

**dti**

**CONSUMER AND COMPETITION  
POLICY**

**PROPOSAL FOR AN EC CONSUMER  
CREDIT DIRECTIVE --  
SUPPLEMENTARY CONSULTATION**

**SUMMARY OF RESPONSES AND  
GOVERNMENT RESPONSE**

2006

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# Proposal for an EC Consumer Credit Directive – Supplementary Consultation

## Summary of responses

### Executive summary

The European Commission originally proposed a new, full harmonisation Consumer Credit Directive (to replace the existing 1986 Directive based on minimum standards) in 2002. In the light of the European Parliament's First Reading the Commission produced a revised proposal in October 2004 (on which DTI consulted February-April 2005). A further modified proposal was published in October 2005. A supplementary DTI consultation on this proposal was published on 31 March and closed on 10 May 2006.

DTI received 22 responses to its supplementary consultation on the proposal for an EC Consumer Credit Directive. Responses came from banks, credit unions, industry representative bodies, consumer organisations, regulators, enforcement agencies and a campaign organisation.

We are grateful for the responses received to this consultation. Some responses addressed all or most questions in the consultation; others focused only on those questions concerning matters of particular interest to them. This response is intended to give as full account as possible of the points raised by respondents to the consultation and the Government's response to those points and how it is intended to follow-up during the remaining negotiations on the Directive. Respondents will appreciate that it is difficult to predict with certainty how negotiations will proceed and precisely what shape the final Directive (if it is agreed) will take but the views received during this consultation have been extremely useful in helping to focus the UK's negotiating priorities.

### **General comments:**

Although most respondents supported the twin objectives of opening up markets and maintaining a high level of consumer protection, there was a lot of concern raised that the current proposal would achieve this, even if it was an improvement on earlier versions. There was general concern from industry at the lack of a formal regulatory impact assessment. In its view there was no evidence to support the need for the Directive. It should be for the Commission to justify the measure it was proposing. Better regulation principles should be adhered to.

In addition to concern about the current proposal's failure to address the real barriers to trade, there was concern that it would result in a significant dilution of consumer protection in the United Kingdom.

Two industry organisations were concerned at the potential lack of coordination between the proposed Consumer Credit Directive and other consumer protection initiatives in the field of financial services. One pointed in particular to the potential for overlap with the Payment Services Directive and the Distance Marketing of Financial Services Directive.

A number of respondents reiterated concerns expressed in the previous consultation about the proposed level of harmonisation: in their view maximum harmonisation should only be applied in those areas where it was essential, and feasible, for consumer protection, while minimum standards should be set in all other areas to avoid unnecessary bureaucracy. One industry organisations suggested a move towards a more principle-based regime.

## **Article 1**

### **Question 1: Are you happy with the exclusion of sureties from the scope of the Directive?**

All but one respondent agreed with the exclusion of sureties from the scope of the Directive. We therefore conclude that we should accept the exclusion.

## **Article 2**

### **Question 2: Do you agree with the exclusion of secured lending from the scope of the Directive?**

All but one of those responding to this question accepted the exclusion of secured lending. The dissenting organisation wanted to see secured lending brought under stricter controls since it believed that second and subsequent charges on property contributed significantly to personal over-indebtedness in the United Kingdom. However, since it is to be expected that secured lending not covered by the consumer credit Directive would be covered by a separate mortgage regime, no explanation was given as to why it should also be covered by the Directive. We therefore remain of the view that we should support the exclusion of secured lending.

### **Question 3: Can we live with an upper limit (now €50,000)?**

We asked whether the United Kingdom could live with an upper limit in the proposed Directive above which credit agreements would be out of scope.

Most respondents either agreed, or could live with, with the upper limit, as long as Member States would be able to regulate loans above it. A bank recommended either full harmonisation in this area or the removal of financial limits in order to encourage cross-border trade. A campaign group thought the limit inadequate even if secured lending was excluded from the scope of the Directive. A consumer body preferred the approach in the Consumer Credit Act 2006, which regulates without an upper limit but in which high net worth individuals can opt out subject to safeguards.

We are confident that we could regulate loans above the ceiling (currently fluctuating between €50,000- €100K) and this would probably also enable us to continue to apply special rules to high net worth individuals above this limit.

### **Question 4: Do you agree with the proposed revised wording regarding hiring agreements?**

In the consultation we pointed out that the language on hire purchase/conditional sale agreements had changed and that it was no longer clear that these were caught by the Directive. Since publishing the supplementary consultation, we have seen a Presidency compromise text which would make it even clearer that hire/leasing agreements which did not include an obligation to purchase would fall outside the scope of the Directive. More

than half of respondents answered this question. Most of these agreed with our objective of including hire purchase and conditional sale agreements within the Directive's scope, but not pure hire/leasing agreements with no purchase option, and a number of respondents called for a more watertight definition to achieve this.

We agree in principle that hire purchase should fall within the scope of the Directive: too many exclusions risk distorting competition and there is no logical reason why a mainstream credit product such as hire purchase should not be covered by the Directive. On the other hand, if hire purchase was exempted from the Directive, we could (and would) nevertheless still regulate it in the United Kingdom. An exemption would also have the advantage of solving a key problem with the across-the-board right of withdrawal in Article 13, which could impact adversely in the case of hire purchase agreements. It also needs to be borne in mind that, regardless of whether or not UK hire purchase agreements fall within the scope of the Directive, equivalent products in some other Member States would probably fall outside the scope and it is unlikely that we would have much success in pressing for their inclusion now.

The current text suggests that HP agreement are outside the scope of the Directive. On balance, we believe that if Article 13 cannot be improved we should accept the exclusion of HP.

**Question 5: Should we accept the deletion of the exemption for credit repayable by a maximum of four instalments within 12 months? If not, in what circumstances should such credit agreements continue to be exempt from regulation (e.g. should they be interest free?) and on what grounds would this be justified?**

The earlier 2004 proposal retained the exemption in the existing 1986 Directive.

About half of those responding to the consultation addressed this question. Most of these agreed that we should accept the deletion, although one respondent thought that it would be worth reflecting on the extent to which the exemption was actually used in practice. The combination of four instalments and 12 months already appeared to inhibit take-up of the exemption in the existing Directive/UK legislation by those offering credit.

One (enforcement) respondent argued in favour of exempting interest free credit because this would allow business some flexibility without entailing any detriment to consumers; another thought that routine deferred invoicing by suppliers of goods and services should be exempt.

On the other hand it was pointed out that, where goods or services were supplied as part of a credit agreement, there was scope for disguising credit charges as part of the cash price. An industry body thought that exemptions simply distorted competition and reduced the likelihood of achieving a single market.

In the interests of level playing fields we believe that it is appropriate to reduce the number of exemptions from the Directive's provisions. The proposed Directive already includes an exemption for three-month interest free credit. In addition the definition of "credit intermediary" in Article 3 probably already excludes traders of goods and services issuing delayed invoices and Article 7 disapplies the provisions of Articles 5 and 6 from suppliers of goods or services acting as credit intermediaries in an ancillary capacity. We therefore believe that traders issuing delayed invoices probably already fall outside the scope of the proposed Directive, but we could seek explicit assurance to this effect either in a recital or in the definition of a credit agreement. To go further would be illogical and at odds with our stance on level playing fields.

**Question 6: Should we maintain our opposition to the exclusion of credit agreements which are the outcome of a settlement reached in court and also to the new exclusion of credit agreements which relate to the deferred payment, free of charge, of an existing debt?**

**Is this an issue on which we could make concessions during negotiations if necessary?**

Most respondents did not address this question. Those that did could see no reason to oppose the exclusion of credit agreements which were the outcome of a settlement reached in court or credit agreements relating to deferred payment, free of charge, of an existing debt. However, two respondents thought that further clarification was needed regarding the meaning of these exemptions. It was not clear that a settlement which was genuinely reached in court could be regarded as a credit agreement and so come under the draft Directive's provisions. It appears, therefore, that we can probably live with these exemptions.

**Question 7: Do the terms of the exclusion of pawnbroking from the scope of the Directive give rise to any concerns?**

Less than half of respondents replied to this question. Half of these had concerns on the grounds that the scope of the Directive should be as inclusive as possible and that exemptions were generally unwelcome as they skewed markets and that there was no special justification for exclusion in this case.

The remainder did not think that the exclusion of pawnbroking from the Directive's scope posed a problem. It is probably unlikely that we could persuade other Member States and the Commission to bring pawnbroking within the Directive's scope and, we could, in any case, continue to regulate this activity nationally. We therefore conclude that we should not oppose the exemption for pawnbroking.

**Question 8: Which articles in the Directive should apply to overdrafts and which should not? Where you see a difficulty in applying articles, please provide an indication of the degree of difficulty and rank your concerns in order of priority.**

There was no clear consensus in response to this question. Some enforcement bodies thought that the whole of the proposed Directive's provisions should apply to overdrafts. On the other hand a number of industry respondents were of the firm view that the proposed Directive's provisions should not apply at all. Another enforcement body and a consumer body thought that the light touch regime proposed was reasonable, although the consumer body thought that the Article 5(5) duty to provide "adequate explanations" should also apply to overdrafts.

An industry body preferred the light touch regime as set out in the 2004 proposal and a large part of the industry thought that the 2002 text was preferable. One industry association thought that a number of the articles which would apply to overdrafts under the current proposal would cause practical difficulties.

We agree that consumers need to be adequately protected when using overdrafts facilities. However, the case has not been made for introducing provisions beyond existing UK legislation based on the 1986 Consumer Credit Directive. Although examples of consumer problems have been cited, these appear to be the result of poor practice in individual cases rather than due to shortcomings in consumer information requirements and we have seen no evidence that the kind of additional information requirements proposed in the Directive would improve the position for consumers.

Overdrafts in the United Kingdom are flexible products designed to allow consumers to deal with specific circumstances (usually temporary cash flow problems) and, on balance, it appears that more onerous requirements would not be in the consumer's interest. In particular, due to the complex interaction between credits to/debits from an overdraft linked to a bank account, we believe that indicating an APR could be positively misleading in some circumstances. We also believe that it should be possible for a bank's agreement to grant an overdraft to be followed up in writing to save consumers inconvenience and that banks should not be required to inform consumers individually and immediately of interest rate changes resulting from changes in the base rate. We will therefore work with the Commission, the Presidency and other Member States to either remove overdrafts from the scope of the Directive or, perhaps more realistically to reduce the cumulative burden which the Directive would impose in the case of overdrafts and in particular to remove the more damaging provisions referred to above.

**Question 9: Should we continue to argue for a lower threshold or should we be prepared to accept the €300 threshold if it formed part of an acceptable compromise?**

Less than half of respondents answered this question. Two of these, an industry and a regulatory body, thought that the €300 threshold (below which a light-touch regime would apply) was acceptable, although the regulatory body thought that Member States should be allowed to apply additional rules

to smaller loans. The remaining respondents thought that the United Kingdom should argue for a lower threshold (in one case €150, in another £50) or no threshold at all. Some thought that this was an area for potential compromise.

The proposals put forward under the Finnish Presidency now say that Member States would exempt loans under the threshold (currently between E200-300 but more likely to be nearer E200) altogether. Member States would be free to regulate small loans nationally, including by applying the full provisions of the Directive. We think the Finnish proposal is the right approach.

**Question 10: Do you agree that the UK should continue to seek an exemption for credit unions?**

About half the responses to the consultation addressed this question. Of these most agreed that the UK should continue to seek an exemption for credit unions. Only one organisation preferred a light touch regime and another thought there should be no exemption at all, although it could accept exemption for non-commercial credit unions if the cost of borrowing was publicly subsidised.

