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SPECIALISED CONSUMER CREDIT PROVIDERS IN EUROPE

Response to the European Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses

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ABOUT EUROFINAS

Eurofinas, the European Federation of Finance House Associations, is the voice of the specialised consumer credit providers in the EU. As a Federation, Eurofinas brings together associations throughout Europe that represent finance houses, specialised banks, captive finance companies of car, equipment, etc. manufacturers and universal banks. The scope of products covered by Eurofinas members includes all forms of consumer credit products such as personal loans, linked credit, credit cards and store cards. Consumer credit facilitates access to assets and services as diverse as cars, studies, furniture, electronic appliances, etc. It is estimated that together Eurofinas members financed over 320 billion euros worth of new loans during 2009 with outstandings reaching 720 billion euros at the end of the year.

For further information about this Eurofinas consultation response, please contact: a.giraud@eurofinas.org

INTRODUCTORY OBSERVATIONS

Eurofinas welcomes the opportunity to respond to the European Commission's public consultation on *policy options for progress towards a European contract law for consumers and businesses*.

Eurofinas agrees, in principle, with the Commission that legal fragmentation across the EU may create obstacles to free movement of goods and services and affect quality and quantity of trade across European frontiers. We support the Commission's view that cross-border transactions within the European Union should be facilitated for businesses and consumers to take advantage of the Single Market. We recognise that differences in Member States' contractual law require businesses to adapt their contractual terms.

However, Eurofinas would like to point out that in addition to regulatory fragmentation, structural barriers such as logistical, cultural elements and uncertainties over cross-border debt recovery may curb the level of direct cross-border trade. The lack of harmonisation regarding contract law is therefore not the only barrier preventing businesses from engaging in cross-border activities. Cultural differences are a major obstacle which prevents cross-border activities. This is not surprising considering the standard consumer preference toward domestic providers which offer a greater sense of security. Language difficulties are also a basic problem. According to an analysis carried out for DG SANCO on the distance marketing of consumer financial services, consumers might be unable or unwilling to purchase products or services marketed in a foreign language (1).

Additionally, not all financial services providers have the technical, financial and logistical abilities to operate on a direct cross-border basis. Nor do consumers intend to shop around different markets when considering the conclusion of a financial service contract. This is particularly the case when it comes to consumer credit agreements where the amount borrowed is usually limited and products often linked to local affinity partnerships (2).

Hence, in the field of consumer credit, direct cross-border lending is insignificant in the EU and where it exists is restricted, in the main, to border areas. As evidenced by a recent study carried out for DG SANCO, direct cross-border lending concerns a limited number of institutions and, in all cases, an extremely small proportion of overall outstanding consumer credit (3). However, it is worth highlighting the importance of indirect cross border lending through mergers/acquisitions and establishments of branches or subsidiaries. Optional harmonised key contract law elements could be helpful to pan-European institutions to provide their subsidiaries with contractual templates. However, we do not believe that the harmonisation of contract law would actually influence *per se* the decision of a local lending institution to trade on a direct cross-border basis.

Though we recognise that regulatory elements are key in every-day business, such a strategic decision to trade cross-border goes far beyond purely regulatory considerations. For lending institutions it notably includes the following parameters:

- Market characteristics (including level of concentration and development potentials)
- Market risk assessment (including overall level of risks of potential customer basis)
- Identification of products/services matching local demand
- Advertising and marketing strategies
- Taxation and VAT
- Establishment of a customer service department (including linked costs)
- Levels of Fraud
- Access to and quality of credit data
- Recovery schemes
- Management of local partnerships
- Transparency of debtors' assets

1 DG SANCO, Analysis of the Economic Impact of Directive 2002/65/EC concerning the distance marketing of consumer financial services on the conclusion of cross-border contracts for financial services between suppliers and consumers within the Internal Market, Submitted by Civic Consulting of the Consumer Policy Evaluation Consortium, 5 September 2008

2 In 2009, the average consumer credit loan was of 3684 Euros (Based on Eurofinas statistics for the year 2009 and including personal loans and credit at the point of sale).

