out in national laws on consumer credit. In the case of creditors who belong to the category of credit institutions, the sanctions provided for in the second Banking Directive may be applicable.

222. Sanctions are not included in the Directive because national legal systems were felt to be too different to envisage harmonising sanctions, particularly in the penal domain.

223. The situation today is somewhat different since (a) all the countries provide for sanctions and (b) civil sanctions predominate, so coordination might be possible.

### **Article 14 Mandatory nature**

224. Article 14 stipulates that the Directive's provisions are mandatory. The ban on circumvention is a general one, and the example provided in the Directive itself, i.e. the device of distributing the amount of credit over several agreements, is not exhaustive. Certain legislators have transposed this example alone.

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<sup>49</sup> Directive 89/646/EEC OJ No L 386, 1989

### The mandatory nature of protection

225. All Member States which have adopted specific legislation on consumer credit provide for mandatory protection of the debtor.

226. In France, the Law of 1978<sup>50</sup> comes under public policy (Article 128). Failure to comply with its provisions is penalised by nullity relative, which may be relied on by the consumer.

227. The Belgian law provides that all contravening provisions are null and void if they are designed to limit consumers' rights or burden them with additional obligations (Article 4).

228. The same approach is to be found in the German legislation (VerbrKrG, par. 18), which also contains provisions concerning the form and minimum content of the agreement (para. 6(1)).

229. In the United Kingdom, section 173 of the Consumer Credit Act declares null and void any terms designed to reduce the protection accorded to the debtor. Moreover, the legislation on unfair terms also applies.

230. The Luxembourg law also enshrines the principle of nullity relative of provisions which fall foul of the legislation, whereby invalidity can be relied on only by the consumer (Article 17).

231. The public authorities in the Netherlands examine the model credit agreements proposed by creditors seeking authorisation. In this connection they check for conformity of the standard terms with the rights and obligations enshrined in the law.

232. In Greece, all terms which contravene the provisions of the Ministerial Decree are null and void (Article 13 (1)). Portugal also provides for the nullity of terms that infringe the law and Denmark provides for the nullity of agreements which are not in compliance.

### Preventing circumvention

233. Two Member States among those which have adopted specific legislation on consumer credit have taken a very global approach, by introducing a very broad definition of credit, with a view to preventing creditors from finding loopholes in the rules in the shape of special forms of credit. Thus, despite the absence of an express legal provision outlawing the adoption of particular forms of credit with a view to circumventing the law, the Member States which have opted for this approach fulfil the obligations imposed on them by Article 14 (2) of the Directive.

234. In France, the number of monthly instalments is not a criterion for application of the law. Neither is there a minimum amount below which the rules do not apply.

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<sup>50</sup> cf. page 16 *infra*

235. Likewise the Netherlands have adopted a more realistic and less formalistic approach by defining credit in a very broad sense: only credits repayable within three months are exempt.

236. Other legislators have introduced an express and blanket ban on circumvention:

- paragraph 18 of the German Consumer Credit Law provides that the legislation applies even if its provisions are circumvented in any manner whatever;
- Portugal also seems to have opted for this global approach.

237. Against this, several legislators merely outlaw distributing the amount of credit over several agreements with a view to circumventing the law. In the United Kingdom, section 17(3) CCA penalises attempts to circumvent the rules by dividing the agreement into a number of smaller ones. In Luxembourg, the law stipulates penal sanctions (Articles 18, 5) on persons who, with a view to circumventing the provisions of the law or its implementing regulations, divide or attempt to divide the credit amount into several agreements. It is interesting to note that the mere attempt to circumvent the legislation is a penal offence.

238. Finally, Belgium has opted for an original solution, in that it does not fully exempt small credits from the scope of the rules, but merely limits the provisions which are applicable to such credits.

## VII MORE PROTECTIVE MEASURES ADOPTED BY THE MEMBER STATES

### Summary of the application of the minimum clause

239. Article 15 provides that the Directive shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty. To this one may add the penultimate recital of the preamble, which specifies that since the Directive provides for a certain degree of approximation in Member State provisions concerning consumer credit and a certain level of consumer protection, Member States should not be prevented from retaining or adopting more stringent measures to protect the consumer, with due regard for their obligations under the Treaty.

240. Member States have made wide use of this clause, both as regards aspects covered by the Directive and aspects which lie outside its scope. After describing how the minimum clause is applied by each Member State, we provide a conspectus of the shared corpus of all the transposition instruments.

### Approach by Member State<sup>51</sup>

#### Belgium

241. The Law of 12 June 1991 on consumer credit transposes both Directive 87/102 and Directive 90/88, although it is based on preparatory work which dates back to an earlier period, and in which the Community discussions were input.

242. The Belgian law also contains numerous provisions which are more protective than the Directive:

- provisions concerning the credit intermediary agreement;
- the law does not provide for exemptions for the opening of credit lines, unless they are of short duration and for a value of less than 1 277 ECU;
- the law provides for a partial exemption only for small loans, as well as those which do not exceed a certain period and a certain number of instalments;
- authentic acts are exempted only if the contract amount exceeds 21966 ECU;
- as regards charges which are excluded from calculation of the APR, this exclusion is limited to the sole condition that the consumer have a reasonable freedom of choice; moreover, in calculating the APR, the notion takes into account a reference amount of 1277 ECU (50 000 Bfrs, not 2 000 ECU). Moreover, the charges may not be abnormally high;
- for all credit advertising the law stipulates that certain particulars be included and proscribes certain other particulars;
- Belgian legislation introduces a specific pre-contractual formality, viz. the prior offer. This offer must contain certain mandatory particulars as set out in certain standard forms; the consumer's signature is subject to certain formalities;
- the law contains particular provisions concerning the opening of credit lines;
- repossession is subject to stringent conditions, notably a court procedure when the consumer has paid 40% of the cash price (unless there has been a written agreement concluded after receipt of registered letter); penal sanctions also apply in this area;

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<sup>51</sup> See Chapter III.B, pages 16-18 *infra*, for details of measures of transposition

- the Belgian law also contains detailed provisions governing early repayment;
- in the event of assignment of claims, the Belgian law provides for supplementary guarantees to protect the consumer;
- in Belgium it is forbidden to use bills of exchange and other negotiable instruments either as a means of payment or as a security; likewise it is forbidden to accept cheques as a guarantee of repayment;
- detailed provisions pertain to hire purchase designed to forestall recourse to a possible third-party grantor of credit (supply of the good in advance, etc.); if however this turns out to be necessary, the law is more precise than the Directive as regards remedies against defaulting suppliers;
- as in German law, Belgian law provides for a cooling-off period, which is seven working days in Belgium; if the consumer invokes this facility, damages cannot be required of him and his deposit must be returned within 30 days of repudiation;
- certain credit agreements are subject to very detailed rules;
- the Belgian legislator makes it mandatory on the parties to provide reciprocal information, and stipulate the creditor's liability in granting the credit;
- the law also bans doorstep selling and the unsolicited dispatch of credit offers;
- guarantors are protected;
- certain unfair terms are proscribed, such as canvassing for credit and unsolicited dispatch of credit devices;
- the law provides for facilitation of repayment; likewise, recovery of debts is also subject to regulation, including rules on practices which may impinge on privacy. Finally, the law contains provisions concerning credit information databases;
- the law contains a provision of private international law as regards application to creditors resident outside of Belgium, provided the consumer is normally resident in Belgium and that the contract has been preceded in Belgium by a specific proposal or by advertising, and that the creditor or his representative in Belgium received a request for credit from the consumer.

### Denmark

243. The 1982 Law on sale of goods by credit has been amended, with a view to transposing the Directive, by the 1990 Law on credit agreements, which also takes Directive 90/88 into account. It is supplemented, in regard to advertising of credit costs, by the 1990 Law on price indication. The Danish law contains several more stringent provisions in favour of consumers:

- protected consumers are not just natural persons, but may also be legal persons;
- the definition of creditor comprises credits granted by private individuals provided the intermediary is a professional;
- Danish law does not exempt real estate credit or mortgage credit; moreover, some of its provisions are also applicable to interest-free loans;
- in the event of infringements of the information requirements incumbent on the professional within the meaning of Article 4 of the Directive, Danish law provides for specific sanctions: if information on the cost of credit is absent, the consumer must only pay the cash price augmented by the interest rate of the Bank of Denmark, to which 6% is added for the outstanding balance. When the particulars state a cost which is lower than the real cost, only the stated cost may be required; penal sanctions may be imposed in the event of repeated and flagrant infringement;

- as regards repossession of goods in the event of consumer default, Danish law contains certain formalities concerning reservation of title, as well as precise provisions designed to preclude unjustified enrichment;
- Danish law outlaws all negotiable instruments, such as bills of exchange, for the payment or the payment guarantee;
- Danish law contains detailed rules for certain categories of credit agreements;
- Danish law also provides that offers made to consumers through telephone canvassing shall be null and void;
- the Danish consumer has a cooling-off period in the event of doorstep selling or mail-order sales;
- detailed provisions regulate the activities of credit reference agencies (managers of data files);
- overindebted consumers may appeal to the courts for rescheduling of their debts;
- the authority responsible for monitoring credit institutions plays an important role in policing consumer credit; the same applies to the consumer ombudsman.

### Germany

244. Directive 87/102 was transposed by the 1990 Consumer Credit Law. This law contains numerous detailed provisions which implement or supplement the Directive. Moreover, since the 1990 law amends earlier hire purchase law, it also includes certain aspects of this law, notably the right of retraction and the attendant formalities, and its application to distance selling. The law contains a plethora of provisions which are more protective than the Directive:

- it contains specific provisions concerning the credit intermediary agreement, notably in regard to remuneration of intermediaries;
- it expands the term "consumer" to include persons who conclude a credit agreement with a view to starting out in professional life;
- it also applies to contracts covering services provided on a continuing basis;
- it goes into more detail on how to calculate the financial threshold for application (the cash price, the net credit);
- it does not contain a financial ceiling unless the credit is granted to an individual with a view to financing a start in professional life, in which case amounts exceeding 52 600 ECU are exempted;
- the law does not exempt repayments in less than four instalments;
- the law only partly excludes leasing agreements, mortgage credit and advances on current account;
- the German law does not contain specific provisions on advertising for the contract; on the other hand, it contains a very extensive list of particulars to be provided in the contract, contravention of which nullifies the contract or limits the rate of interest to the legal rate in the event of absence of information on the APR or the monthly instalments; moreover, costs of which the consumer has not been apprised must not be paid;
- in the event of early repayment by the consumer, the German law contains detailed provisions on how to calculate the rebate in the cost of credit;
- German law outlaws the use of bills of exchange and other negotiable instruments; guarantees in the form of cheques are also prohibited;
- consumers have a seven-day cooling-off period; this period starts to run the moment the consumer is informed of the existence of this facility;

- if the consumer defaults, special rules apply to interest in arrears; moreover, all reimbursements must first apply to the capital and only then to the interests;
- German law sets out the circumstances in which the creditor may cancel the contract and notably demand payment of the balance, as well as the associated procedures;
- the law also contains special rules concerning credit intermediary agreements (information on commission, conditions for payment of this commission).

245. In addition to statutory transposition, the courts have played an important role in Germany, notably in the context of case law on usury (credits that offend good morals). When transposing the Directive the legislator could have given statutory recognition to the principles of case law with an eye to protecting consumers. This approach was not adopted, and so the courts have continued to develop case law in a very flexible manner. However, as a result German law on consumer credit is particularly difficult to pin down.