Organisations representing credit unions pointed out that, although the credit union movement in the United Kingdom was growing significantly, the majority of credit unions were small, community-based, volunteer-led organisations, with a focus on serving a mostly financially excluded market. It supported the Government's preference for exempting credit unions from the Directive on the grounds that credit unions were not commercial organisations. Exemption from the Directive would allow individual Member States to regulate credit unions at the national level. If a total exemption could not be achieved, a light touch regime would be preferable to the full requirements of the Directive, but this should be based on the 2004 proposal rather than the current text.

Credit unions do not trade across borders and play an important role in combating financial exclusion in the United Kingdom. It is clear that the nature of credit unions in those Member States which have them differs considerably. Retaining an exemption from the Directive's requirements therefore seems the best approach as it would allow Member States to regulate their credit unions in line with local conditions. We are currently in discussion with the Commission, Ireland and Poland (who also have credit unions) in an attempt to find an appropriate solution which will not hamper the United Kingdom's ability to tackle financial exclusion by encouraging the development of the credit union sector. Exemption is our preferred option, although we could consider a genuinely light touch regime.

**Question 11: If a total exemption is not acceptable to other Member States and the European Commission, which articles (from the light-touch regime) should/should not apply to credit unions (please give an indication of priority)?**

Again, less than half of respondents commented substantively on this question. Of these a regulatory body preferred the light touch regime as proposed rather than a complete exemption, but was relaxed because Member States could still regulate nationally. In its view any exemptions from the Directive's requirements should be kept to a minimum.

On the other hand a consumer organisation considered the light touch regime as an unsatisfactory option, as it would hamper the development of low cost credit from alternative third sector lenders while at the same time denying borrowers some essential protections.

One body representing the credit union movement said that if a light touch regime was to be applied it should be based on the 2004 proposal. Another pointed to potential problems in a number of areas:

- Article 4(2) -- the price comparison tables which credit unions use to advertise the cost of credit would not normally include the number of payments (although this might not be unduly onerous) and would not provide the other information in the Article in the same order;
- Articles 6 and 9 -- financial data and assumptions used for calculating the APR are not currently contained in the ABCUL model loan agreement and there would therefore be legal and administrative costs (largely one-off);
- Article 9(2)(g) -- the requirement for capital amortisation tables would be onerous.

**Question 12: Would it be desirable to introduce a distinction between the smaller credit unions and others (by means of a threshold) in order to seek a total exemption for the former? How might a threshold be set?**

One enforcement body saw no justification for an exemption based on size. In its view any threshold would be arbitrary and could create distortions while the potential customer detriment would remain the same. Another respondent agreed that it would be difficult to apply a threshold to credit unions.

The Credit Union movement itself preferred a light touch regime to the introduction of a threshold. In its view it would be unhelpful to introduce a legal distinction between different credit unions. Another respondent pointed out that introducing a distinction between exempt and non-exempt credit unions on the basis of a threshold could act as a de facto barrier to growth, whereas growth was an important factor in helping credit unions to succeed and to maximise their impact in tackling financial exclusion.

We are currently working to persuade the European Commission and other Member States of the merits of an exemption and are making significant progress. We think it unlikely that the Commission would accept an unqualified exemption for all credit unions in Europe, and that it would prefer a test which could be applied to individual credit unions – e.g. ensuring that no

credit union has a significant share of one market. We are working in consultation with the Commission to find a way to give this effect.

**Question 13: Which articles should apply to the other agreements subject to a light touch regime?**

Few respondents replied to this question. Of these two were not in favour of a light touch regime except in the case of credit unions; one was happy with the light touch regime proposed in Article 2(4)(c). Another thought that loans under €300 should be exempt from the requirements on the content of agreements.

As indicated in relation to question 9, we conclude that exempting smaller loans from the Directive's requirements altogether (thereby allowing Member States to regulate in line with local conditions) would be a better option than an inflexible light touch regime.

**Question 14: Do you agree with the UK approach to the definition of a credit union?**

Understandably there were few responses to this question (as it was largely an information point). All but one of those who did respond supported the approach set out in the document. The Government's aim will be to agree a definition which will cover the full range of credit unions in the United Kingdom and take into account future developments in this sector in support of the Government's policy of encouraging credit unions as a means of combating financial exclusion.

**Question 15: Should the United Kingdom oppose a light touch regime for refinancing of existing debts? If not, should we seek to limit the light touch regime to refinancing by the original lender?**

Most of those who responded to this question thought that the United Kingdom should oppose this exemption. One respondent pointed out that it would be unlikely that a consumer in arrears on an existing loan would get offered a new loan by another lender which was genuinely to the consumer's advantage and that, in any case, the definition of "less favourable" terms for the consumer would be subjective. For example, a consumer with an existing high interest, short term loan might be offered a replacement slightly lower interest but longer term loan and the lender could argue that the new loan was no less favourable even though the consumer's debt problems might actually be intensified.

Two respondents, however thought that the exemption should be allowed provided that the refinancing was offered by the original lender. On the other hand the credit union movement pointed out that limiting the exemption to the original lender would make it easier for a lender to retain a consumer in a cycle of debt by repeatedly refinancing at high interest rates while it would be more difficult for more responsible lenders to offer consumers an alternative route out of long-term debt.

On the whole we believe that the United Kingdom should oppose this exemption. However, the latest Presidency text makes this a voluntary derogation which we think is preferable.

### **Article 3**

**Question 16: Concern was expressed in the 2005 consultation that the definition of "consumer" would exclude small business persons, the self-employed and unincorporated small businesses. However, because these groups would fall outside the scope of the Directive, we believe we could continue to include them in our definition of "consumer" in the UK and, on balance, this might be better than to risk ending up with a less acceptable definition. Do you agree with the UK's approach to the definition of a consumer?**

Most responses to this question supported the proposed UK approach, provided that UK implementing legislation would continue to cover sole traders and small partnerships. One enforcement body stressed the importance of providing adequate protection to small businesses. Only one organisation expressed concern that this would not create a level playing field within Europe.

**Question 17: Do you believe that the definition of "credit agreement" should be amended? If so how? Should monthly payments for annual insurance be excluded from the scope of the Directive?**

More than half of respondents answered this question. A bank thought that more clarity was required here in order to provide legal certainty -- particularly for insurance businesses. Several respondents agreed that paying for insurance by instalments should not be regarded as a credit agreement, although one respondent thought that where interest or another charge was made insurance payments should be classified as credit agreements. One industry organisation thought that a clear distinction should be made between fixed sum and running account credit. Two respondents thought that the current definition was acceptable.

There were no suggestions for redrafting and, on balance, we believe that the definition is probably satisfactory, although the exclusion of contracts for the ongoing supply of goods should be redrafted so that it does not require goods to be supplied "in the same quantity".

### **Definition of "credit intermediary"**

**Question 18: Do you agree with the principle that where one party (i.e. the principal lender) takes responsibility for compliance with consumer protection obligations these obligations should not also extend to other parties (e.g. agents)?**

Most respondents to this question agreed, in one case strongly, although some doubt was expressed about whether the objective could be achieved simply by amending the definition of "credit intermediary": an explicit exclusion might be needed for intermediaries where the principal creditor took responsibility in law or in practice.

On the other hand, a few consumer/enforcement bodies disagreed: *"Agents should have responsibility for aspects of the Directive within their control"*. They feared that an exemption for intermediaries could undermine consumer protection during the sale of a credit product. In their view both the intermediary and the principal lender should take responsibility for compliance with the Directive's requirements as both were involved in the transaction.

A bank and a credit industry organisation thought that the definition of "credit intermediary" was too wide. The industry association was particularly concerned about the position of home credit and mail-order agents and pointed to the existing UK regime under which an agent could rely on a home credit or mail order company's consumer credit licence provided that they worked only for one credit supplier. In its view a distinction needed to be made between agents and genuine brokers who conducted business with a number of lenders. Otherwise it thought that a disproportionate burden would be imposed without improving consumer protection. Articles 5, 19 and 20 were cited as being of particular concern.

It is not clear what provisions of the Directive would bite on home credit/mail-order agents. Article 7 clearly exempts suppliers of goods or services acting as credit intermediaries in only an ancillary capacity from Articles 5 and 6 of the Directive. Whether a home credit or mail order agent would qualify for this exemption is not clear. The Commission takes the view that the only requirements in the Directive which would apply to credit intermediaries are contained in Article 20 requiring an intermediary to make clear whether or not he or she is independent and setting out rules on the payment of fees. It is arguable that the other requirements in the Directive -- e.g. those in Article 5, cited by one respondent to the consultation -- would actually be taken care of by the documentation provided by the principal lender. Article 19 concerning the regulation or supervision of intermediaries does not set out any prescriptive requirements (and in the recent text the reference to intermediaries has been deleted from Article 19).

This is an issue which we are exploring with the Commission and the Finnish Presidency. A solution may be to qualify the definition of "credit intermediaries" so as to exclude home credit/mail-order agents<sup>1</sup> or to modify Article 7 so as to make clear that the exemption for precontractual information requirements applies to such individuals.

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<sup>1</sup> An industry organisation suggested changing the word "habitually" to "as a main activity" in the existing definition in Article 3(e) and adding the phrase "save and except where the creditor assumes responsibility (whether in practice all in law) for the credit intermediary's conduct in relation to the credit" at the end of the definition.

**Question 19: Do you agree that the "total cost of credit to the consumer" should include all compulsory charges in order to make the APR a genuine comparator?**

Regrettably the reference to question 19 in the index of questions at the beginning of the consultation document was inaccurate and, therefore, confusing. In fact the question was intended to cover the definition of the "total cost of credit to the consumer" rather than the definition of "acting as a credit intermediary" which had already been deleted from the text. In the event, where there was doubt, respondents sensibly answered both questions. For ease of reference we have therefore separated out the two questions below.

**Do you agree that the definition of "acting as a credit intermediary" should be deleted from the text?**

Three respondents answered this question and of these only one opposed the deletion, although no reason was given. Since the current text of the Directive already defines "credit intermediary", we therefore conclude that it can safely be deleted, although if the text changes further, we may need to reconsider.

**Do you agree that the "total cost of credit to the consumer" should include all compulsory charges in order to make the APR a genuine comparator?**

Nine respondents answered this question, including industry, consumer and enforcement bodies. All agreed with the proposed UK line that all compulsory charges should be included in the total cost of credit and feed into the calculation of the APR. One respondent wanted the requirements to be more closely aligned with UK Regulations. Another specifically referred to the need to include intermediaries' fees to avoid a potential loophole in which charges might transfer from the lender to its agent in order to produce an artificially low APR. An industry body qualified its support for the inclusion of all compulsory charges with an exception for transactional charges "such as those which occur in RAC-type products".

We conclude that all compulsory charges payable by or on behalf of the consumer in order to benefit from a product or from an advertised rate of interest should be included in the total cost of credit to aid comparison between products and to ensure that consumers are aware of all costs which would apply.

**Question 20: Should we welcome the introduction of a definition of "overdraft facility", which should make the provisions relating to overdrafts clearer? Is the definition satisfactory? If not, how should it be changed?**

Most of those who responded to this question approved of the definition of overdrafts, although banks reiterated their view that overdrafts should be excluded entirely from the scope of the Directive and a regulatory organisation

thought that the definition should extend only to genuine running-account credit and not include fixed-sum loans offered in the form of an overdraft. A bank reiterated the need to draw a clearer distinction between fixed-sum and running account credit.

One industry organisation thought that the proposed definition would jeopardise short-term overdraft arrangements, which currently didn't need formal agreements. It also thought that the definition needed to make clear that funds could be disposed of when an account was already in debit.

On the whole we believe that the definition is helpful. The most recent text under discussion adds the word "explicit" before "agreement" to make clear the distinction between overdraft facilities and tacit overdrafts.