3 DG SANCO, Establishment of a Benchmark on the Economic Impact of the Consumer Credit Directive on the Functioning of the Internal Market in this Sector and on the Level of Consumer Protection, Submitted by GHK, 5 November 2009

- Anti-money laundering local requirements

The cumulative impact of these key elements makes it difficult, if not technically impossible for a lending institution to consider entering a new market on a purely direct cross-border basis.

In the field of consumer credit, a major step towards a high level of consumer protection across the EU and harmonisation of key contractual elements was achieved with the adoption of Directive 2008/48/EC on credit agreements for consumers (the Consumer Credit Directive – CCD) (4).

Consumer Credit Directive

The Consumer Credit Directive was adopted on 23 April 2008 after more than five years of intense discussions amongst all interested parties. This new European regulation covers all aspects of the consumer credit lending transaction:

- Standard information to be included in consumer credit advertising
- Pre-contractual information to be provided to applicant borrowers via the Standard European Consumer Credit Information Sheet (SECCI)
- Assessment of applicant borrowers' creditworthiness
- Contractual information to be included in all credit agreements
- Specific information related to the borrowing rate to be provided to consumers
- Calculation of the annual percentage rate of charge (APRC)
- Transparency measures for intermediaries involved in the provision of consumer credit agreements (i.e. disclosure of extent of power and fees payable by the consumer to the intermediary)
- Where necessary, additional assistance to be provided to the applicant borrower in order to decide which credit agreement is the most suitable for his needs and financial situation
- Borrowers right of withdrawal from the credit agreement
- Borrowers right to discharge, fully or partially and at any time his obligations under a credit agreement
- Lenders liability for credit agreements linked to the purchase of goods or services
- Out-of-court dispute resolution schemes for the settlement of consumer disputes concerning credit agreements

The transposition of the CCD into Member States legislation brings substantial modifications to lenders' current business practices. As a consequence, lenders have adapted their processes, advertising and marketing materials, information documents, contract templates, staff training and IT systems to the new legal framework.

The CCD is a sector specific legislation that takes into account the particularities of the consumer credit lending sector. We believe that any general initiative on the harmonisation of contract law carried out in parallel should therefore be consistent with the specificities of the sector specific legislation in force.

Though we appreciate the European Commission's commitment to ensure that, in general, regulatory provisions are adopted on a full-harmonisation basis, we note that, in reality, such political policy is very difficult *i)* to negotiate at European level and, *ii)* to transpose at National level. The CCD was proposed by the European Commission on the basis of a maximum harmonisation approach. However, the Parliamentary process led to the inclusion of a high number of national discretions. In parallel, despite its clarity, numerous national regulators goldplated the Directive by extending its scope, adding further requirements and we believe, sometimes contradicting both the letter and spirit of the text.

The Federation believes that such situations should be avoided at all costs.

4 See Directive 2008/48/EC on credit agreements for consumers, OJEU L133/66

It is worth highlighting in this context that, at the time of writing, the 2008 Commission's proposal for a Directive on consumer rights is still being discussed by the European institutions and that it proves almost impossible to reach consensus, both at Parliament and Council levels, on the review of the Directive on unfair contract terms.

Against this backdrop, we doubt that European actors will manage to reach political consensus on a general fully harmonised European contract law.

Q. 1 What should be the legal nature of the instrument of European Contract Law?

Option 1: The outcome of the work of the EC Expert Group on contract law could be made easily available

Regarding *option 1* of the Green Paper, Eurofinas believes that the publication of the results of the Expert Group would be in any case a sensible approach. It would be a useful source of information for Member States and others looking for practical ideas on contract law.

Option 2: Toolbox approach

It is difficult to gauge the real value of *option 2* without knowing how exactly it would be used. Further explanations of this policy option are therefore needed.

Option 3 & 4: Optional instrument of European Contract Law

Eurofinas agrees with the Commission's proposal to establish an optional instrument of European contract law. We believe that such instrument would provide an adequate flexibility for those economic operators willing to gradually implement common contractual standards into their different sites across Europe. On the other hand, such optional instrument would not compel those institutions having purely local activities to adapt their own contracts.