### Greece

246. Ministerial Decision F1-983 of 21 March 1991 transposes Directive 87/102 and Directive 90/88. Although the decision virtually takes over the Directive verbatim, it contains certain interesting features:

- if the debtor is at least three instalments in arrears, the creditor may keep the payments already effected provided they do not exceed one fifth of the total cost of the credit;
- Greek law contains detailed provisions on how to calculate a fair reduction in the cost of the credit in the event of early repayment, stipulates the associated formalities and specifies the day of repayment;
- in the case of hire purchase, the consumer may withhold disputed payments pending a final court decision;
- credit professionals must be registered with the local chamber of commerce.

247. However, until recently consumer credit was subject to stringent restrictions imposed by the Bank of Greece. If such restrictions had the advantage of keeping overindebtedness at bay, they also limited access of Greek consumers to certain basic consumer products such as cars. The Governor of the Bank of Greece has liberalised consumer credit and the banks are preparing a programme of cooperation with the distributive trades in the field of consumer credit.

### Spain

248. See paragraph 16 and Section III C above.

### France

249. The essential principles of the Directive were transposed by the Law of 23 June 1989, while certain other details were transposed by the Law of 21 December 1989. However, the basic text on consumer credit is the Law of 10 January 1978, and the transposition text has modified it only in regard to certain points. This legislation contains a large number of features which are more protective than the Directive:



- the term "consumer" extends protection of legal persons, and excludes only acts designed to finance a trade;
- credit agreements are defined so as to encompass both sales or provisions of series of services whose payment is deferred, staggered or in instalments;
- the French law does not exempt interest-free loans, agreements intended for the purpose of renovating or improving a building if the amount is less than 21 276 ECU, leasing agreements with a purchase option, agreements on overdrafts;
- the law provides for mandatory particulars in credit advertising and bans advertising for certain types of credit outside of business premises;
- the French legislator has introduced the prior offer formula; this must correspond to a standard model and contain mandatory particulars; in the event of infringement, the creditor is not entitled to interest;
- the French law goes into greater detail concerning advances on running account;
- repossession in the event of consumer default is envisaged only in the case of hire purchase;
- consumers may make early repayments without incurring any fees, even on a partial basis. However, in this case the creditors may refuse partial reimbursements which are less than three times the amount of the next instalment due;
- bills of exchange and other negotiable instruments are banned;
- French law has more detailed rules concerning the interdependency between the credit agreement and the main agreement;
- moreover, French law gives the borrower a seven-day cooling-off period;
- there are rules concerning damages in the event of the borrower's default;
- guarantees are protected;
- maximum interest rates are regulated through the ban on usury;
- it is forbidden to keep files on clients who have invoked the cooling-off clause;
- disputes in the field of consumer credit are subject to estoppel after two years(?).

### Ireland

250. As yet there is no definitive law. However, the Irish Parliament is currently discussing a very detailed bill on consumer credit, which has numerous features which are more protective than the Directive:

- the Irish bill does not contain any exemption for real estate credit, for leasing agreements or for short-term credits; there is no financial floor or ceiling;
- the law contains more detailed provisions concerning mandatory particulars in advertising, as well as rules on the typographical highlighting of certain particulars; the law also regulates comparative advertising and advertising for free credit; the law prohibits credit advertising targeted at minors;
- the Irish law also contains more detailed provisions concerning the content of the agreement, mandatory particulars and the form in which certain information must be provided;
- advances on current account are also subject to more specific rules;
- repossession of goods in the event of the debtor's default is regulated in detail, while in the case of early repayment the rebate is calculated by reference to a formula defined by the Central Bank;
- Irish law does not ban negotiable instruments, but specifies that the law's provisions also apply to such instruments;

- as regards the linkage between the sales agreement and the credit agreement, conditions are less restrictive; moreover, the law provides for the joint and several liability of the vendor and third-party grantor of credit in the event of failure to perform;
- the bill contains numerous provisions outside the scope of the Directive: hence it prohibits discrimination on the basis of sex, etc.; it specifies in detail the supervisory powers of the Director of Consumer Affairs; it stipulates that agreements which infringe its provisions cannot be relied on against the consumer;
- the law also provides a cooling-off period of ten days; it bans unfair terms in credit agreements; the creditor must inform the consumer about certain aspects of the agreement during its lifetime; the law also regulates situations in which there are several agreements between the creditor and debtor as well as written communications between the parties (certain particulars may not feature on the envelope);
- moreover, the law outlaws doorstep selling and strictly regulates pressure selling; it also regulates maximum rates of interest, which if excessive may be reduced by the courts; it limits the creditor's freedom to exact early repayment and contains specific rules governing certain types of agreements.

### Italy

251. Directive 87/102 was transposed into domestic law by the Law of 19 February 1992. While the law is very faithful to the provisions of the Directive, it also contains certain more protective features:

- agreements for the provision on a continuing basis of services are exempted only if a written contract exists and if a copy is handed to the consumer;
- credits repayable in a single payment are exempted only if the payment date is less than 18 months after conclusion of the agreement; there is no exemption for advances on current account or for short-term credits or credits repayable in a maximum of four instalments;
- generally speaking, the law lays down conditions pertaining to transparency and labelling in the financial services field, which also apply to consumer credit; moreover, information on the APR must be supplemented by information concerning duration of validity;
- the agreement must contain a realistic indication of charges other than those included in the APR; charges cannot be imposed on the consumer if they are higher than those indicated;
- the Italian law contains detailed provisions in the event of absence or invalidity of contractual terms;
- only certain classes of economic operators are authorised to offer credit.

### Luxembourg

252. Directive 87/102 was transposed by the Law of 9 August 1993; Directive 90/88 was transposed by Grand-Ducal Regulation of 26 August 1993. The following provisions are more protective than the Directive:

- short-term agreements are not exempt; financial floors and ceilings are more comprehensive than the Directive; there is no exemption for leasing agreements;
- the law applies in part to mortgage credits other than those relating to the purchase or renovation of buildings;

- advertising must contain certain particulars, whereas other particulars are prohibited (free credit); special provisions apply when the credit is granted by the supplier; this is all backed up with penal sanctions;
- in regard to the form of the agreement, the Luxembourg law provides that guarantors must also be provided with a copy of the agreement;
- in order to repossess a good in the event of the default, the creditor must seek an injunction;
- in the case of early repayment the rebate is regulated by a Grand-Ducal regulation;
- negotiable instruments are outlawed; credits may not be secured by cheques; the envisaged sanction is reimbursement to the consumer of all charges incurred under the agreement;
- although the law's provisions are mandatory, it also lays down that nullity can only be relied on by the consumer;
- Luxembourg law contains numerous provisions outside the scope of the Directive: ban on credit canvassing, supplementary rules on credits provided by suppliers (definition of maximum rate of interest for the margin between the spot price and the credit price, restrictions on express avoidance clauses, link between sale and credit, two-day cooling-off period). To this one may add the provision of the 1983 law on consumer protection, pursuant to which all advertising or pre-contractual information constitutes an integral part of the agreement.

### The Netherlands

253. The Directives were transposed by several legal instruments, the most important being the Law of 4 July 1990 on consumer credit. In many ways this law is more comprehensive than the Directive. Its main features are as follows:

- the law applies not only to creditors established in the Netherlands but also to those who reside in other Member States while offering credit on Netherlands territory;
- the law does not define the term "consumer": hence in principle protection is available to all natural persons, except for credits which relate to goods which are used exclusively in the course of business, or goods acquired for the purposes of resale, or if the borrower has made a declaration to the effect that he is acting in his professional capacity;
- there is no financial threshold; on the other hand, the financial ceiling of 23 474 ECU does not rule out the application of certain provisions to credits that exceed this amount; neither does the law exempt credits repaid in a maximum of four instalments; neither real estate credits nor mortgage are exempted;
- the agreement must contain certain mandatory particulars and satisfy certain legibility requirements; infringements are sanctioned by nullity relative of the contract;
- if the borrower defaults, repossession is allowed only if certain conditions are fulfilled; moreover repossession is forbidden if three-quarters of the credit has already been paid; the consumer is entitled to recover the good if he pays up within a certain time limit;
- the consumer may repay the loan early, either wholly or in part; in the latter case, the creditor may impose certain conditions;
- bills of exchange are prohibited; cheques received may not be used in payment of third parties;

the law contains numerous provisions outside the scope of the Directive: brokers are not entitled to commissions other than those granted by the creditor; creditors must obtain information on the client's financial circumstances in certain cases; grounds for refusal to grant credit must be indicated; regulation of maximum interest rates; obligation to provide information during the lifetime of the agreement; annulment of the agreement possible only on the basis of a court order;

- mediation of debts is prohibited;
- the law establishes a consultative committee for consumer credit; it also regulates the activities of social institutions which provide credit to the disadvantaged;
- a credit registry system, as well as a system for the protection of personal data, are provided for in the law; moreover, the legislation is supplemented by numerous self-regulatory initiatives.

### Austria

254. Directive 87/102 was transposed into Austrian law by the Banking Activities Act (BGBl 532/93), the Consumer Protection Act (BGBl 287/93) and a decision of the Federal Ministry for Economic Affairs concerning consumer credit (BGBl 365/94). Austrian legislation comprises provisions which are more protective of consumers' interests:

- The Austrian law also applies to real estate credit, to mortgage credit, to credit agreements for amounts of over 20 000 ECU, and to credits granted in the form of advances on current account.
- The provisions governing the form and content of the credit agreement are more detailed.
- Advertising of credit agreements is more stringently regulated than in the Directive. Moreover, credit institutions must display in their premises particulars notably concerning the APR, the annual interest rate and the standard contract terms.
- The consumer must pay cash down at least 10% of the value of the merchandise (or 20% in the case of agreements for more than 225 ECU). If the seller transfers the title to the consumer without receiving the down payment he loses his right to the proportion of the price corresponding to the down payment.
- Grantors of credit may repossess goods only on reimbursement to the consumer of instalments already made. The grantor of credit is also entitled to compensation for depreciation of the good.
- The consumer is entitled to repay the loan early, either wholly or in part. In this case, the cost of the credit is reduced. All contractual terms which burden the consumer with charges other than those provided for in the law are prohibited. However, in the case of real estate or mortgage credits, the consumer must inform the creditor of his intention to repay ahead of schedule within a time limit set out in the credit agreement.
- The Consumer Protection Act bans the use of bills to order in the context of credit agreements.

### Portugal

255. The two Directives were transposed by the Decree-Law of 21 September 1991, which contains a number of more protective features:

- agreements involving less than four repayments within a period of less than 12 months are not exempted; some of the provisions apply to certain forms of mortgage credit and to authentic acts;
- infringement of the form of the agreement renders the agreement null and void;
- Portuguese law provides the consumer with a cooling-off period of seven working days;
- the law also includes an international private law provision which states that the law applies to contracts concluded by a consumer whose habitual residence is in Portugal, if the offer or the advertising has been made in Portugal and if the consumer has indicated his wish to conclude an agreement in Portugal.

### **Finland**

256. Law No 38/1978 on consumer protection mainly concerns consumer credit (Chapter 7). This law was amended on 8 January 1993 with a view to transposing Directive 87/102. It contains a considerable number of provisions which are more protective of consumers' interests :

- The scope of Finnish legislation is far wider than that of the Directive. The law also covers real estate credit, mortgage credit, free credit, interest-free credit repayable in one lump sum, advances on current account, credits for amounts of more than 20 000 ECU; credit agreements involving a maximum of four payments within a period not exceeding 12 months, credit agreements in the form of an authentic act signed before a notary or judge.
- The granting of consumer credit may not be used as a selling argument;
- Charges other than those provided for in the agreement may not be imposed on the consumer.
- The use of bills of exchange and all other negotiable instruments is prohibited insofar as assignment of such instruments to a third party in good faith may restrict the consumer's right to rely on exemptions and defences in connection with the sales agreement or service agreement.
- The consumer has the right to decide to which debt payable to one and the same creditor his payment shall be allocated;
- If the consumer defaults the creditor may, under certain cumulative and strictly circumscribed conditions, demand early repayment, repossess the goods sold or apply other specific sanctions.  
However, he may not take measures against the consumer if the arrears are due to sickness, unemployment or any other cause which cannot be imputed to the consumer, unless an alternative course of action be clearly unreasonably for him (?)
- The law contains provisions concerning the fraudulent use of credit cards.
- Finnish law provides that the Council of State may take measures designed to prevent overindebtedness of consumers. (Comment: a court procedure for debt rescheduling of overindebted persons is provided for in the Law 57/93).