#### *ARTICLE 4 – STANDARD INFORMATION FOR ADVERTISING*

**Q. 21 Should we therefore continue to press for changes to the detailed advertising requirements in order to align them more closely with UK rules? Please give an indication of the order of priority for any changes you propose and indicate which are essential and which might be subject to a degree of compromise.**

The revised text requires standard information to be given where an indication of the interest rate or any figures relating to the cost of credit are included in the advertisement. Where standard information *is* required, there is a list of mandatory information that must be provided. This is made up of the total amount of credit; the APR; duration of agreement; the amount number and frequency of payments; and any fees in connection with the agreement as known to the creditor. There is also reference to the information being provided through a representative example.

There was a clear consensus among respondents that the Government should seek to align the Directive as closely as possible with the UK credit advertising rules. There was also some support for the idea that this particular Article should be a minimum harmonisation measure comprising a short list of readily comparable core information.

There was no support for the concept of representative examples, although one regulatory body thought that were this term to be retained, it should be defined on the basis of the UK's typical APR requirements. A number of respondents pointed out the link to Article 18 and the assumptions used to calculate the APR. One lender said that a single, typical APR calculated on the basis of set assumptions would be preferable to the concept of representative APRs.

There were differing views about the trigger points in Article 4. One business representative body thought that the simplified information triggers in the Directive were beneficial, especially in relation to on-line advertisements. On the other hand one lender thought that if the Directive was to remain in its

current form, it would not be practical to show interest rates in such advertising formats. One regulatory body thought that there should be separate trigger points in the Directive for APR and other financial information.

In terms of what additional information requirements should be included in Article 4, the following were suggested:

- name of the advertiser
- total amount payable and cash price in the case of fixed-sum credit for specified goods/services
- restrictions on use of: "overdraft", "interest-free", "no deposit", "loan guaranteed", "pre-approved", "weekly equivalent" and "gift", "present" or similar expression
- wealth warnings

There were different views about the need to mention whether a deposit or other payment or charge was applicable. One consumer body thought that this was essential on the basis that consumers often have to pay a non-refundable "finding fee". Another representative body did believe this was an area for potential compromise. The same respondent also thought that the following requirements might also be suitable for compromise:

- equal prominence of information
- indication of any other payments and charges

There was also a strong consensus that Article 4.3 concerning the advertising of credit not available to the general public should be deleted.

Although we believe we can retain our typical APR requirements, we intend to continue to seek changes to this Article to bring it more into line with the UK information requirements. We are particularly concerned that there should be changes to the triggering of the information requirements. We think there should be separate trigger points for the APR and other financial information, in particular that the requirements to quote a typical APR are triggered where implications as to any comparative indication or incentive are made in relation to the credit product.

## **ARTICLE 5 – PRE-CONTRACTUAL INFORMATION**

**22. Do you agree that the provision concerning duty to advise is an area in which the United Kingdom could compromise by accepting the revised duty to provide adequate explanations, possibly with the further amendment outlined above? If not, why not? (Please give specific examples of difficulties you foresee.)**

There were mixed views about the duty upon the creditors/credit intermediaries to provide "*adequate explanations*" to consumers to enable

them to assess whether a proposed credit agreement is appropriate for their needs and financial situation.

Two regulatory bodies and an industry representative body agreed that the UK should accept the revised duty to provide adequate explanations and that the current proposal was an improvement on the previous text. It was pointed out that there was no requirement to provide the information orally, so the explanation could be included in a separate document or incorporated into the agreement. Given that there was already a requirement in Article 5(2) that required pre-contractual information to include the “necessary and essential information”, that may well suffice provided such information was presented clearly and enabled the consumer to decide whether or not to enter into the agreement.

Other respondents, while agreeing that the reworded duty should be easier to comply with still had some specific concerns. One lender agreed with the point above about providing relevant information about products in leaflets but thought that the text should be amended to provide that “explanations” should only be required where the consumer had requested the information. An industry representative body suggested that the word “adapted” should be replaced with the word “suitable” because lenders would be unlikely to adapt credit products to suit the specific needs of a consumer (a point we agree with). A related point was made by one lender in respect of the obligation to explain the advantages and disadvantages of the products proposed as this would be dependent upon the circumstances of the consumer in question and in any case was a subjective test.

Two consumer representative bodies agreed with the main principle behind this provision but thought that there needed to be some flexibility in the interpretation of the obligation. For example, some mainstream credit products are straightforward and need little further explanation. Others are more complex and specialised. Similarly some consumers are more sophisticated than others. It was suggested therefore that the option to require compulsory advice in certain specific cases should be considered. Equity release products for the elderly was one example quoted.

Other respondents saw more fundamental problems with the obligation. One lender referred to Internet application situations where the interactive technology is not yet available in a sufficiently sophisticated manner to be able to comply with the obligation. Two industry representative bodies thought that the obligation would create a lot of unnecessary bureaucracy and have the effect of making lenders more cautious in their lending decisions in order to refute any subsequent legal challenge. The outcome would not be positive for the majority of consumers who in effect would be subject to a form of credit rationing.

We are not wholly convinced the duty to provide explanations is necessary and can see that it could give rise to some legal uncertainty as to the interpretation of the duty. But we also believe there is sufficient flexibility as to what would be required under this provision and would intend to make full use

of such flexibility and consult on how it should be applied to the needs of UK lenders and consumers.

**23. Should the United Kingdom accept the inclusion of a responsible lending principle in the Directive or seek to turn it into a prohibition on irresponsible lending? If neither, why not? (Please provide evidence in support of your response.)**

Article 5.1 says that the creditor/credit intermediary shall adhere to the principle of responsible lending. It goes on to say that the creditor/credit intermediary shall therefore comply with their obligations concerning the provision of pre-contractual information and the requirement to assess the consumer's creditworthiness on the basis of accurate information provided by the consumer and consultation of a database, where appropriate.

Of those who responded to this question, a small majority of those who answered the question (11 in total) were in favour of accepting the principle of responsible lending as set out in the Directive. Opinion was evenly split between the option of seeking to turn the principle into a prohibition on irresponsible lending in order to mirror the UK approach in the Consumer Credit Act 2006, and removing the reference to responsible lending in Article 5.1 altogether.

Of those who supported the inclusion of the responsible lending principle, one regulatory body said that the proposal should not be too onerous to comply with on the basis that it merely required having to provide pre-contractual information and assess credit worthiness. There was no reference to any requirement to carry out further checks on the ability to repay while the duty was qualified by the reference to the borrower having to provide accurate information. A consumer representative body agreed with the inclusion of the principle but thought there should be guidance on how lenders can lend responsibly, with the lender free to determine how best to apply this in individual cases. A campaign organisation commented that the principle of responsible lending should mean that the lender should have an overall understanding of a borrower's total indebtedness and have undertaken an assessment of affordability of the product in question.

Another consumer representative body, agreed with the thinking behind the concept of responsible lending because of the prevalence of lenders offering further credit without making any consideration of the ability to repay. However, they were concerned that because of the maximum harmonisation approach to the Directive, this could lead to the removal of the new irresponsible lending provision in the Consumer Credit Act 2006. On this basis, it would be better to argue for a prohibition on irresponsible lending, supported by flexible and evolving guidance.

Of those who were opposed to the inclusion of the responsible lending principle altogether, one industry representative body said that such a duty (plus the duty to advise) would make cross-border lending less, rather than

more viable, as it would be complex to discharge in unfamiliar markets. However, it thought the idea of working the concept of irresponsible lending into Article 19 (Regulation of creditors and credit intermediaries) was worth pursuing. This idea was supported by another industry representative body. A further industry representative body was strongly opposed to the concept of responsible lending on the basis that lenders already assess risk efficiently and it was better to allow them to be free to take risks and price accordingly, rather than allow the law to impose on lenders a view of acceptable credit granting. The latter approach was likely to prompt debtors to make claims against lenders. This would result in lenders creating systems to work out who would make claims and stop lending to them. The net result would be time consuming and wasteful and not in the interests of consumers overall or the economy as a whole.

This principle is key to a number of Member States and it is highly unlikely it will be removed from the Directive. Nevertheless the UK retains its reservations about the explicit inclusion of the principle because of the uncertainty it may create for lenders and also a potential clash with the new irresponsible lending provision in the Consumer Credit Act 2006. We think a better approach would be to achieve responsible lending by ensuring that the relevant regulators take the necessary action. We therefore think that this should be a supervisory obligation on Member States, either in Article 19 or in a separate Article. The alternative approach would be to allow Member States to choose whether this should be a supervisory obligation.

#### **24. Is the Commission's approach to pre-contractual information a one-size fits - all approach that would not work for certain products?**

Article 5.2 deals with the provision of pre-contractual information. It requires that in good time and before the consumer is bound by any credit agreement or offer, the following information shall be provided:

- (a) the duration of the credit agreement;*
- (b) the total amount of credit and the conditions governing the drawdown of the credit;*
- (c) the borrowing rate, the conditions governing the application of this borrowing rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedure for varying the borrowing rate;*
- (d) the annual percentage rate of charge and the total cost of the credit to the consumer, by means of a representative example mentioning all the financial data and assumptions used for calculating this rate;*
- (e) the amount, number and frequency of payments to be made, where possible set out in a payment schedule;*
- (f) where applicable, the costs of maintaining an account recording both payment transactions and drawdowns, the costs of using a means of payment for both payment transactions and drawdowns, and other costs relating to payment transactions;*
- (g) costs payable by the consumer on conclusion of the credit agreement to persons other than the creditor or the credit intermediary, in particular a*

*notary or tax authorities;*

*(h) the obligation to take out an ancillary service relating to the credit agreement, in particular an insurance, where the conclusion of a contract regarding this service is compulsory for obtaining the credit or the advertised interest rate, and its cost cannot be determined in advance,*

*(i) the interest in the case of overdue payments as applicable at the time when the information according to this provision is given and the arrangements for their adjustment, and the charges for defaulting;*

*(j) the sureties required;*

*(k) the existence or absence of a right of withdrawal, the period during which that right of withdrawal may be exercised;*

*(l) the right of early repayment, and, where applicable, the costs arising therefrom, indicating the amount or the calculation method;*

*(m) the right to be informed of the result of a database consultation for the assessment of the creditworthiness in accordance with Article 8(2);*

One regulatory body thought that this Article should be subject to minimum harmonisation with Member States free to add to the requirements, including statutory warnings and signature boxes. Another regulatory body thought that the approach taken in Article 5(2) might work provided that the UK rules on order and prominence of information were retained. A consumer group also thought that there could be some benefit arising from a standard form of presenting pre-contractual information.

However, some respondents were concerned that such an approach would not work in some situations, for example in respect of open-ended credit agreements. One industry body also saw difficulties with this approach, believing it would lead to pre-contractual information being narrowed to a high-level summary sheet.

## **25. Which information requirements currently covered by the UK legislation on pre-contractual information but not covered in Article 5.2 do you think is most important to retain?**

All those who answered this question thought that at least some, if not all of the UK requirements should be retained. The following items were considered to be the most essential:

- The total amount payable under the agreement.
- The name, postal address and where appropriate any other address of parties.
- A description of the goods services land etc to be financed by credit.
- Constituent parts of the total charge for credit.
- Details of how payments are allocated when different rates and charges apply in different circumstances under the agreement

We will continue to press for the inclusion of key UK information requirements as indicated above.