We believe this is the only option which would avoid putting disproportionate administrative and operational burden on economic operators and, in particular, on small-sized lending institutions.

Eurofinas therefore supports a recommendation that would encourage Member States to incorporate the European Contract Law instrument as an optional regime, offering contractual parties an alternative to national law for direct cross-border transactions. In all cases, businesses should remain free to adapt part or all of their contracts. The implementation of the optional instrument would have to be assessed and possible improvements to the instrument brought on a regular basis.

This optional instrument would provide contractual parties with the opportunity to limit risks and obstacles in cross-border trade and therefore bring about internal market benefits led by the demand (i.e. a need to use basis) of contracting parties. As an added benefit, this policy option would not decrease the legal certainty founded upon the various national, pre-existing legal frameworks.

In this context, we believe that the introduction of a regulation establishing an optional instrument would be premature.

Options 5 & 6: Directive/Regulation establishing a European Contract Law

Concerning *options 5 and 6,* Eurofinas opposes the introduction of a Directive or Regulation on European Contract Law. Mandatory instruments would erode the legal certainty that has been built up over centuries at national level through case law and statute. The legal uncertainty and revolutionary changes made by introducing a mandatory instrument could leave individuals and businesses in a worse position than currently is the case.

Option 7: A Regulation establishing a European Civil Code

Finally, regarding *option 7*, Eurofinas opposes the establishment of a European Civil Code as it would cover too broad a range of specific sectors of national legislation. These sectors each have their own specificities which a European Civil Code would be unable to take into account. This would decrease

the legal certainty that has been developed at national level through case law and statutory development in national legal systems.

Eurofinas recommends that the Commission carefully considers the additional burdens that will be placed on consumers and businesses if the above mentioned policy options are pursued.

Q. 2 What should be the scope of application of the instrument?

Any actions taken by the European Commission regarding contractual law should be strictly limited in scope to business-to-consumer contracts. Businesses do not require the same level of protection as consumers. The inclusion of business-to-business contracts within the scope of European contract law would cause confusion considering the different specificities applicable to each business-to-business contract.

Additionally, we warn against the introduction of separate instruments for business-to-consumers and business-to-business contracts that would not necessarily be effective in clarifying this situation. Two contract law initiatives (B2C & B2B running in parallel) would only increase the risks of overlaps and inconsistencies.

As a further remark, SMEs should be regarded as businesses under this initiative and hence be excluded from the scope of any future instrument.

Any initiatives must be limited to cross-border contracts only. There would be no added value to widen its application to domestic contracts. Any such increase in scope would add additional burdens and complications for consumers and businesses. Eurofinas would strongly oppose any intervention in contract law involving domestic transactions.

As previously mentioned, we believe that businesses should remain free to adapt part or all of their contracts for cross-border transactions.

Q. 3 What should be the material scope of the instrument?

Eurofinas is in favour of a narrow interpretation of the material scope of the instrument which should be in fact even narrower in scope than is set out in paragraph 4.3.1 of the European Commission's Green Paper.

Specific contractual clauses (i.e. right of withdrawal) should not be included in the scope of European Contract Law as these vary according to industry sector. EU legislation such as the Consumer Credit Directive or the proposed Consumer Rights Directive already legislates for such specific clauses.

Summary of responses

- Eurofinas supports the Commission's view that cross-border transactions within the European Union should be facilitated for businesses and consumers to take advantage of the Single Market.

- Eurofinas does not believe that the harmonisation of contract law would actually influence *per se* the decision of a local lending institution to trade on a direct cross-border basis.

- In the field of consumer credit, a major step towards a high level of consumer protection across the EU and harmonisation of key contractual elements was achieved with the adoption of Directive 2008/48/EC on credit agreements for consumers.

- Eurofinas doubts that European actors will manage to reach political consensus on a general fully harmonised European contract law.

- Eurofinas agrees with the Commission's proposal to establish an optional instrument of European contract law involving cross-border transactions. Businesses should remain free to adapt part or all of their contracts for cross-border transactions.

- Eurofinas opposes any further action at this stage.