EUROFINAS' COMMENTS ON THE COMMON POSITION ADOPTED BY THE COUNCIL WITH A VIEW TO THE ADOPTION OF A DIRECTIVE ON CREDIT AGREEMENTS FOR CONSUMERS (ref. 9948/07)

Eurofinas commends the European Parliament for having commissioned a study on the economic impact of the proposed Directive on consumer credit (the 'Civic Report'). This study was long overdue and should have been carried out at the request of the European Commission before any (revised) proposal was made.

The Civic Report, although limited in scope, confirmed the longstanding view of the industry that the current proposal will not benefit consumers (as it will result in higher costs, less choice and information overload) and will not lead to greater levels of consumer confidence. The Oxera report published in April 2007 and commissioned by a number of UK Trade Associations reached broadly similar conclusions.

We very much regret that the Council took no account of the Civic Report, in breach of its commitment to Better Regulation. The debate at Council level has been mainly political, and the real issues have been barely discussed.

We consider the Common Position adopted by the Council to be seriously flawed in a number of key respects. These are:

Harmonisation (level of)

As acknowledged in the Recital of the Common Position adopted by the Council, the *(…) situation resulting from (…) national differences leads to (..) obstacles to the internal market where Member States have adopted different mandatory provisions more stringent than those foreseen in Directive 87/102/EEC. (…) In order to facilitate the emergence of a well-functioning internal market in consumer credit, it is necessary to make provision for a harmonised Community framework in a number of core areas (…) Full harmonisation is necessary in order to assure all consumers in the Community a high and equivalent level of protection of their interests and in order to create a genuine internal market.*

Yet the Common Position falls short of fully harmonizing a number of key elements for the development of a single market for consumer credit (incl. information requirements and right of withdrawal). In these circumstances it is doubtful whether the Directive will deliver its single market and consumer protection objectives.

Information requirements

It is inappropriate to overload consumers with excessive and/or duplicate information, which not only inconveniences them but also creates unnecessary burdens and costs for lenders.

The specificities of the point of sale finance (linked credit) market call for a differentiated pre-contractual information regime.

Also, the wide scope of the definitions of the 'total cost of credit' and of the APRC do not allow meaningful comparisons of the cost of credit by consumers.

Right of withdrawal

Unless lenders can understand precisely when the right of withdrawal period starts, they will face major legal uncertainty.

The distribution of credit at the point of sale will be badly hit by the Directive if consumers are not able to waive the right of withdrawal if they wish immediate delivery of the goods or services financed. This will be to the detriment of consumers, distributors and lenders alike.

Also, lenders should be compensated for all the (reasonable) administrative costs they incur. Otherwise the average cost of credit will go up, regardless of any withdrawal.

Linked credit agreements

The definition of linked credit agreements is too broad. It creates the risk that a large number of credits could be defined as "*linked credit agreements*" without any of the parties having intended to give this effect to the agreement.

Credit intermediaries

The definition of 'credit intermediary' is too broad. Unless it is restricted to any natural or legal person whose *principal activity* consists in offering and/or concluding credit agreements for remuneration, it will also apply to sellers/dealers whose main activity is the sale of goods or services other than credit. This is not appropriate in view of the role the latter play in the credit distribution process. This would negatively impact the distribution of credit at the point of sale, once again to the detriment of consumers, distributors and credit providers alike.

Also this would go against the objective of the Directive to facilitate the cross-border provision of credit: like e-credit and the internet, point of sale finance allows creditors to provide credit cross-border without the need to establish a branch or a subsidiary.

The second reading represents an opportunity to address the concerns, listed above.

It is Eurofinas' hope that the Members of the European Parliament will seize this opportunity to take a critical look at the text adopted by the Council, so as to bring about the changes that are necessary for the Directive to deliver its objectives.

We provide below detailed comments on all our concerns.

We stand ready to provide Members of the European Parliament with further information.

ABOUT EUROFINAS

Eurofinas is the main voice of the specialised consumer credit industry at European level. It currently represents 16 Member Associations, in turn bringing together more than 1,000 finance houses, captive companies, specialised and universal banks. Together, these consumer credit providers financed over 380 billion euros worth of new loans during 2006, an increase of 5.4% compared to 2005, with outstandings reaching 645 billion euros at the end of the year. Companies represented through Eurofinas employ some 85 000 individuals.