**26. Of the list of information requirements listed in Article 5.2, which do you think would be of least benefit to consumers/most burdensome for business?**

Responses to this question tended to focus on three particular aspects of the Directive:

(f) “where applicable, the costs of maintaining an account recording both payment transactions and drawdowns, the costs of using a means of payment for both payment transactions and drawdowns, and other costs relating to payment transactions”

(k) The existence/absence of a right of withdrawal (i.e. before the agreement is concluded)

m) – The right to be informed of the result of a database consultation

We agree that we should seek to amend Article 5.2 by removing the requirements contained in sub-paragraphs (k) and (m) above. The former because we think it is more appropriate in Article 9.2 only, and the latter because it gives rise to the more substantive issue of database access (see the discussion of Article 8, page 22-25). We also welcome the removal of the reference to payment schedules in Article 5.2(e).

## **ARTICLE 6 – PRE-CONTRACTUAL INFORMATION FOR CREDIT AGREEMENTS IN THE FORM OF AN OVERDRAFT FACILITY AND FOR CERTAIN SPECIFIC CREDIT AGREEMENTS**

Overdrafts are subject to a limited number of pre-contractual information requirements under the Directive. However, although the regime for overdrafts (and certain other credit agreements) is described as light-touch, Article 2 of the new text extends the application of a much wider range of requirements to both overdrafts and other specific agreements (see annexes).

### **27. Are the additional requirements for overdrafts unwelcome given that industry already had concerns with the existing requirements regarding overdrafts?**

There were mixed views among respondents about issues. Individual lenders and industry representative bodies believed that the requirement to provide detailed pre-contractual information in relation to an overdraft would be confusing for consumers and burdensome for lenders. On this basis, as a minimum requirement, it would be necessary for the Directive to be amended so that there is a distinction between pre-arranged and tacit overdrafts given that the latter often only last for a matter of days or even hours. On this basis the provision of pre-contractual information should only be required for the former. It was also pointed out that the provision to provide the information “in good time” would diminish the flexibility of overdrafts and would encourage market distortions and encourage use of running account credit as an alternative even though that might not be appropriate for the consumer concerned.

Other respondents were less convinced about the difficulties of providing pre-contractual information. One regulatory body said that overdrafts should be subject to the Directive with only minimal modifications. On the issue of “in good time”, one consumer body said that they could appreciate that some consumers might be frustrated if they could not obtain an instant overdraft, but that it was also the case consumers were sometimes persuaded to take out an overdraft in circumstances where more thought would have been prudent. We understand that only Article 17 applies to tacit overdrafts.

### **28. Which of these additional requirements would cause practical difficulty? (Please provide an indication of the degree of difficulty and assign a degree of priority.)**

The focus of attention here was on the requirement to provide the APR as part of the pre-contractual information. One lender thought that it was inappropriate for the APR to be used as the measure for comparing the cost of overdrafts because the resulting calculation would be distorted by the cost of the range of current account features, of which the overdraft facility was merely one element. Another lender thought that it would be better to return to the original proposal of displaying the total lending rate and a list of charges which contribute to the total charge for credit. An industry representative body

also pointed out the inconsistency between the APR requirement in Article 6 as compared with Article 11(Credit agreements in the form of an overdraft) where the requirement at 11(f) refers to the last agreed borrowing rate rather than the APR.

There were mixed views from other respondents about whether it was appropriate to quote the APR in the context of overdrafts. One regulatory body said that it should be possible to derive a meaningful APR based on assumptions regarding usage of the facility, so as to provide a cost indicator and comparator. A campaign organisation also thought that there were no practical difficulties for banks in providing APR costs of overdraft credit provided that the illustrations are consistent across all overdraft providers. On the other hand, one consumer body believed that the use of APRs was likely to be difficult to apply to overdrafts. A good cross-product comparator is needed but it was not convinced that the APR is the best means of providing such a comparison.

As noted in the response to question 8, it appears that more onerous requirements for overdrafts would not be in the consumer's interest. In particular, due to the complex interaction between credits to/debits from an overdraft linked to a bank account, we believe that indicating an APR could be positively misleading in some circumstances. We also believe that it should be possible for a bank's agreement to grant an overdraft to be followed up in writing to save consumers inconvenience. We will therefore work with the Commission, the Presidency and other Member States to reduce the cumulative burden which the Directive would impose in the case of overdrafts.

## **Article 7**

### **Question 29: Do you support Article 7 (exemptions)? If not, why not? (Please provide evidence.) Should "ancillary capacity" be defined?**

In the supplementary consultation we explained that a new article had been introduced which would disapply the provisions of Articles 5 and 6 to suppliers of goods or services acting as credit intermediaries in only an ancillary capacity.

A number of industry organisations and an enforcement body thought that the meaning of "ancillary capacity" needed more precise definition.

Another industry organisation thought that the exemption was arbitrary: it was unclear why this group should be exempted. In its view the solution to difficulties for those acting as credit intermediaries in only an ancillary capacity should be dealt with in the definition of "credit intermediaries" in Article 3 -- in particular the exemption in Article 7 failed to cover the position of affinity card partners, home credit agents and mail order agents. Another industry organisation thought that "ancillary capacity" should be defined in such a way as to exclude affinity card partners.

A motor trade organisation supported the thrust of Article 7, but thought that it did not go far enough: in its view the exemption should also encompass the provisions of Article 20.

On the other hand, a consumer body and a campaign organisation did not approve of the exemption in Article 7: in their view there were numerous examples of consumers inadvertently entering credit agreements and the inquiry into store cards had demonstrated how consumers were let down by lack of advice concerning credit products sold in a retail environment.

Although the meaning of "ancillary capacity" may need further exploration, we believe that the exemption in Article 7 could relieve retailers employing store credit and hire purchase from inappropriate requirements which would fall more appropriately to the principal lender. However, it is not clear whether the exemption would also apply to home credit and mail order agents. Although most of these have "amateur" status, within the context of activities caught by the Directive it could be difficult to argue that credit was an ancillary activity in the case of home credit, even if it might be argued in the case of mail order agents. As already indicated, some amendment of the definition of "credit intermediaries" in Article 3 is probably needed.

## **Article 8**

### **Question 30: Is more than merely “non-discriminatory” access needed to ensure that UK lenders get access to data in other Member States?**

Most industry responses supported the concept of cross-border access to credit databases. However they wanted to see more details on exactly which databases were covered by the Article, what kind of data could be accessed and in what format it would be shared. One industry body wanted a more prescriptive approach to the information which should be submitted by each Member State. Some thought it was unclear how access for UK lenders to data in other Member States would operate in practice. A number of industry respondents wanted to see explicit reference to reciprocity. A credit reference agency suggested referring to access ‘under the same reciprocal terms’ instead of ‘non-discriminatory’ access. A regulatory body agreed and added that Member States should be required to guarantee the operation and population of database.

Reference was also made to the UK position in the February 2005 consultation paper<sup>2</sup> which was approved by a number of industry organisations.

A consumer body believed that the level and type of data held should be sufficient to give effect to any responsible lending principle. Another thought that market harmonisation would require access to all national databases and full data sharing across boundaries.

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<sup>2</sup> <http://www.dti.gov.uk/files/file14388.pdf>

We are not convinced that referring to "reciprocity" rather than "non-discrimination" would actually help. In any case it is questionable whether single market rules would allow a Member State to impose conditions on a lender based in another Member State wanting to access data. On the other hand, non-discriminatory access would appear to allow UK databases to apply the same terms to foreign lenders as to those based in the UK -- including limiting access to data of the same quality and type as that which a lender is prepared to submit to a credit reference agency – and to allow the lender equal access to relevant databases in other Member States.

The only way to achieve full openness in all Member States would be to include a specific requirement for Member States to have databases and to specify what information should be shared. But concern has previously been expressed by some in the UK industry that this might interfere with the way in which private sector credit reference agencies operate in the United Kingdom. The UK has proposed greater sharing by Member States of information about databases which already exist within the EU and the terms on which they can be accessed, with a view to identifying gaps and barriers to obtaining data in other Member States. We will reconsider our position in the light of our findings.

**Question 31: Which of the options concerning database access would you support? (Please give reasons.)**

The second paragraph of Article 8 requires lenders to notify consumers free of charge of the result of any database consultation. In the light of the industry's previously expressed concern on this head we asked which of a number of alternative options the United Kingdom should press for:

- amend the provision to make clear that the "result" could be merely whether or not an application for credit was accepted;
- delete the provision altogether; or
- simply refer to individuals' rights under the Data Protection Directive.

A number of industry respondents favoured deleting the provision altogether. In their view a reference to the data subject's rights would be unnecessary since it would already be required under data protection law. A number of other industry respondents favoured either restricting the requirement to a simple "yes/no" answer to an application for credit or referring to existing data protection provisions. One industry body suggested a combination of both.

On the other hand an enforcement body thought that consumers should be informed of the result of any database consultation where credit was refused or granted on less favourable terms, regardless of whether they had requested it. In its view such disclosure should be sufficient to enable the consumer to decide whether or not to apply for a copy of his or her credit

reference file. Another enforcement body thought that consumers should be provided with a copy of their files free of charge, within seven days of a decision.. However this was on the grounds that this would entail no additional cost to industry and it is hard to see how this could be the case.

A consumer organisation favoured the current wording in the draft Directive as a means of enabling consumers to understand better the use to which information held by credit reference agencies was put. Another consumer organisation wanted to see the existing voluntary provision of reasons why an application for credit was declined in the United Kingdom upgraded to a legal requirement.

On balance we do not see any need for the second subparagraph of this article: the consumer will in any case received a yes/no answer to his or her application for credit. Raw data from a credit reference agency would be meaningless to the consumer and might not shed light on why his or her application has been refused or modified because data is further processed in accordance with an individual lender's own lending criteria. The consumer already has the right to access information direct from the credit reference agency by virtue of the Data Protection Directive (Data Subject Access Requests) --95/46/EC). The Article could simply refer to this right. The requirement to inform the consumer "immediately" could also conflict with the anti-money-laundering requirement not to alert a consumer under investigation.

On the other hand, it would not be unreasonable to require a lender to draw the consumer's attention to his or her rights under data protection legislation or to inform the consumer which credit reference agencies have been consulted if requested to do so.

## **ARTICLE 9 – INFORMATION THAT MUST BE INCLUDED IN CREDIT AGREEMENTS**

Article 9.2 provides that the credit agreement shall include in a clear and concise manner:

- (a) the names and addresses of the contracting parties as well as, if applicable, the name and address of the credit intermediary involved;*
- (b) the duration of the credit agreement;*
- (c) the total amount of credit and the conditions governing the drawdown of the credit;*
- (d) the borrowing rate, the conditions governing the application of that rate and, where available, any index, or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedures for varying the borrowing rate;*
- (e) the annual percentage rate of charge and the total cost of the credit to the consumer, calculated at the time the credit agreement is concluded; all the financial data and assumptions used for calculating that rate shall be mentioned;*
- (f) the amount, number and frequency of payments to be made, where*

- possible set out in a payment schedule;*
- (g) where capital amortisation of a credit agreement with a fixed duration and interest rate is involved, a statement of account in the form of an amortization table, the payments owing, and the periods and conditions relating to the payment of such amounts; the table shall contain a breakdown of each repayment to show capital amortisation, the interest calculated on the basis of the borrowing rate and, where applicable, the additional costs;*
- (h) if charges and interest are to be paid without capital amortisation, a statement showing the periods and conditions for the payment of the borrowing interest and of the associated recurrent and non-recurrent charges;*
- (i) where applicable, the costs of maintaining an account recording both payment transactions and drawdowns, the costs of using a means of payment for both payment transactions and drawdowns, and other costs relating to payment transactions;*
- (j) a statement of the costs, indicating their purpose and amounts which are not included in the calculation of the annual percentage rate of charge but which are known to the creditor or the credit intermediary and are to be paid by the consumer, under certain circumstances, namely the interest in case of overdue payments as applicable at the time of conclusion of the agreement and the arrangements for their adjustment penalties, the charges or interests on arrears relating to an overrunning of the total amount of credit, and the charges for defaulting;*
- (k) the sureties and insurance required;*
- (l) the existence or absence of a right of withdrawal, the period during which that right of withdrawal may be exercised, and the procedure to exercise that right;*
- (m) information concerning the rights resulting from Article 14 as well as the conditions for the exercise of these rights;***
- (n) the right of early repayment, the procedure for early repayment, and, where applicable, the costs arising therefrom, indicating the amount or the calculation method;*
- (o) the procedure to be followed to exercise the right of termination of the credit agreement;*

**32. Is the Commission's approach to information to be provided with the agreement a one-size approach that would not work with all products?**

There were mixed views on this question. One lender and a regulatory body thought there should not be any particular concerns with this approach. However other respondents did have some concerns. One industry representative body made the point that the need to calculate and provide personalised amortization tables was one example of a requirement that was not suitable for all products. Another regulatory body said that this Article was another that should be subject to minimum harmonisation with Member States free to add requirements as necessary, including rules on ordering and prominence of information.