## Sweden

257. Law No 1992/830 of 1993 on consumer credit (as supplemented and amended by Laws 1992/1010, 1992/214, 1993/1214 and 1994/843) is more comprehensive than Directives 87/102/EEC and 90/88/EEC.

- When a credit is offered for the purchase of a specific good or service, the trader must indicate not only the total cost of the credit but also the cash price (spot payment)
  - The consumer must pay a deposit of at least 20% of the cash price of the good.
  - Creditors may not be paid in the form of bills of exchange. Creditors are also banned from accepting guarantees in the form of a negotiable instrument if the transfer of this guarantee to a person acting in good faith might limit the purchaser's right to rely on exceptions or defences in connection with the sale.
  - The borrower is always entitled to discharge his obligations under the credit agreement before the time fixed by the agreement. The creditor may, provided such a measure is provided for in the agreement, require that the consumer repay the credit amount in advance:
    - if more than one month has expired since the time limit for an instalment equivalent to more than 1/10 of the total credit amount or
    - if two instalments, corresponding to 1/10 of the total credit amount, are in arrears;
- Swedish legislation contains detailed provisions for calculating equitable reduction of the cost of the credit.
- The creditor may not allocate instalments paid by the purchaser in relation to a specific credit to repay another debt.
  - The creditor is only entitled to repossess goods in the event of default by the debtor under certain conditions and provided the contract contains a reservation of title clause. However, if the repossession conditions provided for in the law are met, he may seek aid from the local authorities to obtain repossession of the goods. Detailed provisions also indicate how the accounts between the parties shall be calculated so as to avoid unjustified enrichment. Finally, the consumer may recover the goods if he pays up within 15 days.
  - Strict rules govern the debtor's liability in the event of fraudulent use of his credit card.

## The United Kingdom

258. In the light of the 1974 Consumer Credit Act, British law only had to introduce minor amendments to transpose the Directive. In reality, apart from certain technical aspects, the minimum clause was invoked in order to maintain the existing protection mechanism. Currently however, in the context of the deregulation movement in the United Kingdom, the law is being examined with a view to verifying its effectiveness and utility and it will be interesting to see whether the fact that the Directive is less protective than existing British law will be used as an argument in favour of deregulation. Pending a possible reform, the more protective elements in the British law are as follows:

- protection is not limited to "consumers", but applies to all natural persons;
- certain supplementary information must be provided in regard to the APR (indications of changes prior to conclusion of the agreement);

- the law also applies to leasing agreements; in certain circumstances specified in British law contracts relating to the purchase of real estate are also covered; advances on running accounts are not exempted; credits secured by a mortgage or real estate are only exempted in certain circumstances; there is no financial threshold, even if certain provisions are not applicable to small loans;
- British law contains detailed provisions concerning the content of advertising;
- in the event of early repayment, the professional must make the necessary calculations at the client's request;
- the liability of third-party grantors of credit provides the consumer with greater protection. In reality, the law provides for joint and several liability between the vendor and third-party credit providers (moreover, this provision also raises the ceiling to 38 119 ECU);
- moreover, British law covers domains outside the scope of the Directive, notably rules governing canvassing, the ban on advertising targeted at minors, ban on unsolicited provision of credit devices, obligation on the consumer to provide information on his financial circumstances, debt rescheduling, rules governing credit intermediaries, credit advisors and debt recovery agencies; there are legal remedies in the case of excessive interest rates.

### Iceland

259. Consumer credit in Iceland is governed by Law No 121/1994 on consumer credit (consolidated text of Laws 30/1993 and 101/1993) and by Regulation 377/1993 as amended by Regulation 491/1993.

260. In addition to the provisions contained in the Directives, the legislation includes more protective elements:

- The creditor is defined as any natural or legal person or any group of persons who grant credit. Hence, occasional grantors of credit are also covered.
- When a credit is offered for the purchase of a specific good or service, the trader must indicate not only the total cost of the entire credit but also the cash price (spot payment).
- The creditor may not require payment of charges other than those provided for in the credit agreement.
- Repossession of goods in the event of the debtor's default is authorised only if the agreement contains a reservation of title clause.  
Icelandic legislation includes provisions designed to avoid unjustified enrichment of the creditor. In this context it provides that in the event of disagreement between the parties concerning the value of the repossessed good, its value shall be assessed by two independent individuals appointed by the court.  
When one and the same credit agreement relates to the financing of several goods and the creditor wishes to repossess the goods, the consumer may choose to return only part of these goods, provided he pays up. However, this facility applies only if there are a group of goods whose separation would lead to a substantial reduction in their value.
- Vendors or service providers who grant credit to a consumer against a negotiable instrument must insure themselves financially against defences which the consumer may rely on by virtue of the basic agreement.

## Norway

261. Consumer credit in Norway is governed by Law No 82 of 21 June 1985 on credit sales and by Regulation 1616 of 15 July 1986 based on this law. Norwegian legislation was to be extended in 1992 in the context of the EEA agreement to credit agreements intended for the provision of services. Finally, a bill designed to transpose the Directive in its entirety was drawn up.

262. In addition to the provisions contained in the Directive, the legislation includes more protective features:

- Norwegian legislation covers credit agreements for financing movables or a service irrespective of amount, duration and repayment arrangements. Agreements concluded in the course of business and mortgage credit are also covered.
- The creditor must provide the consumer with pre-contractual information, mainly as regards the cash price of the good, the cost of the credit and the associated formalities. This information constitutes an integral part of the agreement.
- The law allows the King to take measures mandating the borrower to pay 25% of the price as a down payment.
- Use of bills of exchange is prohibited. This also applies to any other negotiable instrument whose assignment to a third party in good faith might compromise the purchaser's rights.
- The creditor may not allocate an instalment made in repayment of a specific credit to another debt incurred by the borrower.
- Norwegian legislation circumscribes the borrower's liability in the event of fraudulent use of his credit card.



## VIII OPERATION OF THE MARKET

### A. THE COOLING-OFF PERIOD

263. The cooling-off period or period for reflection has become a classical feature of consumer law, under which the consumer may withdraw from a hasty engagement and reverse a decision taken in circumstances in which the vendor's pressure selling techniques or blandishments undermine the consumer's free and enlightened consent. The cooling-off period has given rise to various legal constructions.

264. The Directive does not contain any provision allowing a consumer to back out of a credit agreement. Nor does it provide for a time limit between signature of the credit offer and signature of the credit agreement. The annex to the Directive lists among the terms which Member States may require to be included in the written agreement as being essential an indication of "the cooling-off period, if any" (point 1 (vii), point 2 (iii), point 3 (iii), point 4 (iv)).

265. Some Member States (notably Belgium, Denmark, Germany, France, Ireland (bill not yet adopted), Luxembourg, Portugal and the United Kingdom) provide for a cooling-off period in one shape or another:

- the cooling-off period may apply to all credit transactions or only to credit transactions concluded in certain circumstances, such as canvassing;
- the cooling-off period may start to run after signature of the offer or signature of the agreement;
- the period ranges from two to ten days;
- determination of the cooling-off period may be specified in detail (working days, day on which the cooling-off period begins to run or terminates, etc.). In some countries, the law contains no such details;
- domestic law may specify how invoking the cooling-off period affects the sales agreement, for example it may nullify it. The law may specify the consequences of invoking the cooling-off period (repayment of amounts borrowed within a certain time limit, plus interest, recovery of deposits, ban on requiring that the consumer pay damages, etc.).

266. A cooling-off period in eight Member States raises the problem of:

- a) the client of a bank who wants to use his credit (or credit line) rapidly (instantly) to settle an urgent purchase;
- b) monitoring of frauds regarding the dates entered in the contracts, as a result of the foregoing.

The Commission proposes studying whether the introduction of a harmonised cooling-off period for certain forms of credit agreements is important for the protection of borrowers and how compliance with the provision can be monitored.

## **B. NON-PERFORMANCE OF THE CONTRACT**

### **B.1 Financial consequences of non-performance**

267. Creditors include a contract term allowing them to apply penalties and interest on arrears in the event of default. Creditors may also, in certain circumstances, terminate the contract. Some countries have imposed restrictions on such terms:

- limitation of damages; the courts may be entitled to reduce them;
- maximum rate for interest on arrears;
- specification of the circumstances in which the creditor may cancel the contract: minimum delay in payment, minimum balance outstanding;
- calculation of amounts to be paid by the consumer in the event of termination of the contract;
- ban on compound interest.

268. In view of the difficulties encountered by a growing number of debtors in meeting their commitments, the Commission is considering proposals designed to achieve better equilibrium in regard to the consequences of the consumer's failure to perform.

### **B.2 Recovery practices**

269. Certain recovery practices may infringe the debtor's privacy. Certain Member States have regulated these practices (France, Netherlands, Ireland (bill), Belgium) specifically:

- ban on debt recovery agencies, i.e. persons who organise payment of debts to creditors at the debtor's expense (?);
- proscription or restriction of recovery charges;
- regulations governing communications to the debtor: ban on threats, indications on envelopes showing that the debtor is in arrears, etc.

270. Debt recovery is a very sensitive issue for consumers. The Commission is examining the possibility of laying down groundrules, for example in the shape of a code of conduct. This would concern the practices of the creditors themselves but also those of firms specialised in this area (recovery agencies, etc.).

### **B.3 Assignment of wages**

271. Assignment of wages is a widely used technique in the event of default. The rules governing this procedure vary from one country to another. In some cases the courts have a say, in others not.

272. For professionals, this procedure is rapid, effective and inexpensive, particularly where a court order does not have to be obtained in advance. Consumers argue that employees who agree to assign their wages are not always fully aware of their rights, or undertake such agreements because they have no alternative. Assignment may affect employers who do not wish to act as a recovery agency or who feel that the trust between them and their staff has been compromised by virtue of the assignment. Assignment does not permit collective regulation of debts, but gives a short-term advantage to an individual creditor.

## C. USURY

### Definitions

273. All creditors choose their clients, and select the risks they are willing to assume. Borrowers who do not pass muster may obtain credit only if they pay the price, the price of risk. High interest rate loans belong to a fringe or even marginal market. They are offered by establishments specialised in this type of loan. From the economic viewpoint, a rate may be considered as usurious if it is "non-market", i.e. if it exceeds compensation for the risks assumed by creditors working in the risk end of the market<sup>52</sup>.

274. From the legal angle, a usurious rate is an abnormal rate by reference to a maximum rate laid down by the legislator, or an overriding ethical rule such as public policy, morality, or fair trading. The usury rate may be determined by an objective metric, i.e. a rate in excess of the one laid down by the authorities. It is up to them to police compliance. It may be subjectively determined, if - depending on the circumstances, such as the weakness or ignorance of the borrower - the rate is unfair and contravenes an overriding ethical rule. It is then up to the courts to decide whether the rate is usurious under the circumstances.

### Application in the Member States

275. While subjective controls on usury exist in many Member States, fewer countries lay down maximum rates or usury rates<sup>53</sup>.

276. The first group of countries include Germany, Spain, Italy, the United Kingdom, Finland and Sweden. But application varies considerably from one country to another. In Germany, usury constitutes an abuse whose assessment is left to the courts. Over the years, case law has developed standards for assessing usurious situations - for example, a hire-purchase agreement or a personal loan may be declared null and void if the rate sought is more than double the average rate for credits of this type.