Consumer credit providers may be of several types and our members' members can be grouped into the categories below. Around 90% of the companies represented through Eurofinas are specialised lenders, falling into the first three categories:

- o Finance houses: specialised consumer credit providers without a banking licence;
- o Captive companies: parent companies of these companies are manufacturers (e.g. car manufacturers). Captives may or may not have a banking licence;
- o Specialised banks : institutions with a banking licence but an activity limited to consumer credit or/and mortgage lending; and
- o Universal banks: banks providing all kinds of products retail, corporate, etc., including consumer credit.

1. KEY CONCERNS

1.1. INFORMATION REQUIREMENTS: STANDARD INFORMATION FOR ADVERTISING

TEXT OF COMMON POSITION (ART.4)

1. Any advertising concerning credit agreements indicating an interest rate or any figures relating to the cost of the credit to the consumer shall include standard information in accordance with this Article. This obligation does not apply to cases where national legislation requires the indication of the annual percentage rate of charge for advertising concerning credit agreements which does not indicate an interest rate or any figures relating to the cost of credit to the consumer.

2. The standard information shall refer to, in the following order, and in a clear, concise and prominent way by means of a representative example:

(a) the borrowing rate, fixed or variable or both, if applicable, together with information on any applicable charges;

(b) the total amount of credit;

(c) the annual percentage rate of charge; in the case of a credit agreement within the meaning of Article 2(3), Member States may decide that the annual percentage rate of charge need not be provided;

(d) the duration of the credit agreement;

(e) in case of a credit in the form of deferred payment for a specific good or service, the cash price and the amount of any advance payment; and

(f) if applicable, the total amount payable by the consumer and the amount of the instalments.

3. Where the conclusion of a contract regarding an ancillary service relating to the credit agreement, in particular insurance, is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed, and its cost cannot be determined in advance, the obligation to take out this [contract] shall also be mentioned in a clear, concise and prominent way, together with the annual percentage rate of charge.

4. This Article shall be without prejudice to Directive 2005/29/EC.

MAIN CRITICISM

It is inappropriate to overload consumers with excessive and/or duplicate information, which not only inconveniences them but also creates unnecessary burdens and costs for lenders.

JUSTIFICATION

The Common Position lays down too many requirements for advertisement and pre-contractual information. They are two distinct concepts, but the Common Position treats them as similar.

Advertising is one of a range of marketing tools. Its intention is to capture the general public at a very preliminary stage rather than to target individual consumers. The requirements under this Article are inappropriate for radio, TV and internet advertising and might stop the development of such marketing media, given the very limited duration of advertisements and the significantly increased costs the advertiser would incur.

Moreover, we see no need or justification for setting out information requirements in a binding fashion as per Article 4-2.

Providing the consumer with such detailed information at an early stage may mislead the consumer at a stage when they have not yet expressed any intention to enter into negotiations with the lender. Most of the information items listed under Article 4-2-a)-f) are identifiable only with reference to a specific profile which makes it impossible to provide them in a general, standardised advertisement. It is particularly the case for revolving credit (a credit line of a limited amount which fluctuates as repayments are made), in which each parameter (drawdown amount, monthly payment, rate, etc) is likely to fluctuate rapidly. The same is true for Article 4-2-c) which refers to the APRC applicable to overdraft facilities repayable within 3 months.

The "representative example" mentioned in Art. 4-2 seems to encapsulate all the essential information needed to compare different offers, even though it is not based on the individual consumer's needs. There is therefore a risk that consumers could be tempted to choose the lender on the basis of the representative example provided in the advertising, thereby initiating contractual negotiations only with that creditor. This would render worthless all provisions enabling the consumer to compare different offers (Art. 5, SECCI). The consumer would not benefit and might even be misled.

EUROFINAS' PROPOSAL

Many of the information requirements (such as the borrowing rate, the total amount of credit, the APRC, the duration of the credit agreement) laid down under Article 4 should be part of the pre-contractual requirements of Article 5, as it is only at the pre-contractual stage that lenders are able to provide such information accurately and consumers are in a position to effectively use the information to make an informed choice.