**33. Which information requirements currently covered by the UK legislation on contractual information but not covered in Article 9.2 do you think is most important to retain?**

All those who answered this question thought that at least some, if not all of the UK requirements should be retained. The following items were considered to be the most essential:

- The constituent parts of the total charge for credit
- Details of how payments are allocated when different rates and charges apply in different circumstances under the agreement
- Details of when/where variations might occur during the agreement and that no account had been taken of such variations
- Amount of any advance payment payable
- The total amount payable under the agreement

**34. Of the list of information requirements listed in Article 9.2, which do you think would be of least benefit to consumers/most burdensome for business?**

There was an almost unanimous consensus among respondents that the inclusion of amortisation tables in credit agreements would be very burdensome for business and of limited value for consumers.

One industry representative body also commented that the requirement to include the name and address of the credit intermediary in the credit agreement was unnecessary given that by the time the agreement is made, it is the identity of the creditor which is important to the customer and not the intermediary.

There were also some comments on the provision in Article 9.1 concerning access to dispute resolution procedures. One regulatory body said that this information was important provided it was made clear that in-house complaint procedures must be followed first. They added that while there should be reference to this in the agreement, the actual details should be provided in a separate leaflet or other document. Along similar lines, one industry representative body said that it was not necessary to include in the agreement details of the formalities to be followed as this would add unnecessarily to the length and complexity of the agreement.

We will continue to seek changes to Article 9.2 so that they are brought more into line with the UK information requirements as suggested by the response to Question 33 and 34. A particular priority will be to remove the requirement to provide amortisation tables.

## **ARTICLE 10 – INFORMATION ON THE BORROWING RATE**

Article 10 provides that the consumer shall be periodically informed of changes to the borrowing rate and that if the change is significant, the consumer shall be informed immediately following the date of the change.

There were three questions asked about this Article:

**35 How practical will it be for lenders to comply with the revised requirements contained in Article 10?**

**36 How important is the information regarding the borrowing rate for consumers. Is the information relevant to all types of credit agreement?**

**37 Should we take advantage of the flexibility afforded in Article 10 by not defining "significant increase"?**

Among individual lenders and business representative there was strong agreement that while it would be possible to comply with the requirements of this Article, these requirements were clearly much more relevant to variable rate agreements. They would not be relevant for fixed rate credit, while it should not be necessary to notify changes arising from movements in a base rate linked agreement. One consumer body agreed with this point. However, one regulatory body thought that the proposal should apply to all types of credit agreement under which the borrowing rate may be subject to change.

On the practicalities of notifying consumers, one industry representative body said that lenders advertise changes to interest rates in newspapers and that consumers are told in which newspaper the relevant advertisement for a particular lender will appear. One lender pointed out that the Banking Code and Unfair Terms in Consumer Contracts Regulations already require lenders to give 30 days' notice to consumers of adverse changes to interest rates. Arguably this is a higher standard than the term "periodically informed of changes" as contained in Article 10. However, it would appear to fall short of the requirement for the consumer to be informed "immediately" of "significant" changes to the interest rate because it would not include base-rate linked changes.

On the question of defining the term "significant increase", there were mixed views. One industry representative body said that the UK should take advantage of the flexibility such a term affords when implementing the Directive as this will allow the issue to be determined on a case-by-case basis. A consumer group also thought there might be some advantage in this approach in terms of saving lenders from costs that are disproportionate to the benefits to borrowers. However, if this approach were adopted consideration would need to be given to the fact that "significant" is a relative term and that even a small rise in the borrowing rate could have a disproportionate effect on borrowers of variable rate loans depending on the

size of the loan and their income. A campaign group commented that it was for the consumer and not the lender to determine what was “significant”.

On balance we believe lenders should be able to comply with this requirement but that we should maintain a flexible approach in terms of notifying individual consumers immediately given the existing requirements in the UK and the facilities for provision of this information. On this basis we welcome the latest proposals on this Article that would limit the situations where the information referred to in paragraph 1 of Article 10 would need to be provided to individual consumers immediately.

### **ARTICLE 11– CREDIT AGREEMENT IN THE FORM OF AN OVERDRAFT FACILITY**

Article 11 sets out information requirements in respect of credit agreements in the form of an overdraft. It requires that the consumer shall be regularly informed by means of a statement of account, on paper or on another durable medium, containing the following information:

- (a) the precise period to which the statement of account relates;*
- (b) the amounts and dates of drawdowns;*
- (c) the balance from the previous statement, and the date thereof;*
- (d) the new balance;*
- (e) the dates and amounts of payments made by the consumer;*
- (f) the last agreed borrowing rate;*
- (g) the total amount of interest due;*

There were two questions asked about this Article:

#### **38. Does Article 11 cause any problems given that it is now clear that this applies only to overdrafts?**

Most respondents who answered this question thought that the information requirements in Article 11 would not be onerous for pre-arranged overdrafts. However some respondents believed that there were inconsistencies of approach here as compared with other Articles in the Directive. One regulatory body and a campaign group thought that such post-contract transparency arrangements should not be limited to just overdrafts. On the other hand, an industry representative body said that there was no reason why requirements concerning pricing changes should be more stringent for overdrafts compared to other products. On the detail of the Article, an industry representative body pointed to a conflict between Article 11(f) and Article 6.1 (c) . The latter refers to the APR whereas the former refers to the last agreed borrowing rate (we understand this to reflect the Commission’s view that the APR is more relevant for the purposes of comparison at the pre-contractual stage.

As noted earlier in this response we intend to continue to work with the Commission, the Presidency and other Member States to reduce the cumulative burden which the Directive would impose in the case of overdrafts.

**39. Would the requirement to inform individual consumers of changes to the borrowing rate be impractical/unacceptable?**

Most lenders and industry representative bodies thought that the requirement would be a significant burden for business, with minimal consumer benefit. One lender thought that the requirement was acceptable because it represents no change to the approach currently undertaken in the UK. One regulatory body referred to the practice of publishing changes to bank base rates, to which overdraft rates are usually linked, in newspapers. Unless the rate change was significant, it felt that individual notification was not likely to be of great benefit to the consumer as compared to the cost of providing the information.

As noted in the response to question 37, we believe lenders should be able to comply with this requirement but that we should maintain a flexible approach in terms of notifying individual consumers immediately and individually given the existing requirements in the UK and the facilities for provision of this information.

## Article 12

**Question 40: Should we continue to oppose the inclusion of this Article on the grounds that it adds little, but be prepared to accept it (with suitable amendments) as part of an overall compromise package? If so, what changes would you want to see? (Please give reasons and indicate the degree of importance you attach to any proposed change.)**

Article 12 of the draft Directive requires that either party to a credit agreement should be able to terminate it by giving three months notice, but allows the creditor to terminate a consumer's right to draw down on an open-end credit agreement without notice (although the creditor would have to inform the consumer "without delay"). The article also requires that fixed-term agreements of more than three years should not be renewed without the explicit prior approval of the consumer.

Six industry bodies thought that the United Kingdom should oppose this article. One of these suggested that, if the article was nevertheless to be included, the phrase "standard termination" in paragraph 1 should be redrafted to make clear that it did not cover breach of contract, since it would be inappropriate to require a lender to wait three months where a consumer had defaulted. In the same way fraud, repeated breach of agreed limits and abusiveness towards a lender's staff should also be grounds for immediate termination.

One enforcement body was concerned at the prospect that a consumer might have to give three months notice of termination and agreed that the text needed to be amended to make clear that this was not required. It was not clear why Article 12(3) was needed, as it should already be impossible to extend the term of an agreement without the consumer's express prior consent. An industry body agreed with this last point. Another enforcement body concurred, but did not believe that the UK should oppose this Article. A campaign group thought that some notice period should be required together with clearer definition of the circumstances in which an agreement could be terminated.

We conclude that paragraph 1 of this Article serves a purpose (to protect consumers from being locked indefinitely into open-ended agreements) but that it needs to be redrafted to make clear that the three months notice is the maximum which can be required rather than a statutory minimum.

Discussions during Council Working Group meetings have suggested that some Member States do not believe that a lender should be able to terminate a consumer's right to draw down under a pre-agreed credit limit with or without notice, since they would regard this as a breach of contractual terms. We therefore think that there may be benefit in retaining the second paragraph of this Article, but making clear that notice need not be given in

cases of money-laundering, fraud, unacceptable behaviour, breach of contractual terms etc.

We cannot see the need for the third subparagraph, although we believe this may be deleted from the text. We agree with such a deletion (unless the European Commission can come up with convincing reasons as to why it is necessary).

### **Article 13**

**Question 41: Should the United Kingdom press for suitable amendments to make clear that, in the case of linked credit the consumer's right of withdrawal will be dependent on him making alternative provision to pay for goods/services or otherwise compensate the seller for depreciation? If we are unsuccessful should we continue to oppose this article? (Please provide evidence in support of you answer.)**

Article 13 of the proposal would allow consumers to withdraw from all credit agreements (including face-to-face agreements) without penalty for a period of 14 days following their conclusion. In our consultation paper we highlighted the potential problems that this could cause, both in terms of legal certainty for suppliers and convenience for consumers, in the case of hire purchase agreements and we proposed that in agreements of this sort the right of withdrawal should be dependent on the consumer making alternative provision to pay for goods/services or compensating the supplier for any depreciation where goods were returned. We pointed out that it was unlikely that the majority of Member States would support deletion of the right of withdrawal for agreements concluded face-to-face altogether.

A regulatory body thought that it should be possible to cancel a credit agreement linked to a contract for the supply of goods or services where this contract had not been completed. In other circumstances it thought that alternative provision to make payment or compensation for depreciation should be required, but it would be important to ensure that consumers were aware of the consequences of cancellation in advance. In its view it should also be possible to cancel any linked insurance. However, in the case of hire purchase and conditional sale agreements, where the credit was integral to the supply of goods/services, the same regulatory body thought that the consumer should be entitled to return goods without charge and without compensation for depreciation. In its view retailers would have the option of retaining goods until the end of the cooling off period or offering an alternative form of credit. Another regulatory body supported the right of withdrawal but thought that the position regarding hire purchase would need to be clarified.

One industry body also thought that there was no need to amend this article because suppliers could decide whether or not they wanted to take on the risks surrounding recovery of goods in the case of hire purchase agreements. On the other hand it thought that there needed to be a deadline for repayment of amounts owed by the consumer in the case of cancellation and that the amount of interest should be based on the APR rather than the borrowing rate

to avoid abuse (i.e. manipulation of the rules in order to obtain short-term interest-free credit).