277. In the United Kingdom the courts may penalise clearly extortionate rates. Assessments involve comparison with the market rate and the borrower's characteristics. But case law is far more rudimentary than in Germany.

278. In Italy, usury is a penal infringement, but the law is largely a dead letter. A loan is considered usurious if the creditor, acting in full knowledge of the facts, exploits the borrower's plight to impose on him rates of interest which are flagrantly in excess of those prevailing in the market. However, it is so difficult to enforce this provision that a new bill is currently being discussed in Parliament.

279. The second group of country includes Belgium, France and, to a certain extent, the Netherlands. Netherlands law makes no specific reference to usury, but there is an administrative regulation governing the price of consumer credits. This regulation stipulates

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<sup>52</sup> Comité des usagers du Conseil National du Crédit: *La réforme de la législation sur l'usure: un premier bilan*, (Paris 1992)

<sup>53</sup> Response of Commissioner Scrivener to Written Questions E-3751/93 (2 March 1994) and E-387/94 (1 March 1994), OJ No C 349 09.12.94

a grid of maximum rates depending on the duration of the repayment period and the credit amount. This scale is determined by three components: one concerning the refinancing conditions, one concerning variable handling charges and one concerning fixed handling charges.

280. In Belgium the law empowers the King to lay down, at least once every six months, the maximum APR depending on the type, amount and duration of the credit, after consulting the Consumer Council and the National Bank. The administration proposes the maximum rates, in accordance with a method which is not disclosed. When a creditor grants a credit exceeding the maximum rate, he may be subject to penal sanctions, administrative sanctions and civil sanctions. The effect of the civil sanction is that the borrower's obligations are reduced by rights to the cash price of the good or service financed or to the amount borrowed.

281. French law defines as usurious any loan granted at a global percentage rate which exceeds by more than one third the current mean percentage rate for the preceding quarter applied by credit institutions to operations of the same kind involving similar risks. In application of this law, a decree has been adopted that defines the different categories of credit, each of which has its own usury rate. Usury is subject to penal and civil sanctions (reimbursement of excess payments).

#### Application of national regulations to cross-border situations

282. Rules governing usury are not designed solely to protect borrowers. They are market groundrules. They are generally considered inseparable from public policy. In regard to Community law, they fall within the category of rules in the general interest. Hence, foreign creditors must comply with the usury legislation of the host country.

283. In the context of a dispute over a cross-border agreement, what rules will apply? If the contract is subject to a legislation which lays down maximum rates which exceed those of the legislation of the country in which the court hearing the case is established (the country of the court to which the dispute has been submitted), the fact that usury rules belong to the domain of public policy should mean that the *lex fori* applies.

284. Two court rulings illustrate the difficulties involved in resolving problems of this kind. A Luxembourg court<sup>54</sup> had to rule on a dispute concerning a credit agreement governed by Belgian law. The rate of the credit agreement did not exceed the maximum rate prescribed by Belgian law but did exceed the rate laid down by the Grand-Ducal Regulation: "In view of the disparity between the Belgian and Luxembourg texts, it is necessary to analyse whether the Luxembourg text takes precedence over Belgian law and hence imposes a reduction in the contractual rate of interest. An analysis of the two texts in question shows that both have the same end, namely consumer protection, and that the two legislations adopt the same approach, i.e. lay down a maximum rate of interest. The only difference between the texts is the maximum rate of interest as such. The difference, of the order of 0.14% monthly, is not however such as to jeopardise the essential conditions of social life in the Grand Duchy, as conceived from the point of view of the Luxembourg economic, political or moral order."

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<sup>54</sup> Tri. Arr. Luxembourg, 5 June 1991

285. A credit agreement is concluded in France and subject to French law. The borrowers move to Germany. They stop paying. They are summonsed before a German court. The State court held that an interest rate of 15.9% contravened German public policy, even without reference to the French law on usury. The Celle Appellate Court set aside the ruling with the argument that application of the foreign law, in this case French, was not "intolerable" from the viewpoint of German law.

286. Differentials in credit interest rates currently have a basis in reality: the cost of the resources (the raw material) varies from one country to another. In the context of monetary union, the cost of the resource will be the same in all countries which belong to the third phase. Since the cost of the raw material will be the same, is it proper that the maximum authorised price (the rate of usury) should really differ from one country to another?

### Perspectives

287. Usury has been widely debated in recent years in a number of countries. In the United Kingdom<sup>55</sup>, it is by no means unusual for agreements concerning small amounts to have an APR of 200%. In Italy, reform of usury law is currently being discussed in Parliament. The French and Belgian laws were amended in 1989 and 1991 respectively. The Irish bill lays down maximum rates. In Sweden, the issue has been under discussion for several years. There is good compliance with the rules governing information on the rates. However, loans with rates of 45% have been granted, to the clients' satisfaction. Such loans generally concern small amounts and are rapidly repaid. For the Swedish government, this is a complex subject which goes beyond the mere question of the rate of interest applied.

288. Usury has also been discussed in the United States, where rules governing usury are laid down by the individual states of the Federation. For the issuers of credit cards, it is the legislation of the state in which the head office is located that applies, not that in which the consumer resides. Hence all the large American card issuers have their head office in a rural state with no usury statutes.

289. Opponents of usury laws argue that it is enough to provide information on the actual rate applied. The Directive mandates indication of the APR. By comparing the information the consumer can choose the best bargain. But this mechanism functions only if two conditions hold: firstly, the information must be correct, and secondly, the consumer must be free to choose. However, loans at extremely high rates are most frequently found in the fringes of the market, and are granted to consumers to whom very few options are open.

290. Usury affects people in socially and financially precarious circumstances. While "low-risk" borrowers (whose economic and social circumstances are stable and who are very unlikely to default) enjoy low rates of interest, "high-risk" individuals (whose circumstances are unstable and hence are quite liable to default) are subject to high interest rates. This difference is arguably "immoral"<sup>56</sup>. Credits at usurious rates have negative social externalities. These externalities reflect the growing marginalisation of "high-risk" borrowers: homelessness,

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<sup>55</sup> *Unjust Credit Transactions: A Report by the Director General of Fair Trading on the provisions of sections 137-140 of the Consumer Credit Act 1974*, (OFT, London, 1991)

<sup>56</sup> Comité des usagers du Conseil National du Crédit: *La réforme de la législation sur l'usure: un premier bilan*, op.cit. p. 8-9

unemployment, greater risk of disease, higher crime rate, etc. - all phenomena which require a collective shouldering of the burden.

291. There are various remedies to control usury. In most countries it is the task of the courts, but this means that the debtor must take the initiative. The work of the courts does not necessarily lead to regulation of the market.

292. Invoking the creditor's liability would punish those who have granted a loan, even though they could reasonably have assumed that the borrower could not satisfy his obligations.

293. Rules governing recovery procedures constitute a third potential instrument. Loans at extremely high rates work because the creditor is more effective in recovering them. Certain practices may constitute an infringement of debtors' privacy, or quite simply their dignity. If these practices are restricted, there will be fewer loans with usurious conditions.

294. The most effective approach is probably to lay down maximum rates, even if this may be technically complex.

295. A number of criticisms have been levelled at usury regulation, notably the argument that the credit market is thereby restricted. Sceptics contend that the credit market will be shut to those who need it most, to groups who need credit to survive, to persons who could not set themselves up without taking out a credit at a very high rate of interest. Regulating maximum rates would be tantamount to outlawing credit for risk individuals.

296. This criticism raises the question of credit's function in society. In certain situations credit may compensate for a lack of purchasing power but it can never make good a structural lack of resources. Hence, we must ask whether there exists a level of credit charge which is normally unacceptable. In other sectors similar notions also exist, such as the abuse of a dominant position (from the firm's viewpoint) or the abuse of a weakness (from the consumer's angle).

297. The Commission would like usury to be debated at Community level. In the framework of monetary union, i.e. when creditors will be dealing in ECU, it follows logically that any rules on usury, should they be necessary, must apply at Community level.

#### **D. CREDIT INTERMEDIARIES**

298. Credit intermediaries do not exist in all Member States and exist in different forms in certain states. In general, they occupy an 'intermediary' position between the financial institution which supplies the credit and the recipient and include, in certain countries, the professions of credit brokers. Generally, they arrange credit agreements with the institution in question. Article 12 of the Directive applies both to credit offerers and those 'offering to arrange credit agreements', and Member States are therefore obliged either to require official authorisation or monitoring of their activities, or to establish appropriate bodies to receive complaints concerning the activities of credit intermediaries as well as of those offering credit.

299. Most Member States have some regulations on the activities of credit intermediaries. In some cases, as in Germany and Sweden, Member States extended the scope of their national legislation implementing Directive 87/102 in order to cover them. In other cases, as in the United Kingdom, credit intermediaries (including credit brokers and debt collectors) are subject to licensing as banking activities or ancillary credit businesses, and are also subject to regulations on credit advertising and charges. In Austria, the relevant Trading Code Order regulates credit intermediaries, requiring a licence from the Federal Ministry of Finance.

300. The level of regulation by Member States varies in strictness and scope: some Member States merely regulate the levels of commission which intermediaries can charge, while others regulate matters such as their training, conditions of operation and matters such as transparency and information. For instance, in Belgium, aspects such as advertising and levels of commission are regulated, but not training. In the Netherlands, a Decree on Commission for credit intermediation regulates the amount of commission and the method of its payment, while in Norway, the relevant legislation lays down minimum requirements with regard to the information which intermediaries are to give to consumers.

301. The majority of respondents felt either that intermediaries do not pose any real problems, or that no further regulation was needed. In some cases, this was due to recent revision of the relevant laws or, according to a German respondent, because the number of intermediaries had fallen due to the legislation in question. However, the areas where regulation was felt to be necessary were training, credit advertising, and transparency of operations. In addition, one respondent proposed the establishment of a 'Register' of credit intermediaries. Another respondent questioned the need for credit intermediaries due to the additional cost of credit obtained in this manner.

302. The Commission intends to commission a study on problems encountered by consumers in their relations with credit intermediaries. On the basis of these practical aspects it will be possible to determine precisely whether provisions to protect consumers are being effectively enforced.

## **E. THE CREDIT CONSUMER'S PRIVACY**

### **Protection of private data**

#### **E.1 The importance of privacy**

303. Protecting privacy has two aspects. Firstly, the need for a protected domain within which the citizen will find refuge against all assaults on his tranquillity. This is known as "internal privacy". Second aspect: information concerning citizens and the use made thereof. Here we speak of "external privacy".

304. Credit transactions generate a significant amount of data on citizens' private life. Income, existing debts, professional and family history, defaults, repossessions - all these data are used by credit professionals and circulate amongst them.

305. To obtain a loan, consumers must tender certain information so that the lender can assess the borrower's solvency. Should there be restrictions on such investigations? Are there limits on the economic objectives of the creditor's activity?

306. In certain circumstances, creditors will pass on data on borrowers to various persons: a recovery agency, a marketing firm, a credit insurer, a central database of defaulters, etc. Are all these addressees legitimate? Should one distinguish between dossiers intended strictly for internal usage and files in respect of which certain data may be disclosed? What are the implications of this distinction? Under what conditions may third parties use the borrower's personal data? Does not a database of defaulters risk becoming an "economic criminal record"?

307. The data used or communicated by the creditor may affect the borrowers' financial image, if they are incorrect or irrelevant. What rights do citizens have relating to these data? What remedies may they rely on?

308. These questions fall outside in Directive 87/102. It is true that protection of privacy in consumer relations goes far beyond the scope of consumer credit. On the other hand, consumer credit databases have witnessed a boom in recent years. Rather, they come within the scope of the Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in respect of which the Council adopted a common position on 20 February 1995.