1.2. INFORMATION REQUIREMENTS: PRE-CONTRACTUAL INFORMATION

TEXT OF COMMON POSITION (ART.5.1)

In good time before the consumer is bound by any credit agreement or offer, the creditor and, where applicable, the credit intermediary shall, on the basis of the credit terms and conditions offered by the creditor and, if applicable, the preferences expressed and information supplied by the consumer, provide the consumer with the information needed to compare different offers in order to take an informed decision on whether to conclude a credit agreement. Such information, on paper or on another durable medium, shall be provided by means of the "Standard European Consumer Credit Information" in Annex II to this Directive. The creditor is deemed to have fulfilled the information requirements in this paragraph and in Article 3 paragraphs 1 and 2 of Directive 2002/65/EC if he has supplied the "Standard European Consumer Credit Information". This information shall refer to:

(a) the type of credit;

(b) the identity and the geographical address of the creditor as well as, if applicable, the identity and geographical address of the credit intermediary involved;

(c) the total amount of credit and the conditions governing the drawdown;

(d) the duration of the credit agreement;

(e) in cases of a credit in the form of deferred payment for a good or service and linked credit agreements, the product or service and its cash price;

MAIN CRITICISM 1

The proposed Standard European Consumer Credit Information (SECCI) Sheet represents a further example of information overload.

JUSTIFICATION 1

Lenders' standard contracts include the required information requirements as per Article 10 so we see no reason for creating a further layer of information. There is ample research that consumers do not want additional paperwork/information which they are unlikely to read.

EUROFINAS' PROPOSAL

As an alternative, allow creditors to fulfil their pre-contractual information requirements by supplying a copy of the draft credit agreement in accordance with Article 10.

MAIN CRITICISM 2

The provision "*In good time before the consumer is bound by any credit agreement or offer, the creditor (...) shall (...) provide the consumer with information needed to compare different offers...*" will impact the point of sale finance business model in a considerable and disproportionate manner.

JUSTIFICATION 2

The proposed wording conflicts with the current practice for automotive and furniture, equipment and home appliance financing at the point of sale (and due to belong to the "linked credits" category under the new definition).

The negotiation of the eventual trade-in, the purchase of the new equipment/car and the financing thereof are usually done on the spot in a single visit.

The current proposal would result in consumers needing to visit the dealership twice, first to receive the SECCI and second to sign the credit agreement a few days later. This will damage the position of the consumer who may have an urgent need for the goods (for example, a cooker) or who may have already researched competing credit offerings prior to visiting the store.

It is also not clear when the purchase order would be signed, with the potential difficulty that any modification to the goods (e.g. the car) would necessitate modification to the terms of the finance agreement, making the SECCI obsolete.

EUROFINAS' PROPOSAL

Article 5.1 should not apply to linked credit agreements.

NB: It should be noted that the Common Position already offers two broadly equivalent protections for the consumer, which effectively allow him to change his mind. These are the rights to withdraw (Article 14) and to repay early (Article 16). Both allow the

consumer to exit the contract if he changes his mind. The existence of these protections minimizes the risk of consumer detriment flowing from the exclusion of linked credit agreements from the scope of Article 5.1.

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TEXT OF COMMON POSITION (ART.5.1 – CONTINUED)

(f) the borrowing rate, the conditions governing the application of the 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. If different borrowing rates apply in different circumstances, the abovementioned information on all the applicable rates;

MAIN CRITICISM

The industry is concerned about the need to comply with a "reference rate" or an "index".

JUSTIFICATION

This is inconsistent with a free market.

EUROFINAS' PROPOSAL

For the sake of consistency, the following sentence should be added to the definition of the "*borrowing rate*" in Article 3-j):

"*A variable borrowing rate may vary either after agreed periods provided for in the credit agreement and in line with the agreed index or reference rate, or in accordance with other arrangements agreed on by the parties."*

This sentence is similar to that of Article 14-3 of the text that had been endorsed by the European Parliament in first reading.

* * *

TEXT OF COMMON POSITION (ART.5.1 – CONTINUED)

(g) the annual percentage rate of charge and the total amount payable by the consumer, by means of a representative example mentioning all the assumptions used for calculating this rate; where the consumer has informed the creditor of one or more components of his preferred credit, such as the duration of the credit agreement and the total amount of credit, the creditor has to take into account these components;

MAIN CRITICISM

This example is far too complex for the average consumer, not to mention the less literate. In addition, in certain cases, indicating the "*total amount of credit*" might be difficult, for instance when the credit agreement is concluded for an indefinite period of time.