On the other hand a number of other credit organisations/banks agreed that the United Kingdom should seek amendment of this article on the lines proposed. Some would prefer deletion of the 14 day right of withdrawal altogether for face-to-face agreements. One wanted the possibility of consumers waiving their right of withdrawal in order to take immediate delivery of goods. A motor trade organisation also favoured a waiver or a shortening of the period of withdrawal. It pointed out that in about 50% of cases consumers took delivery of cars within 14 days. It foresaw considerable inconvenience for consumers and cash flow problems for dealers. If satisfactory amendments could not be achieved, it suggested that hire purchase should be excluded from the scope of the Directive altogether.

A consumer body supported the 14-day right of withdrawal and thought that it should apply to all EU consumer protection legislation.

One industry body foresaw potential confusion about whether the deadline for withdrawal had been met in an individual case.

A 14 day right of withdrawal for all credit agreements would represent a significant increase in consumer rights and we are not convinced that the case has been made for such a right in the case of face-to-face agreements as opposed to distance and doorstep selling, where different considerations obviously apply. Nevertheless it is unlikely that the majority of Member States will oppose an across-the-board right of withdrawal, although we know that some of them have difficulties and there is therefore the possibility that the period may be reduced. In at least one Member State which already has a right of withdrawal, goods are often not released until the period of withdrawal has expired. In fact in the Member State in question monies cannot be drawn down under a credit agreement during the so-called withdrawal period and it is therefore questionable whether it is genuinely a withdrawal period rather than simply an enforced extension of the precontractual period of reflection. In a couple of Member States we understand that the consumer's right of withdrawal can be waived in order to allow the release of goods within a shorter period.

We will work towards making the right of withdrawal for face-to-face contracts contingent on the consumer repaying monies owed -- including the value of goods already taken into possession -- or, where appropriate, making satisfactory alternative arrangements for repayment. If this proves unattainable, we will need to reconsider whether hire purchase/conditional sale agreements should be excluded from the scope of the Directive in Article 2 (the current text suggests that hire purchase is outside the scope of the Directive but that conditional sale agreements would be within scope).

## **Article 14**

**Question 42: Can we accept the revised Article 14 (linked transactions)?**

Article 14 of the current proposal combines a minimum legal right for consumers to obtain satisfaction from a creditor in the case of linked transactions (subject to certain conditions) with the possibility of Member States introducing or maintaining joint and several liability provisions which go further, as is already the case in the United Kingdom. It also allows consumers who have withdrawn from a contract for the supply of goods or services also to withdraw from a linked credit agreement. We asked for views on the revised text.

Eight respondents including industry, consumer and enforcement organisations were broadly happy with the revised text of Article 14, although the consumer organisations thought that joint and several liability provisions along the lines of those which operate in the UK should be extended to the EU in general.

One bank was concerned that the automatic right to cancel a linked credit agreement where a contract for the supply of goods or services was cancelled, represented a significant change to UK practice. This view was shared by a number of industry organisations, which proposed deletion of the first paragraph of the Article. An enforcement body thought that the article should clarify that joint and several liability rules operating in a Member State would apply to lenders from other Member States entering that market.

We believe that it is reasonable that a consumer should be able to cancel a credit agreement which is genuinely linked to a contract for goods or services which is itself cancelled. This would not, of course, mean that the consumer's liability for repayment of outstanding amounts owed would be in any way reduced. Our aim in negotiations on this article should be to ensure that the way in which a linked transaction is defined is acceptable (and, at least at present, the direction in which this has been moving in discussions in Brussels has been favourable).

We recognise that, despite the United Kingdom's generous joint and several liability provisions, Article 14 would extend the consumer's right to seek a satisfaction from a creditor in some circumstances (e.g. for smaller loans not covered by the existing UK provisions). However, this would appear to be a reasonable rationalisation of consumer rights and the degree of flexibility built into this article would allow the United Kingdom, like other Member States, to determine exactly how this provision would work. Again, ensuring that the definition of linked credit agreements is right will be crucial here.

## **Article 15**

**Question 43: Should the UK accept the move, regarding early repayment of loans, from an actuarial formula to a fair and objective indemnity calculated according to the method set out in the credit agreement? If not, why not? (Please provide supporting evidence.)**

A small number of respondents commented on this. Half of these (4) preferred the actuarial formula, although in principle some supported the concept of a fair and objective basis for consistent standards across Member States. However, some pointed out that there was no evidence that an actuarial formula would not provide a fair and objective indemnity. Both an enforcement authority and a credit organisation agreed that the indemnity for early repayment should cover the creditor's administrative costs.

We think it is fair that lenders should be able to make a reasonable charge for early repayment so as to avoid passing on the cost of early repayment to all consumers rather than only to those who choose to repay early. In the United Kingdom lenders can recoup the costs of early repayment in part by deferring the repayment date by a month in the case of loans of at least 12 months duration. Hence the charge for early repayment can include the equivalent of one month's interest. In the case of loans of less than 12 months duration the repayment date cannot be deferred, although in some cases the lender can put back the settlement date to be used for calculation of outstanding interest by up to 28 days and, in certain circumstances, this can constitute an additional charge to the consumer.

In addition to rules on deferment, UK legislation also sets out the actuarial formula which is to be used to calculate outstanding amounts owed by the consumer who repays early. Because this relies on the APR rather than the borrowing rate, it also includes an element of compensation for costs incurred where a consumer repays early.

Provided that Article 15(2) retains the degree of flexibility which the Commission has proposed (and subject to the further restrictions dealt with in Question 44 below), we understand that the United Kingdom could continue to make use of its actuarial formula as a means of calculating the rebate to the consumer and could probably also continue to use its rules on deferment.

More recently, two options have been looked at in an attempt to make further progress on this Article. Both these set out broad parameters relating to early settlement principles, which we welcome and we will continue to resist any attempt to be more prescriptive about the way in which an indemnity should be calculated.

**Question and 44: What should our position be on the prohibition on charging indemnities and on the prohibition in Article 15.2(b) (where repayment has been made under an insurance contract)? (Please provide supporting evidence.)**

A consumer organisation felt it was unfair for consumers to have to pay a charge where early repayment was covered by insurance; charges would generally hit the most vulnerable consumers. A debt campaign organisation wanted stricter controls on the charging of indemnities. An enforcement body thought that indemnities should be precluded where a borrower was

refinancing with the existing creditor (to prevent problems associated with "churning" of loans).

The industry did not see grounds for differentiating between different kinds of loans when imposing limits on indemnities and foresaw possible problems in the case of interest only credit. There was little difference in the costs of setting up loans of less than and more than one year. There was even the danger that short-term loans might become relatively more expensive and might be replaced by longer-term loans (an enforcement body was also concerned about this and thought that publicity/regulatory action would be needed to counter the possibility). One industry organisation regarded early repayment as akin to breach of contract. In its view it was important that the outcome should be fair to both parties. A business wanted the current position maintained on loans of less than one year.

Although UK legislation distinguishes between loans of less than and greater than a year, it does not make any distinction between fixed and variable rate loans and does not set out a threshold for the size of loans below which an indemnity cannot be charged. A recent informal discussion draft of this article which we have seen sets a threshold of €3000 (although this is a derogation in one of the options referred to above). However, the provision that an indemnity can only be charged where the interest rate is fixed for a period (now a year or the duration of the loan) remains.

Previously we had been concerned that, if lenders were unable to recoup the cost of early repayment from those consumers who chose to repay early, the cost will simply be passed on to all consumers regardless of whether or not they choose to repay early. We believe that this would be inherently unfair and could lead to a reduction in consumer choice by making some loans less viable than others and we therefore conclude that we should oppose these restrictions. However, we think the modification proposed above would help alleviate this concern.

On the other hand, we agree that a consumer should not have to pay an indemnity where early repayment is covered by insurance. It has now been clarified that this is the intention of paragraph 2(b) of Article 15, rather than to prevent lenders receiving any compensation for early repayment where this is covered by an insurance contract.

## **ARTICLE 16**

**Question 45: Do you agree that the United Kingdom should accept Article 16 (assignment of rights) with the extension of the exemption to block discounting and debt factoring as well as securitisation?**

Article 16 provides that any transfer of the creditor's rights under a credit agreement should not have the effect of placing the consumer in a less favourable position. Furthermore, the consumer should be properly informed when the credit agreement is assigned to a third party unless the assignment is effected for securitisation purposes only.

A strong majority of those who responded to this question (nine in total) agreed with the principle that where there is no change to the rights of the consumer it would be unnecessary to inform them of the re-assignment. Two industry representative bodies made the point that there were other financial instruments (apart from block discounting and debt factoring) that achieve a similar aim to securitisation. Therefore, rather than specifically single out block discounting and debt factoring, a more generic phrase such as "other financing or fund raising purposes only... and where the original creditor...still performs the functions of a creditor on behalf of the assignee as a creditor vis-à-vis the consumer". The latest thinking on this Article does propose the use of a generic phrase in paragraph 2.

Opposition to the exemptions to Article 16 were expressed by a regulatory body and a campaign group who thought that the consumer should always be informed in cases where the credit agreement is assigned to a third party.

On the basis of these responses, we agree that the Article should be accepted but that the exemption from informing the consumer of a re-assignment should be widened along the lines suggested above.

## **FORMER ARTICLE 18 (BAN ON THE USE OF BILLS OF EXCHANGE ETC)**

### **Question 46: Can we conclude that the deletion of the former Article 18 banning the use of bills of exchange, promissory notes and cheques guaranteeing repayment is to be welcomed?**

Only three respondents answered this question. An enforcement body and an industry organisation welcomed the deletion of the former Article 18. A consumer body was concerned about the high cost of cheque-cashing, which in its view could lock the most vulnerable consumers into a detrimental cycle of debt from which it was difficult to escape. Nevertheless it agreed that the proposed Directive was not the place to deal with the problem and that a ban on cheque-cashing altogether would be counter-productive in the absence of other forms of credit. It was also concerned about bills of exchange, which in its view might replace hire purchase as a means of financing car purchase without adequate consumer protection -- especially with regard to limits on the consumer's liability in the event of termination and the lack of protection against repossession and harsh debt collection practices. Overall it felt that bills of exchange resulted in a one-sided relationship which enabled less scrupulous lenders to exploit consumers. However, again, it was not clear that the Directive was the place to deal with this problem unless there was evidence of a problem at the European level.

There has been no support among other Member States for the retention of the former Article 18 and it is now highly unlikely that it will be re-instated.

## **ARTICLE 17 – OVERRUNNING OF THE TOTAL AMOUNT OF CREDIT**

### **47. Do you agree that it would be inappropriate to require a lender to respond to overrunning of credit by entering into a new credit agreement providing for a higher level of credit?**

Most respondents who answered this question agreed that it would not be appropriate to require a new credit agreement to be entered into under these circumstances. One consumer body commented that such a requirement could have the unintended consequence of increasing over-indebtedness. Some lenders also thought that such a requirement was unnecessary given that often such situations are accidental and can be quickly resolved. On this basis there was support for the idea of deleting Article 17(2) or ensuring that it was made clear that it only related to overdrafts.

One regulatory body pointed out that the need to enter into a new agreement was merely one way of resolving the situation and was not necessarily a requirement under Article 17(2). Were a new agreement to be set up, this could only be with the consumer's prior consent and could not be enforced compulsorily by the creditor.

We believe that there is no need to require a new credit agreement to be entered into and will seek changes to the Article to clarify this. The only circumstances where this might be appropriate is with a temporary unauthorised overdraft where there might be merit in the requirement given that the consumer had not specifically requested the overdraft.