## **E.2 Applications**

### **A. Credit information centres**

#### ***Situation in the Member States***

309. Credit information systems in Europe vary greatly. In certain countries, such as the United Kingdom, Ireland and Sweden, credit information is provided by firms acting on a purely commercial basis: collecting the information is a market activity. Generally, such firms are not subject to any specific controls and their activity is not necessarily confined to keeping tabs on credits. This explains why in certain countries several systems are in competition. Given their commercial nature, their main objective is not consumer protection.

310. In a second group of countries, the systems are managed by professional bodies or private organisations, which are generally non-profit-making institutions. Examples include the "Bureau Krediet Registratie" in the Netherlands, the Austrian "Kreditschutzverband", the "Schufa" in Germany, and the Belgian "Mutuelle d'information de L'union Professionnelle du crédit". These systems respond to the finance sector's need to defend common professional interests: data on ongoing credit commitments are collected by a professional body; access to the information collected by the participants is an important source of information concerning the credit applicant's solvency.

311. Finally, in other countries such as Belgium or France, the legislator has intervened to regulate credit information systems, although private systems already existed in these countries. The reason for legislative intervention was to prevent private overindebtedness.

312. The operation of these databases, managed by the Central Bank, is strictly regulated. The legal basis offers certain privacy guarantees, and also has the advantage that all creditors are obliged to participate, which means that the system is exhaustive and reliable.



### Positive and negative centres

313. Credit information systems in Europe are even more varied as regards the kind of data collected. Records are called negative if only payments in arrears are taken into account. Records are called positive when all credit agreements are covered. Positive centres exist in Germany, the Netherlands, and the United Kingdom, whereas Belgium and France have negative information centres.

314. The choice between the two systems has been the subject of a vast debate. Should all credit agreements be recorded at the time of conclusion, in order to prevent overindebtedness? Advocates say yes, because then creditors will have a very broad view of the consumer's financial circumstances. This would also be a way of making creditors behave more responsibly. Their liability could easily be invoked in the event of default on an agreement granted concurrently with other agreements.

315. Opponents perceive a threat to privacy and have misgivings as to the effectiveness of such a system, since many liabilities would go unrecorded (energy, rent, tax, etc.). There would be no need for a positive centre if the consumer told the truth and the whole truth about his ongoing commitments.

316. In France, the parliamentary assessment report on the *Neiertz* Law on overindebtedness proposes the creation of a positive list which would be "a genuinely effective way of combating overindebtedness resulting from the accumulation of debts from different credit institutions"<sup>57</sup>.

## **B. Credit scoring**

### Definition

317. Credit scoring is an attempt to rationalise the use of information collected by the credit institution in order to assess its debtors' solvency. It involves allocating a number of "points" to each data element, which are then added and compared to a statistically pre-established grid, on the basis of which a credit is granted or refused.

### The advantages

318. The objective of credit scoring is to minimise the risks associated with the granting of credits. This system makes it possible to:

- decentralise the decision;
- process requests for credit more speedily;
- reduce the cost of applications for credit;
- learn more about the clientele and hence finetune commercial strategy.

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<sup>57</sup> R Léron: *Rapport sur la loi relative à la prévention et au règlement des difficultés liées au surendettement des particuliers et des familles*, Publication du Journal Officiel de la République française (1993)

### Critical assessment

319. Two types of criticisms are levelled at credit scoring:

- it includes discriminatory criteria and
- the decision is based purely on automatic information processing.

320. The criteria utilised discriminate in that they make it possible to rank the degree of risk of the envisaged operation. Persons living in one city may score fewer points than those living in another; married people rate higher than unmarried women. Where does differentiation end and discrimination begin?

321. In the United States there are specific statutes which prohibit discrimination in the granting of credit<sup>58</sup>. The criteria used are based on statistically pertinent data concerning the borrower's solvency.

322. Credit scoring establishes a borrower profile. In regard to freedoms, the creation of profiles is often considered to be one of the major risks of information technology.

323. Several countries have introduced specific provisions on automated individual decisions.

324. In France, notably Article 2 of the Law of 6 January 1978 on information technology, data files and liberties, provides that "no decision involving an assessment of human behaviour may be based purely on automated data processing providing a definition of the interested party's profile or personality". A confidential annex indicating for each variable utilised a range of extreme values must accompany the declaration, allowing the Commission nationale de l'informatique et des libertés (CNIL) to correct, where necessary, excessive discrepancies which could lead to discrimination (between French citizens born in France and those born in French overseas territories, for example).

325. Several complaints relating to conditions for the granting of credit have been submitted to the CNIL. "It emerged that the stability criterion was more important than the solvency criterion. For example, a newly wed young person in his/her first job and living in a new apartment was refused a credit for a small amount by comparison with his/her income because that person combined all the negative criteria"<sup>59</sup>.

326. Following a number of investigations, the CNIL published a recommendation on measures which must be taken to inform clients stating, notably, that "all persons who are refused credit must be informed in writing or orally of the reasons for refusal in a sufficiently explicit manner"<sup>60</sup>. This recommendation has been amended. The requirement that grounds be indicated no longer applies in all cases because - so the argument runs - since there is no such thing as a right to credit, there is no justification for insisting that grounds be indicated. But the issue of a "right to credit" is irrelevant. The sole objective for providing grounds for

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<sup>58</sup> *Consumer protection in the field of consumer credit*, Report by the Consumer Policy Committee (OECD (1977), p. 23

<sup>59</sup> CNIL: *Dix ans d'informatique et libertés*, Paris, Economica (1988) p. 95

<sup>60</sup> CNIL: *6ème rapport d'activités* (Paris, 1986) p. 298

refusal is to make it possible to check on the information underlying the bank's decision. Should transparency work only in favour of those who can keep it at arm's length?

327. The professionals fear that, by providing grounds, people could learn how the scoring system works and hence manipulate it. Is it proper that the modalities underlying a decision should remain unknown to the person concerned? Does not the professional's obligation to provide information mean that the consumer must be informed about how the credit scoring system works, as recommended by the Office of Fair Trading in the United Kingdom? The OFT argues that the creditor should inform the consumer of the application and mode of operation of the scoring system and serious factors affecting the score<sup>61</sup>.

#### C. Use for business purposes

328. The information obtained by a financial institution in connection with the granting of credit or in connection with performance of the agreement casts light on its clientele and influences the firm's commercial strategy. In principle, nobody contests the legitimacy of such an approach.

329. In the context of its activities, it would seem normal that a firm should use the information in its possession to tune its commercial offers to different types of clients<sup>62</sup>. Information on citizens' incomings and outgoings can be put to good use by a wide variety of professionals. The question is whether these data may be used for purposes other than those which they have been communicated.

330. Hence in Belgium a case occurred in which a bank kept tabs on insurance premium transfers and proposed to the holders policies that were being sold by the bank. This practice was severely criticised by the Commission de la Vie Privée (Privacy Commission) and was penalised by the courts. In the United States databases have been established containing information from credit institutions and card-issuers<sup>63</sup>. The score obtained by the American borrowers is a datum which can easily be circulated in the databases. The American Congress has recently considered banning the communication of this information.

#### D. Protection of the private sphere

331. Protection of privacy is not the same as protection of personal data. It also encompasses respect for the consumer's private sphere (internal privacy). In this regard it is interesting to note that Belgium and Luxembourg have introduced a specific provision governing consumer privacy, insofar as the consumer's private space is concerned: hence, the law prohibits the conclusion of credit agreements via doorstep canvassing.

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<sup>61</sup> *Credit-scoring*, (OFT, London, 1984) p. 22. See also *infra*

<sup>62</sup> C.N.I.L.: *12ème Rapport d'activités* (1991) La Documentation française, Paris, (1992) p. 112

<sup>63</sup> The most ambitious project to date was proposed by Lotus Development, a Massachusetts-based software firm which had proposed the creation of files on the private life of 80 million Americans. Details on their lifestyles, income, state of health, purchasing patterns and a host of other information were to be registered on compact disks. In the face of a barrage of protest, the project was abandoned.

332. Certain Member States<sup>64</sup> regulate the way in which debts are recovered. Recovery procedures may offend privacy; for example, if the envelope bears particulars showing that the addressee is in default, or if the debtor's neighbours, family or employer are approached in connection with recovery.

### **E.3 Perspectives**

333. The borrower's privacy and financial reputation are protected by general laws on protection of private data which exist in most Member States. Currently, a proposal for a directive is being discussed at European level. The common position on this proposal for a Directive<sup>65</sup> contains certain provisions which will be apply specifically to the credit sector. Hence, Article 15 focuses particularly on credit scoring techniques:

#### " Automated individual decisions

1. Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, such as professional competence, creditworthiness, reliability, conduct, etc.

2. Subject to the other Articles of this Directive, Member States shall provide that a person may be subjected to a decision of the kind referred to in paragraph 1 if that decision:

- a) is taken in the course of the entering into or performance of a contract, provided the request by the data subject has been satisfied, or that there are suitable measures to safeguard his legitimate interests, such as arrangements allowing him to defend his point of view; or
- b) is authorised by a law which also lays down measures to safeguard the data subject's legitimate interests."

334. Article 12 allows the consumer to obtain a "certain" knowledge of the reasoning applied in credit scoring:

"Member States shall guarantee for every data subject the right to obtain from the controller... knowledge of the logic involved in any automatic processing of data concerning him, at least in the case of the automated decisions referred to in Article 15 (1)."

335. Again, Article 14 grants each data subject the right to object at any time to the processing of data relating to him on "compelling legitimate grounds relating to his particular situation".

336. These regulations - either already in force or at the drafting stage - cover data generated by credit transactions.

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<sup>64</sup> See also the Debt Collection Practices Act in the United States, 15 USC, p. 1601 ff, which entered into effect on 1 July 1986

<sup>65</sup> Common Position 20 February 1995

337. However, the general nature of the rules does not always allow an adequate response to the specific problems encountered in the credit field. The problems include:

- data which may be recorded;
- persons who may be apprised of these data;
- the creation of profiles on the basis of the data;
- use of the data for purposes other than credit transactions;
- protection of the consumer's private sphere;
- lifespan of the data;
- handling of complaints.

338. While certain countries have adopted a regulatory approach, others have established codes of good conduct. Whatever means used, there seems to be a need for better organisation of the processing of personal data in the credit field. It will be up to the Member States to apply to the consumer credit sector - notably as regards credit scoring and credit reference agencies - the provisions of the framework Directive on the protection of personal data.

#### F. GUARANTEES

339. In some cases where consumer credit agreements are being concluded, the consumer may be obliged to obtain a guarantee from a person who is willing to act as guarantor of their debt. Individuals who assume a guarantee (or other form of liability) for the debts of third parties are, in effect, accepting liability in the event of default by the borrower. However, guarantors often have less protection than the consumers whose loans they guarantee, and often fail to understand or receive sufficient information on, the consequences of their commitment, and are therefore in need of protection. This is particularly true where the guarantor is a relative or in some close relationship to the borrower.

340. Member States have approached this problem in different ways. France introduced a new system of protection<sup>66</sup> for guarantors under which the guarantor has the same rights and obligations as the borrower - they have the right to a written acknowledgement of their undertaking, the right to a 7 day cooling off period and the right to increased information. In addition, the financial institution concerned must check the guarantor's financial situation, and must inform him of any breach of the guarantee (e.g. possible or actual default by the borrower).

341. With the continuing recession, other States began to introduce protection for guarantors. Belgian law provides for increased information for guarantors, and limits the circumstances in which lenders can act against them, while legislation in Norway and the United Kingdom gives the guarantor more information on their legal status and obligations. In Finland, new provisions prohibit unlimited guarantees, and a Committee has been established to totally revise legislation in this area, while in Sweden regulations have been introduced to check the guarantor's credit situation and to prevent credit institutions from accepting personal guarantees for commercial credit from anyone not in a position to supervise the business involved. The Irish draft legislation states that the guarantor must be provided with a copy of the credit agreement / contract of guarantee within 10 days.