JUSTIFICATION

Lenders are not in a position to determine the "*total amount payable by the consumer*", i.e. the sum of the total amount of the credit and the total cost of the credit, as the latter is based on items that are not within the remit of lenders.

EUROFINAS' PROPOSAL

To remove the obligation to provide the consumer with "*a representative example, mentioning all the assumptions used,…*" of the APRC and of the total cost of the credit.

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TEXT OF COMMON POSITION (ART.5.1 – CONTINUED)

(h) the amount, number and frequency of payments to be made by the consumer and where appropriate, the order in which payments will be allocated to different outstanding balances charged at different borrowing rates for the purposes of reimbursement;

MAIN CRITICISM

It is doubtful whether the "*order in which payments will be allocated to different outstanding balances charged at different borrowing rates for the purposes of reimbursement"* applies to credit for consumers, i.e. to individuals.

JUSTIFICATION

Information will already be provided on "*the amount, number and frequency of payments*" and so consumers are already well informed about the monthly charges and aggregate cost of the loan. Use of a payment schedule is not common practice. Imposing it would increase the total cost of the credit, while delivering little added value to the consumers.

EUROFINAS' PROPOSAL

To delete the requirement to provide a payment schedule.

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TEXT OF COMMON POSITION (ART.5.1 – CONTINUED)

(j) where applicable, the existence of costs payable by the consumer on conclusion of the credit agreement to a notary;

MAIN CRITICISM

Notwithstanding the "*where applicable*" wording, lenders are not always in a position to quantify all costs payable by consumers, at the conclusion of a credit agreement, to persons other than the lender (or credit intermediary).

Notary fees and taxes levied by tax authorities are not necessarily precisely known by lenders.

These costs can, and do, vary from one Member State to another, and depend on criteria that are linked to the individual consumer and that are not within the remit of the lenders.

JUSTIFICATION

This issue is of particular importance in a cross-border context, where such an obligation

-and the related liability regime- could easily discourage lenders from entering foreign markets if they were not able to manage this information-based risk, i.e. to regularly obtain such information from reliable sources.

This would become an obstacle to the free provision of financial services in cases where the establishment of branches or subsidiaries is not contemplated. This goes against the objective of the Directive to establish a genuine internal market in the interest of both lenders and borrowers.

EUROFINAS' PROPOSAL

The lender should not be required to ascertain and disclose the precise amount of costs that are not levied by him for his own benefit.

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TEXT OF COMMON POSITION (ART.5.1 – CONTINUED)

(l) the interest rate in the case of overdue payments and the arrangements for its adjustment, and, where applicable, the charges for default;

MAIN CRITICISM

As with Article 5-1-h), it is doubtful whether such a provision applies to credit for consumers.

JUSTIICATION

It is impossible to determine in advance what the interest rate will be in case of such defaults.

EUROFINAS' PROPOSAL

The lender should not be required to disclose this information in advance.

* * *

TEXT OF COMMON POSITION (ART.5.1 – CONTINUED)

(p) the right of early repayment, and, where applicable, information on the creditor's right to compensation and how this compensation will be determined;

MAIN CRITICISM

It is not always possible for lenders to quantify *ex ante* the costs arising from early repayment.

JUSTIFICATION

The calculation of early repayment fees depends on different contractual parameters (including the interest rate) that are not always known at the time pre-contractual information has to be made available.

NB: The industry welcomes nonetheless the use of the words "*right to compensation*" and "*how this compensation will be determined"*.

EUROFINAS' PROPOSAL

The lender should not be required to disclose this information in advance. The words "*where applicable"* should be deleted.

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TEXT OF COMMON POSITION (ART.5.1 – CONTINUED)

(q) the right to be informed immediately and free of charge of the result of a database consultation for the assessment of the creditworthiness in accordance with Article 9(2);

MAIN CRITICISM

Such information should only be provided upon request.

JUSTIFICATION

As the provision of such information represents an additional cost for the lender, the said information should be given upon request only.

EUROFINAS' PROPOSAL

To indicate that the result of such database consultation should be made available to the consumer upon request only.

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TEXT OF COMMON POSITION (ART.5.1 – CONTINUED)

Any additional information the creditor would like to provide to the consumer shall be given in a separate document which may be annexed to this form.

MAIN CRITICISM

The requirement to put it in writing is too prescriptive.