## **FORMER ARTICLE 24**

### **Default notice and enforceability (was Article 24)**

#### **Question 48: Does exclusion of the provisions on default notice and enforceability from the scope of the Directive on balance appear an attractive option?**

In the supplementary consultation we pointed out that the provisions on Default notice and enforceability contained in the previous Article 24 had been deleted. We assumed that this would allow Member States to maintain or introduce their own provisions in these areas.

Two banks and an industry organisation thought that the deletion of the former Article 24 was reasonable and were happy that this would allow the United Kingdom to continue to apply its existing requirements. Two enforcement bodies agreed.

On the other hand one industry body was concerned that differences between national provisions in this area would lead to uneven playing fields. A consumer body highlighted the importance of adequate default and debt enforcement regulation to protect consumers. In its view the Directive should cover these areas, but it recognised that a poorly drafted provision would do more harm than good. It suggested that explicit reference should be made to these issues in Article 19 concerning supervision, ensuring that default and enforcement fell within the field of consumer protection while leaving Member States free to implement in accordance with local conditions.

A campaign organisation thought that prior notice of enforcement action should be maintained as a principle but that if this could not be agreed across the EU national measures should be retained in the United Kingdom.

On balance we believe that the deletion of the former Article 24 is to be welcomed given the likely differences between local conditions, custom and practice in Member States. The important thing is that the United Kingdom will be able to retain its provisions on these matters.

## **ARTICLE 18 – CALCULATION OF THE ANNUAL PERCENTAGE RATE**

### **Q49. Do you have any additional concerns about the provision concerning the calculation of the APR?**

Article 18 deals with the calculation of the APR. It says that:

1. *The annual percentage rate of charge, which equates, on an annual basis, to the present value of all commitments (drawdowns, repayments and charges), future or existing, agreed by the creditor and the consumer, shall be calculated in accordance with the mathematical formula set out in the Annex I.*

2. *For the purpose of calculating the annual percentage rate of charge, the total cost of the credit to the consumer shall be determined, with the exception of the charges payable by the consumer for non-compliance with any of his commitments laid down in the credit agreement and charges other than the purchase price which, for purchases of goods or services, he is obliged to pay whether the transaction is paid in cash or on credit.*

*The costs of maintaining an account recording both payment transactions and Drawdowns, the costs of means of payment for both payment transactions and drawdowns, and other costs relating to payment transactions shall be included in the total costs of credit to the consumer unless they are optional and they have been clearly and separately shown in the credit agreement or in any other agreement concluded with the consumer.*

*3. The calculation of the annual percentage rate of charge shall be based on the assumption that the credit agreement is to remain valid for the period agreed and the creditor and the consumer are to fulfill their obligations under the terms and by the dates agreed in the credit agreement.*

*4. In the case of credit agreements containing clauses allowing variations in the borrowing rate contained in the annual percentage rate of charge but unquantifiable at the time of calculation, the annual percentage rate of charge shall be calculated on the assumption that the borrowing rate and other charges are to remain fixed in relation to the initial level and are to remain applicable until the end of the credit agreement.*

*5. Where necessary, the following assumptions may be adopted in calculating the*

*annual percentage rate of charge:*

*(a) if a credit agreement gives the consumer freedom of drawdown, the total amount of credit shall be deemed to be drawdown immediately and in full;*

*(b) if there is no fixed timetable for repayment, and one cannot be deduced from*

*the terms of the credit agreement and the means for repaying the credit granted, the duration of the credit shall be deemed to be one year;*

*(c) unless otherwise specified, where the credit agreement provides for more than*

*one repayment date, the credit is to be made available and the repayments made on the earliest date provided for in the agreement;*

Most respondents agreed that maximum harmonization of the APR would be essential to enable meaningful comparisons to be made, otherwise different national rules could undermine price comparability and competition.

One lender recommended the retention of the illustrative examples of APR calculations that were contained in the previous draft of the Directive.

Some lenders and a regulator pointed out that there were differences between the assumptions contained in the Article (e.g. paragraph 5(b)) and those used in the UK. For example, in relation to annual fees, default fees and situations where interest was charged in “month 13”.

There were also doubts expressed by some lenders concerning the suitability of the APR being used in respect of running account credit products and

overdrafts. If this was to be required under the Directive, it was important that consistent assumptions for all credit card products were used in order to avoid manipulation of product features such as annual fees and minimum repayment amounts. One lender made the following suggestion:

Amount of Credit/ Drawdown:	The 'typical' (to be defined) amount of credit offered for the product in question
Term:	12 months
Type of borrowing:	Constant capital balance
Repayment:	Interest Payments in months 1-11 and bullet repayment of principal in month 12.
Interest rate:	Standard rate for purchases after any introductory offers.

Along similar lines, another lender thought that it preferable to allow lenders to express the costs for overdrafts as the annual interest rate, and complement this information with a 'box' stating the related fees payable.

One lender also thought the Directive should clarify how APRs for cash advances on charge cards should be calculated.

The other main point expressed concerned the use of blended rates. There was a consensus among respondents that the use of blended rates should be discouraged and that "go-to" rates were preferable. On this basis it would be better to assume that the rate should be assumed to remain fixed at the initial level or at the lenders SVR as appropriate. One regulator suggested that credit card APRs should be based on the highest rate applicable to purchases during the first 3 years as is the case in the UK.

We do not agree with the approach taken in Article 18 to blended rates. We will also be seeking to revise the Article so that appropriate assumptions can be used for different products given that those contained in Article 18 would be misleading in some cases.

## ARTICLE 19

### **Q 50: Are the provisions of Article 19 on regulation of creditors and credit intermediaries sufficiently robust? If not, how should they be strengthened?**

Most respondents (including industry, consumer and regulatory organisations) suggested that they wanted common proportionate standards across the EU, and that the UK system was generally fair and proportionate and they would like to see this continue. Respondents were not entirely clear whether the wording of Article 19 would allow this, although two felt that the provisions were sufficiently robust.

There was a general feeling that the article was too broad, and some concern about the change from "or" to "and" which could lead to yet another regulator for consumer credit. There should be more definition (along the lines of the

UK system) and the article should be amended to outline both high level principles defining the system of supervision / regulation and the matters and practices to be regulated (for instance debt enforcement)

There was most concern about the possible additional regulation of credit intermediaries. Again, the existing UK solution, which allowed the principal lender to take responsibility for the actions of its agents, was generally accepted as a sensible way of dealing with the issue. Latest indications are that the reference to intermediaries in Article 19 will be deleted.

There was some support for a passporting system along the lines of the Banking Consolidation Directives (primarily from a regulatory body), where Member states would monitor fitness and could take action to protect consumers (all subject to notification of the Home State).

On balance now that we believe that mutual recognition is unlikely to be included (see below) we think it best to leave to Member States how to regulate/supervise lenders.

**Q 51 – Can we accept mutual recognition in this area? Would additional mechanisms be needed to make it work?**

There was a general acceptance that mutual recognition should be accepted in this area. However the majority of respondents thought that this should not be at the cost of consumer protection, and that in order for it to work there would need to be some equivalence of supervisory standards – preferably to UK level. Some requirements suggested for acceptance were:

- Additional mechanisms would be needed to make it work:
- Passporting scheme
- Networking of supervisory bodies
- Need to regulate regulators to ensure consistency of application
- EU scheme for licensing

As already indicated it is now unlikely that mutual recognition will be included in the Directive.

**Q 52 – Would Article 21 encourage increased cross-border trade by reducing the need for lenders to be registered in more than one Member State?**

The general feeling was that while an apparent reduction in administrative burdens should increase cross-border trade this was unlikely to happen in practice. This was partly because the article needed tightening up and there would need to be greater supervisory equivalence across the EU. It was also felt that this provision in and of itself would not necessarily increase cross-border trade. Furthermore, a debt organisation expressed concern that creditors would congregate in those member states with the least regulation. Both consumer organisations and business stakeholders wanted to ensure that opening the market did not bring lower levels of consumer protection.

Although the proposal might be beneficial to businesses, it would take consumers time to develop the confidence to buy credit from another Member State and might not generate large commercial interest for lenders. One respondent expressed concern about different levels of supervision in the new member states and others similarly agreed that supervisory and regulatory regimes should be consistent.

There has been almost unanimous opposition from Other Member States to the principle of mutual recognition. The Article has now been dropped and will almost certainly not be reinstated.

## **Article 20**

### **Question 53: Should we accept the requirement for disclosure in the case of a broker (but not for home credit/mail-order agents or co-branding)? If not, why not? (Please provide supporting evidence.)**

A bank and a consumer organisation supported a requirement for full transparency concerning the status of intermediaries. However a number of industry organisations thought that this should only apply to genuine brokers, not to home credit and mail-order catalogue agents or to co-branding and affinity partners. Another industry organisation thought that the advertising requirements in Article 20(a) should be limited to any materials actually produced by the intermediary rather than by the lender.

On the other hand a regulatory organisation thought that the requirements in Article 20 should apply to all intermediaries and to all forms of communication -- not just advertising. In its view intermediaries should disclose at the outset their status and the nature of the service they were offering.

It is likely that for the most part home credit/mail-order catalogue agents (as opposed to brokers) probably don't advertise and it is not clear whether they would be required to provide any information other than standard information supplied by the principal lender. We are not convinced, therefore, that this provision would necessarily pose a problem in practice, although this is something we wish to discuss further with the help of interested parties in the UK. We think that there may be some merit in extending the requirement for transparency to communications other than advertising -- for example to oral communications during face-to-face advice sessions.

### **Question 54: How should the exemption for co-branding be framed? What else should be covered?**

A bank favoured a specific exemption for cobranding which would result in the exemption of registered charities where fees paid would be used for charitable purposes. According to two industry groups, the exemption could only be made workable by narrowing the definition of "credit intermediary" so as to

exclude home credit, mail-order, affinity groups and cobranded schemes (see question 18 concerning Article 3).

On the other hand a campaign organisation thought that there should be no exemption for cobranding.

The solution appears to be to seek appropriate amendment of the definition of "credit intermediary" in Article 3 so as to exclude cobranding partners and affinity groups altogether and to exclude home credit and mail-order catalogue agents where the principal lender takes responsibility for their actions.

**Question 55: Should the issue of intermediaries' fees be left to the market as long as their existence is made clear? Should we argue that this issue should not be within the scope of the Directive? If not, why not? (Please provide evidence.)**

Only five respondents answered this question. Two industry organisations and a bank thought that the issue of fees should be left to the market. A consumer body and a campaign organisation disagreed. The consumer body cited the possibility of unscrupulous intermediaries charging excessive hidden fees to vulnerable consumers as a reason for keeping intermediaries' fees within the scope of the Directive, although it didn't suggest that there should be a ban on fee charging.

One of the industry organisations (representing mortgage intermediaries) thought that consumers should be free to choose whether to pay for advice: for example a consumer might wish to use a firm because of the level of service it offered; or a consumer might value access to independent advice and be willing to pay a fee for this. In its view the issue was transparency. In practice many intermediaries operate a system under which the consumer agrees to offset any commission received from a creditor against the fee charged by the intermediary, thus enabling consumers to access independent advice at little or no direct cost. In the organisation's view maintaining this approach would ensure market competitiveness and lead to clarity for consumers. On the other hand where a firm is only allowed to be remunerated by the lender there is the risk of distorting the market through discouraging wide-ranging advice.

We conclude that the key to solving problems in this area lies with the requirement for transparency regarding an intermediary's status covered in paragraph 1 of Article 20, which will enable consumers to make appropriate choices. We understand that the reason why the Commission included a ban on the charging of fees to both consumers and lenders was to ensure that, where a consumer paid a fee, he or she could be confident that the intermediary would act on his or her behalf. However, we believe this would simply create a false (and therefore, misleading) sense of security. Given that the cost of intermediaries' involvement will in the end be passed on to consumers in one form or another, we therefore think it would be pointless to dictate the circumstances in which a fee can be charged to either party and that this can be left to the market subject to adequate rules on transparency

and the possibility, as in the United Kingdom, of enforcement action in cases of misconduct.