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<sup>66</sup> Law No 89-1010 of 31 December 1989

342. In order to protect family members acting as guarantors from undue burdens, the German courts have developed principles whereby the guarantee / joint liability is in certain circumstances considered to be contrary to good morals and therefore null and void. There have also been voluntary Recommendations from associations of credit institutions.

343. While some respondents felt that the guarantor is sufficiently protected by existing regulations, or stated that guarantees do not tend to be used for consumer loans in their countries, there were some suggestions for reform. Among the ideas proposed were the introduction of credit-scoring for guarantors (as proposed by Sweden); the introduction of particular protection for family members, as has been done by the German courts; the placing of a ceiling on liability, or an entitlement to waive liability after a period of time.

344. A case involving all the legal problems associated with guarantees was referred to the European Court of Justice for a preliminary ruling<sup>67</sup>. This case has since been withdrawn. Mrs X, a teacher, had assumed a guarantee for her husband, in the context of the latter's professional activity. Mrs X's signature was obtained in the course of a short visit to her husband's office. The German court asked whether the provisions of the Council Directive on contracts negotiated away from business premises (85/577/EEC)<sup>68</sup> applied to this contract. Hence, this concerned a consumer who had assumed a guarantee for a credit agreement for professional purposes. Was this a consumer contract within the meaning of the Directive?

345. Although Directive 87/102 does not cover guarantees, provisions have been enacted in several Member States. The Commission proposes extending to guarantees certain information obligations provided for in the Directive.

## **G. CROSS-BORDER CREDIT**

### **G.1 The law and contracts**

346. Adopted on the basis of Article 100, prior to the entry into effect of the Single Act, the Consumer Credit Directive has as its main objective the elimination of distortions to competition resulting from the wide disparities between the laws of Member States in the field of consumer credit. In its recitals the Directive refers explicitly to difficulties encountered as a result of these disparities by the various economic agents wishing to enter into contractual relationships with parties established abroad, be it in respect of credit agreements or purchase contracts insofar as such contracts are stimulated thanks to easier access to credit.

347. More basically, in the Community context, it goes without saying that all Community initiatives should cover not only national situations, but also cross-border situations. The Directive is silent in regard to the specific problems associated with cross-border situations as such, both as regards the Member State with jurisdiction over the dispute and the law applicable to the dispute.

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<sup>67</sup> Case C-24/93 *Commerzbank*, removed from the register by order of 13.09.93

<sup>68</sup> See footnote 24

## G.1.A Conflicts of jurisdiction

### a) *The Brussels Convention, Article 13*

348. The Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters establishes a special regime for the sale of goods on instalment credit terms and any other credit arrangements entered into in order to finance the sale of goods (Article 13).

349. A consumer may bring proceedings against his creditor either in the courts of the state in which the creditor is domiciled or in the courts of the state in which he himself is domiciled. However, the creditor may bring proceedings against the consumer only in the courts of the state of the consumer's domicile. Any clause concerning jurisdiction, concluded before the dispute arose and which derogates from the principles of Article 13, cannot be relied on against the consumer.

### b) *The Brussels Convention, Article 2*

350. However, Article 13 applies only if there is a link between the credit and a product. Hence, many forms of credit, such as overdrafts, are outside the scope of this Article. For these forms of credit, the following regime will apply: in principle (Article 2), persons domiciled in a contracting state may be sued only before the courts of that state. However, the consumer will be free to choose the jurisdiction if:

- the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising and
- the consumer took in that State all the steps necessary on his part for the conclusion of the contract.

351. Hence this also covers the stationary consumer who receives an offer and who, without moving, accepts it in the context of a credit transaction at a distance.

### c) *Clauses attributing jurisdiction*

352. The consumer's choice may never be vitiated by clauses that attribute jurisdiction unless they:

- were entered into after the dispute has arisen or
- allow the consumer to bring proceedings in courts other than those indicated in Article 13 or
- have been concluded between a consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same contracting state and which confer jurisdiction on the courts of that state, provided that such agreement is not contrary to the law of that state.

## **G.1.B The law applicable to cross-border consumer credit**

### **1. The principle**

353. In the absence of standardised rules in the consumer credit Directive, it is the Rome Convention of 19 June 1980 on the law applicable to contractual obligations that applies. The general principle is that it is up to the parties to choose the applicable law (Article 3). In the absence of choice, the principle is that the contract shall be governed by the law of the country with which it is most closely related (which in principle is favourable to the creditors).

354. For consumer contracts, the Convention establishes a special regime:

- in the absence of choice, the contract is governed by the law of the country in which the consumer has his habitual residence, provided the other party to the contract receives the order in that country (Article 5.3);
- if, in the circumstances described above, a choice of law is made by the parties, this shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence (Article 5.2). In these circumstances there is nothing to prevent the court from choosing between the provisions of the law chosen and that of the consumer's habitual residence.

### **2. Application to credit agreements**

355. The particular protection afforded to consumers applies only to agreements for the supply of goods or services or contracts for the provision of credit for that object, except for those relating to immovables and non-material goods.

356. Moreover, certain conditions must apply to the contract, as defined in Article 5(2):

- the conclusion of the contract must have been preceded by a specific invitation addressed to the consumer or by advertising, and the consumer must have taken in that country all the steps necessary on his part for the conclusion of the contract;
- the other party to the contract must have received the consumer's order in that country;
- the contract must be for the sale of goods and the consumer must have travelled from that country to another country and there have given his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

357. As in the case of the Brussels Convention, the question is whether the provisions of the Rome Convention should apply to all credit transactions, and notably to openings of credit lines. The response will be positive if a credit contract is considered to be a contract for the provision of services.



## G.2 The law and cross-border transactions

358. Under what conditions may a lender not established in a given Member State offer a credit in that State?

### A. The principle: the second Banking Directive

359. The second Banking Directive<sup>69</sup> applies only to credit institutions and to financial institutions which are 80% subsidiaries of credit institutions. Its objective is to harmonise matters which are considered to be essential. This harmonisation is considered necessary but sufficient for application of the principles of single authorisation and "home country control" to credit institutions operating via a branch office or via provision of services in the territory of a Member State other than the home Member State. It is enough for a credit institution established in the Community to obtain authorisation in a single country to exercise in the other Member States the activities covered by the authorisation, provided they are included in the list of activities enumerated in the Annex to the second Directive. Consumer credit is explicitly mentioned. Pursuant to the home country control principle, all credit institutions are governed, from the administrative viewpoint, by one set of rules, namely those of the home Member State. The second Banking Directive does not ipso facto mean that the host State must refrain from applying to the institutions concerned its own rules governing the activities subject to mutual recognition<sup>70</sup>. Hence, a credit institution operating in another Member State must comply with a certain number of mandatory provisions of the host Member State. These provisions mainly concern the relations between the lender and the consumer (contract law, commercial practices, etc.). Moreover, they must have been adopted in the interest of the general good. The monitoring authorities in the Member States must inform the institutions of the rules governing the general good which apply in the host State. Rules governing consumer credit may be wholly or partly constrained by the Member States' rules governing the general good, provided they do not fall foul of the interpretation given by the European Court of Justice.

### B. Problems in application

360. As regards possible restrictions to advertising of financial services, the Commission has specified: "Advertising of financial services for sales across frontiers will generally be possible without restrictions. The banking and other financial services directives restate the principle that financial services firms should have access to all the normal advertising media. Such advertising is and will be, where appropriate, subject to other specific Community provisions such as those contained in the Directives on misleading advertising and broadcasting activities, and in the proposed Directives on direct selling and comparative advertising. However, Member States may, in the interest of the general good and within the limits set by the case law of the European Court, also adopt rules governing the form and the content of advertising"<sup>71</sup>.

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<sup>69</sup> Second Council Directive of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, OJ No L 386, 30.12.89, p. 1.

<sup>70</sup> Mutual recognition of financial techniques is not provided for in the Second Banking Directive. The principle is set out in a recital.

<sup>71</sup> OJEC No C 46, 14/02/94, p.1

361. May the host Member State require prior control of the contractual terms proposed by the host institutions? On the one hand, one might argue that this prudential control has the sole and unique objective of checking compliance with rules governing the general good according to the provisions of the host country. On the other hand, according to the European Court's case law, foreign suppliers of services may not be subjected to administrative controls which could hamper their activities, even if these controls are exercised on firms in the host country. Exceptions to this rule, designed with an eye to protecting consumers, can only be accepted if the principles of necessity and proportionality are respected. Likewise, prior control of insurance policies is from now on outlawed in the insurance sector.

362. Under what conditions may service providers who are not covered the second banking Directive conduct cross-border operations? This situation concerns both lenders who are not credit institutions (they provide loans but do not take deposits) and intermediaries who bring creditor and borrower together. Pursuant to the principle of free movement, these services should not be subject to restrictions. The direct effect of the Treaty provisions should allow these lenders to offer their services in Member States in which they are not established. However, several Member States have provisions for the prior control of the exercise of these activities (authorisation, registration, conditions, etc.). If they are not to be struck down, these rules must be in line with the case law of the European Court and hence must satisfy the principles concerning necessity, non-equivalence and proportionality<sup>72</sup>.

363. If an intermediary acts on behalf of a credit institution, must he notify the establishment of a branch agency? The Commission considers that a Member State can only require a non-established credit institution acting via an intermediary to establish a branch office if the intermediary is a genuine extension of the credit institution, such that third parties no longer have to address themselves directly to the foreign credit institution and may do business with the intermediary who constitutes this extension. Four conclusions, inspired by the case law of the European Court, must be satisfied if the institution is to be subject to the prior notification procedure for the establishment of a branch office:

- the intermediary must be subject to the authority, normally exclusive, of the credit institution;
- the intermediary must be empowered to negotiate with third parties;
- the intermediary must be empowered to bind the credit institution;
- the intermediary must be active on a permanent basis.

## H OVERINDEBTEDNESS

### A *The situation at present*

364. Member States are currently very concerned with the problem of overindebtedness. Many countries have specific rules in this domain; in other countries draft laws are under examination (see annexed table). This regulatory situation in 11 of the 15 Member States shows that overindebtedness has become a European problem, irrespective of the Union's volition and powers in this domain.

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<sup>72</sup> For the Court's rulings relating to "co-assurance" cf *Commission v. Germany*, C 205/84, 04/12/86, ECR 1986, pp. 3755-3815

365. Overindebtedness is a relatively vague concept. There are a plethora of definitions to match the different objectives pursued. The transition from debt to overindebtedness may cover two quite different circumstances: either the emphasis is on a large volume of debt (the objective definition), or on financial difficulties (subjective definition).

366. The first approach, which is interesting from the statistical viewpoint, ignores differences in income (debt repayments constituting 60% of one's income have a very different impact on persons earning 600 ECU than on those earning 6 000 ECU monthly) and de facto circumstances (for example an unmarried senior manager as compared with a working-class couple with several children).

367. The subjective definition of overindebtedness provides a better picture of the global nature of the problem. It must be defined as the situation of being unable to meet all one's financial commitments.

368. On the one hand, debts abound: consumer credit, rent, gas and electricity bills, maintenance payments, tax arrears, mortgage credits, etc. On the other hand, the household's obligation to reduce certain outgoings on so-called "strategic" consumer goods so that they can repay their debts is equivalent to overindebtedness in the form of under-consumption.

369. Currently, it is difficult to quantify the extent of the phenomenon in the European Union. Detailed statistics do not exist in all countries, and where they do exist they are not generally comparable. Moreover, the figures given are often disputed. There is a need for better European statistics in this area. The proliferation of statutory proposals as to how best to address overindebtedness of private individuals indicates that overindebtedness has become a major concern in most Western countries.