JUSTIFICATION

The information to be provided to the consumer is already extremely comprehensive and detailed. If ever a creditor wants to give additional information, requiring him to do it in writing is disproportionate and may in fact discourage him from doing so (to the detriment of the consumer).

EUROFINAS' PROPOSAL

To delete this provision.

* * *

TEXT OF COMMON POSITION (ART.5.2)

4. Upon request, the consumer shall in addition to the "Standard European Consumer Credit Information" be supplied with a copy of the draft credit agreement free of charge. This provision does not apply if the creditor is at the time of the request unwilling to proceed to the conclusion of the credit agreement with the consumer.

MAIN CRITICISMS

The second sentence is superfluous.

JUSTIFICATION

It goes without saying that in such circumstances the provision should not apply.

EUROFINAS' PROPOSAL

To delete the second sentence "*This provision (…) with the consumer"*.

* * *

TEXT OF COMMON POSITION (ART.5.2 – CONTINUED)

6. Member States shall ensure that creditors and, where applicable, credit intermediaries provide adequate explanations to the consumer, in order to put the consumer in a position to assess whether the proposed credit agreement is adapted to his needs and to his financial situation, where appropriate by explaining the pre-contractual information to be provided in accordance with paragraph 1, the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of default in payment by the consumer. Member States may adapt the manner by and extent to which this assistance is given, as well as by whom it is given, to the particular circumstances of the situation in which the credit agreement is offered, to whom it is offered and the type of credit offered.

MAIN CRITICISM 1

The borrower is the only one responsible for deciding which product is the most appropriate according to his personal situation.

JUSTIFICATION 1

The lender has a duty to assist, not a duty to advise.

Providing personalized explanation of the specific effects the proposed product may have on the consumer equates to a duty to advise. This is a service *per se* which should be provided upon the consumer's request and duly charged for.

EUROFINAS' PROPOSAL 1

To delete the words "*the specific effects they may have on the consumer"*.

MAIN CRITICISM 2

As currently worded the duty to assist implies that the lender has to assist every consumer on an individual basis. This would slow down the granting of credit as it does not reflect modern, automated methods.

JUSTIFICATION 2

Modern consumer credit is efficient because (in advanced markets) it is automated. Such systems offer consumers savings in terms of time, convenience and cost.

Markets and consumers must continue to benefit from such efficiencies.

Also, a central objective of CCD is to create cross-border credit markets. Almost by definition, cross-border credits must be concluded on an automated basis if they are to stand any commercial chance of competing with domestic suppliers.

EUROFINAS' PROPOSAL 2

Add the words in bold to the last sentence of paragraph 6:

*Member States may adapt the manner by **(including in a systematized manner without manual intervention)** and extent to which this assistance is given, as well as by whom it is given, to the particular circumstances of the situation in which the credit agreement is offered, to whom it is offered and the type of credit offered.*

This makes clear that the explanations required by Article 5-2-6) can be provided in an automated way.

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1.3. RIGHT OF WITHDRAWAL

TEXT OF COMMON POSITION (ART. 14)

1. The consumer shall have a period of fourteen calendar days to withdraw from the credit agreement without giving any reason.

That period of withdrawal shall begin:

(a) either from the day of the conclusion of the credit agreement, or

(b) from the day on which the consumer receives the contractual terms and conditions and information in accordance with Article 10, if that day is later than the date referred to in point (a).

MAIN CRITICISM REGARDING THE STARTING POINT OF THE PERIOD

The right of withdrawal period starts at the moment the consumer receives the contractual information referred to in Art. 10 (even if this information is not connected specifically to the right of withdrawal).

The wording of Art. 10 is complex and gives rise to legal uncertainty.

JUSTIFICATION

Creditors cannot be sure that the way they interpret the contractual information requirements is correct. Hence, if a Court decides that a creditor does not properly fulfil all its information obligations, its whole credit portfolio risks becoming withdrawable.

This legal uncertainty affects the lenders' refinancing costs which obviously will raise their average cost of doing business.

EUROFINAS' PROPOSAL

In Article 14-1-b), reference to be made to the specific content of Art. 10-2-o), rather than to the content of the whole Article 10.