## **Article 21**

### **Question 56: Should we support the principle of mutual recognition set out in Article 21 (If not, why not?)**

Generally, respondents supported mutual recognition but a consumer organisation said that there are still areas of uncertainty, in respect of articles subject to mutual recognition.

An enforcer added that even with maximum harmonisation there would be scope for differences in the way provisions are interpreted and applied in national legislation and how the courts would enforce it. In particular, if key principles are left vague, mutual recognition would lead to confusion for consumers. A group of business stakeholders asked whether the Commission would clarify the objective of the proposal and they believed that mutual recognition was a compromise that constituted bad law.

A consumer organisation asked how if mutual recognition were adopted, equivalent standards would be monitored to promote cross-border cooperation?

In addition, a bank suggested that full harmonisation was required for the directive to be effective in encouraging an integrated market and to protect consumers. They stressed that the proposal for maximum harmonisation and mutual recognition would neither provide certainty nor simplicity for lenders to trade cross-border.

One campaign group supported a request for a regulatory impact assessment to help assess the impact of the directive.

As already indicated, there has been almost unanimous opposition from Other Member States to the principle of mutual recognition. The Article has now been dropped and will almost certainly not be reinstated.

### **Question 57: Should mutual recognition apply only to certain articles and not others? If so, to which articles should it apply? (Again, please provide evidence in support of your answer).**

Representatives from UK credit providers agreed that mutual recognition should apply to certain articles and not others and identified articles offering real consumer protection subject to maximum harmonisation. such as pre-contractual information, responsible lending, right of withdrawal and early repayment. Furthermore, they said that it would be useful if this article set out the provisions subject to maximum, minimum harmonisation and mutual recognition.

An enforcer did not agree but another said that mutual recognition was necessary in APR calculation and access to databases but for other articles minimum harmonisation would suffice, permitting member states to go further. They added that this might raise minimum standards within member states and would not jeopardise consumer protection in the UK towards maximum harmonisation.

A bank stressed that member states should remain free to maintain and introduce further legislation at a national level. This could however, be confusing for both businesses and consumers and ultimately undermine member states' ability to enforce the regimes.

## **Article 22**

**Question 58: Given our doubts about the value of a "responsible lending" provision, is the removal of the specific reference to it in relation to penalties to be welcomed?**

Two banks and four industry organisations supported the deletion of the reference to responsible lending in this article. An enforcement body also thought that it was sensible to keep the wording of the article general. Another enforcement organisation, a consumer body and a campaign organisation preferred to keep the specific reference to responsible lending in the article as a means of controlling poor lending practices.

We conclude that there is advantage in keeping the wording of Article 22 general rather than singling out specific areas for attention so as to allow maximum flexibility for enforcement authorities. In the United Kingdom we have provisions allowing action against irresponsible lending and (see comments on Article 5(1)) our aim will be to ensure that these are not jeopardised.

## **Article 23**

**Question 59: Do you agree that the provisions in Article 23 on out-of-court dispute resolution are helpful?**

Article 23 of the proposed Directive requires Member States to ensure that "adequate and effective" out-of-court dispute resolution procedures are put in place for the settlement of consumer disputes and that Member State should encourage the bodies responsible for such procedures to cooperate in cross-border disputes.

Two banks, four industry organisations, two enforcement organisations, a consumer body and a campaign organisation agreed that the wording of Article 23 was helpful. One enforcement body nevertheless thought that it would be useful to clarify that out-of-court dispute resolution mechanisms would also include adequate and effective provision for redress, as was the case in earlier drafts.

We therefore conclude that Article 23 is helpful and that it would not pose any problems for the United Kingdom, where we already have alternate dispute resolution.

## **Article 26**

### **Question 60: Could this kind of retrospective application of legislation be problematic? How many agreements would be affected by this requirement and how easily could they be amended?**

The article would require open ended agreements already in existence on the date on which national implementing measures came into force to be adapted to the requirements of the Directive by means of an addendum to the existing agreement sent by the creditor to the consumer within a set period following transposition.

A bank thought that greater clarity was needed on the aspects of agreements which would be subject to retrospective amendment: the extent of any burden would depend on the final detail of the Directive's requirements. It pointed out that the application of many of the Directive's provisions to open-ended agreements would, in any case, have major cost implications.

An enforcement organisation thought that the requirement for amendment should apply to all agreements, not just open-ended agreements. In its view there should be a maximum transitional period of two years for effecting the necessary amendments (except where these would cause consumer detriment). It did not however believe that the lender should have to renegotiate terms whose modification would be required by the Directive (again, subject to the caveat about consumer detriment). Another enforcement organisation thought that it would be important to update open-end agreements as required in Article 26.

Two industry organisations thought that the requirement could be problematic. It was not clear what would happen if a consumer refused to accept or failed to respond to revised terms. Another industry organisation regarded the current text as an improvement on earlier versions which had required a signed addendum. It was not clear, however, whether, for example, the APR would need to be recalculated in line with changes in the Directive and whether a lender would have to reconsider a consumer's credit worthiness. Another industry organisation and a bank thought that the requirement to adapt existing agreements was workable, but would be potentially burdensome unless it could be integrated into other business-initiated revisions to terms of open-ended agreements.

A campaign organisation thought that the requirement could be problematic for both lenders and consumers.

On balance the requirements of Article 26 appear acceptable provided that they can be integrated into lenders' normal channels of communication with

their customers. There will need to be clarity about how this would work in practice.

## **Article 27 -- Amendment to Directive 93/13/EC on Unfair Terms in Consumer Contracts**

**Question 61: Should we press for the deletion of this article? (If not, why not?)**

**and**

**Question 62: Is this a point on which the United Kingdom could compromise (other than with regard to the issue of cash securities and the rate of interest payable on deposits)?**

Article 27 of the draft Directive proposed the addition of a number of specific terms to the list of unfair contract terms annexed to the Directive on Unfair Terms in Consumer Contracts. These were terms which had the effect of:

(a) imposing on the consumer a requirement to leave as security the amounts borrowed or to use them to constitute a deposit or to purchase securities or other financial instruments, unless the consumer obtained at least the same rates for such a deposit, purchase etc as the agreed APR;

(b) obliging the consumer to enter into another contract with the creditor, credit intermediary or third-party designated by them, unless the costs thereof are included in the total cost of credit;

(c) obliging the consumer to use the same creditor to refinance any final payment on a credit agreement.

A bank, a regulatory body and three industry organisations agreed with the proposed UK position that the Article was unnecessary, but thought that it was an area in which we could compromise. Another bank and a further industry organisation also agreed that the Article should be deleted and did not believe that this was an area in which the UK should compromise. On the other hand an enforcement body and a consumer organisation preferred to retain the Article and a campaign organisation went further -- wanting also to specifically outlaw terms which would lead to an extortionate price or interest rate.

On balance we consider that adding unfair contract terms to the list annexed to Directive 93/13/EEC is unnecessary, since the annex is not exhaustive and the Unfair Terms in Consumer Contracts Directive therefore already provides consumers with adequate protection against the use of unfair terms. Adding only certain specific terms might even have the unfortunate side-effect of implying that other contract terms in consumer credit agreements would therefore be acceptable. Although we might be able to compromise on this Article, we would need to ensure that the first proposed unfair contract term, (a) above, was not included, since we understand that it is possible that this could restrict market developments.

In the most recent text under discussion this Article has been deleted.

## **Regulatory Impact Assessment**

**Question 63: Do you agree with the assumptions in the attached partial regulatory impact assessment? Can you give an indication of the costs and benefits associated with the proposed Directive?**

The DTI received only limited comments regarding assertions on the estimated costs and benefits in the initial regulatory impact assessment during this round of consultation.

However, a small subset of responses identified the need for closer consideration of the costs of the directive from the perspective of consumers and advice agencies. Potential sources of costs identified by respondents include;

- The dilution of some protections available to consumers under UK legislation,
- Enforcement and advice costs incurred when consumers enter into agreements based on the laws of another member state (but this is no longer relevant assuming the Mutual recognition Article is not re-instated),
- The cost of providing advice on compliance for UK firms attempting to enter into business in other countries (although there was no evidence that this would increase due to the Directive)

A Consumer body also commented that the adoption of mutual recognition could have serious consequences for agencies advising consumers on their rights, as advice agencies might have to advise on agreements governed by 25 different codes in those areas subject to mutual recognition in the directive. If this were to happen on a large scale the costs and difficulty would cause severe problems in helping consumers to access their rights.

The DTI notes the importance of consumer protection issues and the potential for costs to be created as a result of a loss of consumer protection and due to increases in the provision of advice. The DTI does however, also note that such costs will be difficult to quantify and will depend very much on the specific detail of particular Articles contained within the directive.

The DTI has seen no evidence that this Directive will produce any benefits and regrets the lack of an impact assessment. The DTI will endeavor to include estimates of such costs in any future regulatory impact assessments undertaken with regard to the directive.

**Question 64: in your view will be Directive increase competition by encouraging cross-border trade and/or facilitating lenders' entry into other EU markets? Will it overcome barriers to trade?**

A bank said that the current proposal would not encourage it to increase its investment in new consumer credit products and services across the EU and that, on the contrary, the additional costs which the Directive would entail might discourage new investment. It deplored the lack of an impact assessment, which it thought should be a priority. In its view, a fundamentally different approach was needed in partnership with key stakeholders. Two other banks agreed that the Directive would not increase cross-border trade as there would remain too many barriers (cultural, political and legal), which were not addressed. In its view the current proposal might even reinforce existing barriers by its mix of mutual recognition and maximum harmonisation. Apart from access to databases, they thought the Directive would do nothing to facilitate entry into other markets, which would be driven more by the removal of barriers to cross-border corporate ownership and increased reliance on competition policy.

A cross industry grouping did not believe that the Directive would increase competition. Even if there was a slight increase, this would be dwarfed by the fall in national GDP which it believed the Directive's requirements would trigger (up to 0.2% in the UK according to the 2003 Oxera study). In its view an internal market in credit was already emerging as a result of increased cross-border mergers, joint ventures and scale market entry, which provided consumers with the same benefits in terms of increased choice and competition. Three other industry organisations concurred. One thought that the Directive would reduce consumer choice and that the Commission should concentrate its efforts on supporting industry's efforts to create an internal market. Another believed that the number of exemptions from the Directive's requirements would hamper the creation of a single market.

An enforcement organisation thought that the Directive would increase competition and, if properly implemented, could overcome barriers to trade. Only one industry body agreed, although it thought that any change would be small. It was also pointed out that because the United Kingdom was outside the euro zone it was unlikely that there would be any advantage to UK consumers.

A campaign organisation thought that information asymmetries and the lack of harmonisation of regulatory standards would reduce the extent to which there was any real competition.

## **ANNEX A**

### **LIST OF RESPONDENTS**

Association of British Credit Unions  
Association of Credit Intermediaries  
Barclays  
British Bankers Association  
CAB  
CBI  
Consumer Credit Association  
Debt on our Doorstep  
Direct marketing Association  
East of England Trading Standards Association Ltd  
Egg  
Experian  
Finance and Leasing Association  
Financial Services Consumer Panel  
Glasgow Council Credit Union  
Institute of Credit Management  
Lacors  
Lloyds TSB  
The Newspaper Society  
OFT  
Royal Bank of Scotland  
Society of Motor manufacturers and Traders Ltd

End

DTI  
Consumer and Competition Policy Directorate

November 2006