370. While nobody challenges the importance of this phenomenon, there are very different views as to its causes and remedies.

## **B**     Arguments

371. In their replies to the questionnaire, several Member States expressed an interest in Community initiatives in this domain, notably Sweden, Finland and Austria, all of which adopted specific rules in this domain in recent years.

372. Generally speaking, professionals are opposed to regulation in this area.

"Moreover, when problems of overindebtedness emerge, there is a large temptation to pass the buck to the credit institutions, the traditional scapegoats in circumstances of this kind. Nobody denies that creditors must assume their responsibilities, just like debtors. In this context, one may note the abandon with which universal banks fed the consumer credit boom during the late 80s, in flagrant contrast with the prudence shown by specialised institutions. At any rate, they alone cannot shoulder burdens which, to a large extent, they are neither responsible for nor are capable of resolving."  
(*Histoire du crédit a la consommation*: Rosa Maria Gelpi et François Julien-Labruyère, 1994)

373. Several professional bodies consider that it would be inappropriate and unrealistic to take measures at European level, given the specific circumstances of each country in this domain and taking into account differences in culture, social organisation and legal systems.

374. On the other hand a number of consumer groups consider that the Commission should present proposals in the light of the objective of completing the single market and the potential role of the Union in raising the level of consumer protection in Europe. They focus on the need for a collective procedure in the interests of debtors and creditors alike, and argue that the absence of such a procedure has undesirable consequences all round. As a rule creditors can only hope to recover a minimum proportion of their debts. The assessment report on the French law by deputy Roger Leron highlights the expense of litigation for creditors and in particular lenders when dealing with a population of borrowers in default, one result being that they cannot recover all the amounts due.

375. Roger Leron argues: "There may even be reasons to assume that debt rescheduling for certain categories of debtors, who will continue to pay off their debts in the context of a plan negotiated with all their creditors, may reduce the losses which would have been incurred by the banking community as a whole in the absence of such a mechanism".

376. As to the consumer, the tribulations abound: debtors may suffer bouts of depression with attendant medicare outgoings and the need to draw social benefits, they may be discouraged from seeking work or from seeking a better job because of fears that their salary will be confiscated, or they may moonlight or opt for occasional work for similar reasons. This is why the existence of a system for the collective regulation of personal debts may be beneficial at economic and social level: it enables the consumer to become reintegrated in the consumer market and prevents the ascerbation of social problems, and hence the burdens incumbent on the State.

377. In 1992, the Consumer Policy Service commissioned the Leyden Institute of Law and Public Policy to conduct a study on overindebtedness in the Member States. In conclusion, the study recommends the establishment of a system for collective regulation of debts at European level.

378. The Consumer Law Group, a group of European experts on consumer law, has drawn up ten fundamental points, present to a varying degree in the various national discussions, which should constitute the basis for any measures in this domain:

- better information in regard to credit;
- creation of independent bodies to provide advice and assistance to overindebted persons, before and during the procedure;
- a procedure adapted to natural persons;
- broad access conditions in the common interest of debtors and creditors;
- the creation of a collective procedure, on an amicable and/or in-court basis, allowing the establishment of a repayment schedule including all private and public debts;
- equality between creditors;
- adoption of preliminary measures designed to improve the likelihood of the plan's success while protecting the legal and economic interests of the overindebted person and his creditors (suspension of proceedings, verification of claims);
- elaboration of a realistic repayment plan which in particular would enable the debtor and his family to meet their commitments over a period of several years without risk of a litigation explosion in the event of default;

- the facility of writing off debts at the end of a reasonable period, respected by the debtor;
- measures designed to limit the opportunities for recidivist debtors to exploit the procedure.

### Perspectives

379. At European level the Community instances have already adopted a number of initiatives.

380. In its Resolution of 13 July 1992 the Council "invites the Commission to propose as soon as possible measures to create consumer confidence in the single market, in particular as regards greater transparency, information, health and safety and protection of the economic interests of consumers ..." and recommends as one of the priorities "examination of the question of excessive consumer indebtedness"<sup>73</sup>.

381. In its Opinion on the Consumer and the Internal Market, the Economic and Social Committee held that "... whilst excessive levels of consumer indebtedness have been identified and made the subject of legislation in some Member States, there have not as yet been any Community legislative initiatives in this area, although there is a Community dimension to the problem"<sup>74</sup>.

382. The adoption of recent statutes to deal with overindebtedness on the part of private individuals, notably in the three new Member States of the Union, is a new departure. On the one hand, one might argue that insofar as this problem is dealt with by most of the individual Member States, why should the Union intervene? But on the other hand, if different rules are in force, should they not be harmonised? Divergencies in the approach to overindebtedness in the Member States may engender real problems in the case of cross-border credit agreements. The conditions to which creditors are submitted when attempting to recover their debts from an overindebted consumer may vary considerably depending on whether a collective settlement procedure exists or not and whether debts may or may not be discharged in this context. These differences in risk management may lead to major distortions of competition which may make it difficult to establish the internal market in the credit field.

383. Pursuant to the Council Resolution of 13 July 1992, the Commission proposes to examine:

- application of the rules governing indebtedness in the Member States, in particular the new Member States;
- the influence of disparities in rules on the operation of the credit market, notably as regards the creditors;
- the need for European intervention, notably with an eye to the principles of subsidiarity, consumer protection and the free movement of persons;
- non-regulatory mechanisms which might be proposed in order to deal with the problem of overindebtedness.

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<sup>73</sup> Council Resolution of 13 July 1992 on future priorities for the development of consumer protection policy, OJEC No C 186, 23/07/92, p. 1

<sup>74</sup> Opinion of 26/11/92, OJ No C 19, 25/1/93, p. 22

## **IX THE MINIMUM CLAUSE**

384. All members of the European Economic Area i.e. the 15 members of the European Union in addition to Norway and Iceland, are obliged to transpose Directives 87/102 and 90/88 as these Directives formed part of the Agreement on the European Economic Area. However, while the Commission has information on the actual transposition in these countries, in the case of the new Members, Norway and Iceland insufficient information is available on the details of the transposition and the relevant national legislation. For this reason, references in this Chapter, particularly paragraphs 387 to 392, are to the twelve members of the European Union before 1 January 1995.

### **A. Summary**

385. Directive 87/102 has given rise to a massive application of the minimum clause by the Member States which have transposed it:

- many Member States have extended the scope to cover contracts other than credit agreements *sensu stricto*: credit intermediaries, debt recovery, debt mediation, etc.;
- the definition of consumer is often wider than that given in the Directive. However, the criteria applied in the different Member States are very varied: extension to all legal persons, all natural persons, coverage of professionals in the case of persons financing a business, etc.;
- in parallel, the creditor as defined by the national legislations is not necessarily a credit professional: he may be a private individual if the intermediary is a professional, or granting credit may be a habitual activity, even if not a professional one;
- several Member States have included in the definition of credit agreement contracts relating to provision of services on a continuing basis;
- in a small number of cases, the rules governing calculation of the APR are more protective: hence, Belgium provides for inclusion of charges which are outside calculation of the APR provided the consumer has a reasonable freedom of choice; Belgian law also defines the reference amount for the calculation (1 277 ECU); British law also provides that the client must be informed about variations in the APR before conclusion of the agreement;
- as regards the exemptions provided for in the Directive, there is a plethora of more protective provisions: several Member States regulate real estate or mortgage credit, at least in certain respects. Likewise, many Member States regulate advances on current account, as well as short-term credits or credits to be repaid in less than four payments; financial floors or ceilings are not always provided for; leasing agreements come within the scope within several Member States; numerous Member States do not envisage a favourable treatment for certain categories, etc. It is very difficult to assess the harmonising impact of the Directive in view of the diversity in the transposition rules as regards its scope: numerous legislators do not reproduce the list of exemptions in the same way, but again certain exemptions are only partial or apply only under certain conditions;
- the Directive's provisions concerning advertising have often been fleshed out at national level: wider mandatory content of advertising, typological highlighting of certain provisions, ban on certain mentions in advertising, ban on advertising targeted at young people, ban on advertising outside the place of sale for certain types of

credit, obligation to provide a prospectus, etc. Moreover, the national laws often prohibit canvassing for credit, as well as unsolicited dispatch of credit devices;

- with regards the formal aspects of the agreement, the national laws are generally more detailed in regard to the mandatory information to be contained in the agreement; certain laws have rules concerning a prior offer of credit; others have rules on legibility; other statutes provide that a copy of the agreement be sent to the guarantor; there are some original penalties for non-compliance: waiving of interest, costs about which the consumer has not been informed need not be paid by him etc.;
- repossession of goods in the event of default is also subject to more detailed rules in numerous Member States: the conditions may be stricter, repossession may be outlawed when the bulk of the credit has been repaid, the consumer may be entitled to recover the good if he pays up, etc.;
- several Member States extend the possibility of early repayment to partial repayment; certain Member States lay down detailed rules on how to calculate rebates in such cases;
- assignment has not played much of a role in national developments;
- on the other hand, bills of exchange and other negotiable instruments have generally been outlawed in numerous Member States;
- the interdependency between the credit agreement and the sales agreement has been strengthened in several Member States to the consumer's advantage; certain countries even provide for joint and several liability involving the seller and the third-party grantor of credit.

386. However, it is mainly in regard to the provisions not provided for in the Directive that the Member States have taken many initiatives. Some examples:

- recognition of a cooling-off period ranging from two to ten days;
- some countries regulate the maximum authorised rate of interest;
- several Member States have rules on the damages to be paid by the consumer in the event of default, or the creditor's freedom to rescind the agreement;
- several laws make it mandatory to provide reciprocal information, notably as regards the creditor's responsibility to collect information before granting credit;
- certain legislations have provisions concerning data protection;
- guarantors are protected in several Member States;
- affiliated professions are also regulated in several countries.

## **B. Perspectives: is there a common denominator?**

### **B.1 Scope**

387. The Member States have transposed the provisions of Article 1 and 2 in very different ways. In five Member States consumer credit legislation also covers real estate credit.

### **B.2 Advertising practices**

388. Advertising is subject to specific, more protective provisions in seven Member States: wider mandatory content, typological highlighting of certain provisions, ban on certain advertising mentions, ban on advertising targeted at young people, ban on advertising outside the place of sale for certain types of credit, obligation to provide a prospectus, etc.

389. Doorstep selling and telephone canvassing is regulated or banned in five Member States.

### B.3 Formal aspects

390. The form of agreements is the subject of more protective provisions in nine Member States: prior offer formula, legibility rules, the requirement that a copy of the agreement be sent to the guarantor. Penalties for non-compliance are sometimes original: waiving of interest, costs about which the consumer has not been informed must not be paid by him, etc.

### B.4 Contractual terms

- a. Cooling-off period (from two to ten days) in seven Member States.
- b. Use of bills of exchange regulated or prohibited in ten Member States.
- c. Interdependency between the credit agreement and the sales agreement reinforced in favour of the consumer in six Member States; certain countries even provide for joint and several liability between the seller and the third-party grantor of credit;
- d. Maximum rates of interest or penalties on excessive rates in six Member States.
- e. Early repayment is regulated in greater detail in nine Member States: several Member States also allow for partial repayment; some Member States have detailed rules concerning calculation of the reduction in the cost of credit.

### B.5 Consequences of the debtor's default

- a. Repossession is subject to more detailed provisions in nine Member States: stricter conditions for implementation, ban on repossession if a large proportion of the credit has been repaid, the consumer may recover the good if he pays up, etc.
- b. Economic aspects of the debt (calculation of interest on arrears, limitations on the penal clause, calculation of the balance due in the event of termination or cancellation of the contract) is subject to particular rules in five Member States.
- c. Special procedures: special procedures for defaulting debtors exist in four countries.