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MAIN CRITICISM REGARDING THE DURATION AND THE MODALITIES

The regime proposed is much more restrictive than the regime existing in many EU Member States. The need to introduce such a general right of withdrawal is therefore questionable, as is the possibility given to Member States under Recital 9 of *"maintaining or introducing national provisions on the cancellation of the contract of sale of goods or supply of services if the consumer exercises his right of withdrawal from the credit agreement (…)"*.

JUSTIFICATION

Whereas a period of withdrawal of 14 days might be justified for financial services agreements entered into at a distance, the reference to the Distance Marketing of Consumer Financial Services Directive in the Whereas n° 33[1] of the Common Position does not provide adequate grounds for extending such period of withdrawal to all credit agreements; this is even more so since EU and national legislations provide numerous examples of shorter periods of withdrawal (see background information below).

A 14 day withdrawal period is not appropriate for face to face transactions as it acts as a brake on the rapid marketing of goods, which will affect both consumers and businesses throughout the European Union.

In addition, the discretion left to Member States under Recital 9 quoted above is likely to have damaging consequences for the economic growth, particularly of small businesses, and on the distribution of credit at the point of sale in many EU Member States.

In practice, when a right of withdrawal for credit agreement exists, it is in general coupled with a right of withdrawal from the sale contract. When a sale is financed with a credit at the point of sale, the credit provider does not give the money to the consumer, but pays the supplier directly. Payment by the credit provider to the supplier is settled according to

[1] "*…it is necessary to make provision for a right of withdrawal without penalty and with no obligation to provide justification, under conditions similar to those provided for by the Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services".*

the terms of their mutual agreement (it can be made a few days later, settled on certain days every week or every month, etc.).

If a consumer is not allowed to waive the right of withdrawal, the credit provider will most probably wait until the end of the withdrawal period before paying the supplier. If the consumer withdraws from the credit contract before the supplier is paid, the credit provider will not pay the supplier because the credit contract will no longer exist. Three possible scenarios can then be envisaged in instances where the goods were made available to the consumer during the withdrawal period:

1) The consumer somehow manages to pay the purchase price. This does not give rise to particular problems.

2) The consumer does not (or may not) withdraw from the sale contract, keeps the goods and fails to pay the purchase price. The supplier faces all the complications -and costs- of repossession, recovery and financial shortfall, which it is not equipped to handle. Absorbing or managing such a risk will be difficult for it.

3) The consumer, as is frequently the case, is allowed to withdraw from the sale contract. The supplier is confronted with the problem of repossession (picking up of the goods) and asset depreciation. This is particularly pertinent to the automotive market, as values depreciate quickly.

Cases 2) and 3) above will have an adverse impact on the growth of a supplier's business. Small businesses would suffer most. Figures available from the UK show the extent to which small retail business grows faster than large ones: between 1994 and 2002, small retail business grew 73%, compared with 5% for larger ones.

The industry is concerned that a right of withdrawal of 14 days, with neither a waiver nor a satisfactory compensation mechanism, will lead to lenders being reluctant to release funds to shops and motor dealers until the period has expired.

By the same token, suppliers would be reluctant to release goods immediately to their customers. Consequently, consumers would be disadvantaged.

To sum up, the right of withdrawal as put forward in the Common Position, instead of protecting consumers, would complicate or even jeopardise their plans. This is demonstrated in the recently-published Civic Consulting and Oxera reports[2] (the former

[2] [2] Civic report p. XV: "A large majority of more than 80% of the national banking associations expect a fairly or very significant increase in costs through a right of withdrawal. Reasons given include: increased administrative and liquidity management costs and abuse of the right of withdrawal by some customers".

Oxera report p. 29: "There are two ways in which the proposed CCD may have an impact on other Member States' economies.
-Direct impact: where the CCD is more stringent than current domestic legislation, it might make the provision of credit more costly and result in a restriction in the provision of credit (as in the UK). If existing domestic regulation is sub-optimal, the CCD may have a positive effect on the local credit market.
- Indirect impact: since the Directive would affect the UK economy, it could also indirectly affect economies in other EU Member States. For example, a significant proportion of consumer credit in the UK is used for the purchase of cars, while a significant number of cars sold in the UK are manufactured in Continental Europe. Thus, a restriction in the supply of credit could also affect economies in Continental Europe".

Civic report p. XVI: "An option that would reduce the costs of the right of withdrawal would be to reduce the duration of the withdrawal period, as this might reduce the number of customers making use of it".