### B.6 The intermediaries

391. Four countries have stricter rules governing the activities of intermediaries than that of the mere authorisation mandated in Article 12, including provisions on remuneration or commission, relations with consumers or the way the profession is organised.

### B.7 Sanctions

392. All the Member States provide for sanctions for infringement of the consumer credit laws. The provisions to which the penalties apply and the nature of the penalties themselves (civil, penal, administrative) vary greatly.



***Annexes***

## Debt arrangement schemes in Europe

Country	Act or draft proposal	Special rules for private individuals	Access	Stages of the settlement schemes	Discharge/Conditions	Debt advice assistance centres
Austria	Act "Konkursordnungs novelle" 1993 (BGBC 974/1993)	Yes	Indebted private debtors	1) First step : an attempt for an out-of-court settlement 2) Judicial proceedings a) Compulsory composition settlement b) payment schedule c) levying scheme	Yes	Yes
Belgium	Amongst three drafts, the foremost one	Yes	Idem France	Idem France but the Judge controls the entire proceedings from the beginning	Yes	Yes, Centres of social aid/private associations (Credit group : pioneering organization)
Denmark	New Bankruptcy Code 1984	Yes	Hopelessly indebted and clearly overindebted in typical cases > 25 000 ECUS of unsecured debts	Compulsory debt settlement asked by the debtor/ debt rescheduling plan of 4 or 5 years /then discharge	Yes, even immediate discharge if no realistic prospect of repayment	No

Country	Act or draft proposal	Special rules for private individuals	Access	Stages of the settlement schemes	Discharge/Conditions	Debt advice or assistance centres
Finland	"Adjustment of debts of Private individuals" Act of 8/02/93.	Yes	The debtor is insolvent and unable to remedy the situation (economic approach).	1) Voluntary arrangement with creditors 2) if not, compulsory debt settlement by court Insecured debts : generally 5 years, 10 years if the debtor can keep his owner-occupied flat. Secured debts : depends on the original and remaining loan period	Insecured debts : discharge after 5 years Secured debts : no cancelling (but if the debt exceeds the value of the secured collateral, the excess is considered to be insecured and can be discharged)	On the voluntary and public founded scheme, municipal authorities.
France	Articles L 331-1 à L 333-8 du Code de la consommation (Loi du 31 décembre 89 modifiée par la loi du 8 février 1995) Act n°95-125 du 8/02/95	Yes	Faithful debtor in the obvious impossibility to meet the whole of one's outstanding and accruing debts	1) Voluntary debt settlement ("commission de surendettement") 2) Compulsory settlement "juge de l'exécution".	Yes, but only in the case of mortgage loans and after selling the house	No, except in the field of access to property (ANIL)

Country	Act or draft proposal	Special rules for private individuals	Access	Stages of the settlement schemes	Discharge/Conditions	Debt advice assistance centres
Germany	Act of 5/10/94 (in force 1999)	Yes	By the goodfaith debtor (débiteur qui ne fraude pas et essaie par tous les moyens de payer sa dette)	Out of court debt settlement. If not/voluntary debt settlement with the majority of creditors. If not/classic but simplified bankruptcy with a trustee	Yes, if the debtor has paid all of his garnishable income for a 7 year period and made effort to increase his income. (dettes converties en obligations naturelles)	Yes. Private advice centres (advice assistance centres) public debt advice centres (advice assistance centres) for out of court debt settlement computerized de counselling (CAL CADAS)
Greece	Nothing (very recent law about consumers loan)		No			No
Ireland						No specialized organizations but a guarantee fund established to guarantee loans to borrowers in debt to moneylenders

Country	Act or draft proposal	Special rules for private individuals	Access	Stages of the settlement schemes	Discharge/Conditions	Debt advice or assistance centres
Italy		No				
Luxembourg	Draft 6/07/93	Yes	Idem France with a strict interpretation of "professionnal debts" and "good faith" : economic approach	Idem France but a single "national commission"	Yes, at the end of the proceedings ( The order?)	Yes ("Service national de lutte contre le surendettement", non profit making association)
Netherlands	Draft 28/12/92 n° 22969	Yes, but including traders and the Professions	Debtors with serious and permanent debt problems	Repayment Plan for a maximum of 5 years : the debtor sells his property. After this period, possibility of a new plan or/ the remaining debts are transformed in natural obligations.	Yes, after 5 years	Municipal Credit Banks/determined by the city council. (credit to low income groups, debt refinancing, debt mediation). Public and social organizations

Country	Act or draft proposal	Special rules for private individuals	Access	Stages of the settlement schemes	Discharge/Conditions	Debt advice assistance centres
Norway	Debt Composition Act June 1992, came into force on 01/01/93	Yes	Private debtors with serious and permanent debt problems	All efforts must be done during 3 months to reach a voluntary arrangement. If not/ compulsory debt settlement by the Court of execution. 5 years	Yes, at the issue of the order	Yes, municipal social service authorities provide information, advice and guidance (Social services Act, came into force 1-1/93)
Portugal	Decret-loi n°132/93	No, but the individual business are considered "Concordata Particular" (art.240 to 245 of D.L.132/93)	Account definition : insolvency (assets < liabilities).	Voluntary arrangement. if not, "concordat" with creditors. if not, bankruptcy.	No	

Country	Act or draft proposal	Special rules for private individuals	Access	Stages of the settlement schemes	Discharge/Conditions	Debt advice or assistance centres
Spain		No				
Sweden	Debt insolvency Act 1994	Yes	"Qualified insolvency" which means permanent debt problems	1. Voluntary debt settlement between debtor and creditor before the trial 2. Voluntary settlement between debtor and creditor (With assistance from enforcement office) 3. Mandatory debt insolvency by court decision	Fully or partial discharge if the debtor has no hope to pay his debts in a foreseeable future	The municipality authorities are by law obliged to render advice and assistance
Switzerland	Debt insolvency Act of 1889 amended by Act of 16-12-1994	Yes	No proof of insolvency Idem, but the judge may, if necessary, inquire about debtor's misuse of law. The debtor has to advance legal expenses.	Voluntary debt settlement Judicial proceedings (juge du concordat) : stay of bankruptcy (periods of three months)	No	Private associations ("Associations caritatives") and, in some "cantons", municipal or cantonal advice services.

Country	Act or draft proposal	Special rules for private individuals	Access	Stages of the settlement schemes	Discharge/Conditions	Debt assistance centres	Mont
United Kingdom	Insolvency Act 1985	Yes, but including traders and the Professions	debts < £ 5000  debts > £ 750	- Administration Orders - voluntary arrangements debt rescheduling plan of 3 years: single payment to the court to reimburse the creditors on a pro-rata basis - Bankruptcy : assets are sold, debt is often reduced	No  Yes, in most cases after 3 years	Debt assistance centres	Settlement Advice (National Citizen Advice bureau (CAB))  Montreuil Centre debtline bureau



## Questionnaire on the application of Directive 87/102

### A. Transposition

1. When and how was the Directive transposed in your country?
2. Has the application or interpretation of the Directive given rise to any difficulties on the part of:
  - courts/ tribunals
  - administrative control authorities
  - lenders
  - consumer organisations?
3. If so, please indicate these and whether these difficulties are a result of the provisions of the Directive or of the national implementing measures.

### B. Scope

4. Does the scope of the Directive sufficiently cover the market for credit in your country? If not, please indicate its failings.
5. Should the scope of the Directive be enlarged/ reduced? Why and how?
6. Should Article 2 be revised? If so, which aspects thereof (e.g. financial limits, time periods for repayment...)?

### C. Advertising and Information for Consumers

7. In general, does advertising of credit conform to the rules? If not, please indicate the reasons (e.g. insufficient regulation or control...)
8. Have you any recommendations for reform (e.g. stricter regulation, prohibition of advertising encouraging a credit-based lifestyle...)?
9. Is the consumer sufficiently informed about credit conditions?
10. Should this information be improved? If so, in what way?

### D. The Contract

11. Would it be useful to consider standardising the form of contracts (from the point of view, for example, of presentation or drafting)?
12. Should a consumer who gives false/ inexact information to a lender be penalised?
13. Should a lender who grants credit too easily, without inquiring whether the consumer can meet his repayments, be penalised?



**E. Contract Terms**

14. How does repossession (Article 7) operate in your country?
15. Is there a need for reform in this area? If so, please give recommendations.
16. What are the provisions of your regulations on early repayment (Article 8), and how do they function?
17. If you feel that there is a need for reform, please give recommendations.
18. Are the provisions of Article 9 often used? How do they operate in your country?
19. If you feel that there is a need for reform, please give recommendations.
20. What volume of payments in your country is achieved by means of letters of exchange (and the other means of payment listed in Article 10)?
21. What protections have been introduced for consumers using these means of payment? Do they work?
22. Should payment by letters of exchange be prohibited?
23. What is the position in your country as regards Article 11 (connections between the credit contract and the sales contract)? Is the application of this Article effective?
24. Should these connections be strengthened or should autonomy be increased between credit and sales contracts?
25. Does a general cooling-off period provide effective protection for the consumer?
26. Should the proposed market rates be subject to a maximum (usury)?

**F. Non-execution of the contract**

27. What are the consequences, according to your law, of non-execution of the contract by the parties (e.g. the calculation of the amount due, the penalty clause, interest on late payments...)?
28. What are the procedures in your country for recovery of amounts due in the event of non-execution of the contract?
29. Do these procedures take into account the economic aspects of debt and overindebtedness (e.g. are there possibilities for obtaining terms or delays in payment, seizure of salaries, counselling-systems)? What is your opinion of these methods?

## **G. Credit Intermediaries**

30. Do the activities of credit intermediaries pose particular problems e.g. in terms of commission, training, independence and transparency?
31. Should the activities of intermediaries be regulated?

## **H. The Decision**

32. Should there be more transparency in the rules governing the credit-scoring system?
33. Have you any recommendations on the subject of credit-scoring (e.g. whether the consumer should be informed of the reasons for refusal of credit)?
34. Should there be regulation of databases? How? Should there be positive files (debts) or negative files (registration of incidents of debt)?

## **I. Guarantees**

35. Do guarantees pose particular problems for consumers? Should the guarantee be better protected? If so, how?

## **J. Article 12**

36. Of the options given in Article 12, which was chosen?
37. What sanctions are applied in your country, and do they work effectively?

## **K. Cross-border credit**

38. Do consumers in your country avail of credit in another country? If so, please indicate the country, the amounts and any trends.
39. Do consumers in your country receive advertising/ offers from lenders established in other countries? If so, which?
40. Does cross-border credit pose particular problems in your country?
41. If so, what is the solution? For example, should there be:
  - better information on existing solutions (if any);
  - better harmonisation of law on a European level; or
  - better harmonisation of law on the level of conflicts of laws?

**L. General questions**

42. Are there other aspects of the operation of the Directive which concern you?
43. Do any particular provisions of the Directive appear ineffective/ pointless or badly drafted? If so, please indicate which.
44. Is the Directive still adapted to the social and economic situation in your country, or do you feel that it is no longer relevant? Please give reasons.
45. Are there any dispositions on overindebtedness in your country? Do you consider that intervention on the European level is necessary?
46. How has the market for credit developed in your country? What are the amounts involved and the most notable characteristics of the market?
47. Are there legal definitions for the following:
- credit card (carte de crédit)
  - debit cards (carte de débit)
  - charge cards (carte de débit différé)
  - withdrawal cards (carte de retrait)
  - cheque guarantee cards (carte de garantie de chèque)
  - prepaid cards (carte prépayée)
  - payment cards (carte de paiement)?
48. Any other remarks which you wish to make...

ISSN 0254-1475

COM(95) 117 final

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Catalogue number : CB-CO-95-183-EN-C

ISBN 92-77-88335-9

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Office for Official Publications of the European Communities

L-2985 Luxembourg

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