Oxera report p. 19: "In Ireland, withdrawal rights already exist, but, pragmatically, the debtor is allowed to waive the right (which they will do if they wish to take delivery of goods)".

having been commissioned by the European Parliament and largely ignored by the Council).

EUROFINAS' PROPOSAL

To reduce the withdrawal period to seven calendar days.

To provide consumers who want immediate delivery of the goods/services financed at the point of sale with the possibility of waiving their right of withdrawal. If this is not acceptable, to reduce, in such circumstances, the withdrawal period to 3 calendar days.

BACKGROUND INFORMATION

In a number of EU countries (e.g. Austria), there is no general right of withdrawal applied to any kind of credit agreement. In those countries where a right of withdrawal exists, as illustrated by the following examples, the regimes in force are significantly less restrictive than the one envisaged by the Common Position.

Special rights of withdrawal are already available to consumers in situations in which they are particularly vulnerable. For instance, for contracts negotiated away from business premises, the Council Directive 85/577/EEC grants consumers a special protection due to the fact that the contract is signed on the premises of the consumer in most cases.

Where a general right of withdrawal exists, its duration period in most cases is limited to 7 days. This right is often combined with mechanisms such as a waiver, a reduction of the withdrawal period, compensation for losses incurred and/or reimbursement of costs borne by lenders, which allow a certain flexibility to satisfy consumers' particular needs, such as the immediate delivery of goods/supply of services financed via credit.

Below are some examples of existing national regimes:

- In Belgium, the consumer credit contracts are subject to a right of withdrawal period of 7 days. Before 2003 the right of withdrawal did not apply to instalment credits. Since then it has applied only to instalment credit contracts beyond EUR 1250. For these instalment credits, should consumers withdraw from the credit contract, they would also withdraw from the sale contract. More specifically for motor vehicle sales, the right of withdrawal period starts only when the consumer signs the book order ("bon de commande").

- Legislation in France provides for a right of withdrawal period of 7 days. In case of credits granted to consumers in order to finance the supply of a specific good or service (so called "crédits affectés"), should consumers withdraw from the credit, they also have the choice to withdraw from the sale contract. Conversely, the credit contract is automatically cancelled in case of cancellation of the sale contract. If consumers ask for immediate delivery, the right of withdrawal can then be reduced to three days upon explicit request by the consumer.

- Similarly, in Portugal a right of withdrawal applies for a 7-day period but consumers have the possibility of waiving their right of withdrawal if they want immediate delivery of goods or supply of services.

- In Spain the legislation governing instalment sales ("ley de ventas a plazos") provides for a 7-day right of withdrawal period for the sale contract and as a consequence for the credit contract. This provision does not apply, however, to motor vehicles.

- In Germany, the legislation has, since 2000, provided for a 2-week period to exercise a right of withdrawal. But when the sale contract and the credit agreement are linked, the cancellation of the latter also affects the former, so that the sale contract is also cancelled. In addition, and provided that the supplier has forewarned the consumer in writing that the he/she would be liable for any loss in value of the good returned, the supplier is entitled to claim compensation for all losses incurred. The consumer may therefore avoid the risk of incurring such a liability only by refraining from using the goods.

- In Ireland a right of withdrawal is provided by law and can be exercised within 10 days of receipt of the agreement by the consumer; but again, the consumer who wishes to take immediate delivery of the goods may forego his right to a cooling-off period by signing a separate statement to that effect.

- In the UK the Consumer Credit Act 1974 (Sections 67 to 73) provides for a limited right of cancellation. Broadly speaking, credit agreements regulated by the Act are only cancellable if they have been negotiated personally (face to face) with the lender or with an agent of the lender (i.e. retailer of the goods whose purchase is to be financed by the credit agreement) and if the credit agreement has not been signed by the consumer on the premises of either the lender or the lender's agent.

- In Poland a right of withdrawal has been introduced and can be exercised in 10 days. However, the implementation of this legislation has caused considerable difficulties and has increased the number of legal actions taken by providers against consumers who have not paid for the goods after having withdrawn from the credit agreement. As a consequence, many small retailers have simply exited the instalment sales business market.

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TEXT OF COMMON POSITION (ART. 14 - CONTINUED)

2-b) pay to the creditor the capital and the interest accrued on this capital from the date the credit was drawdown until the date the capital is paid, without any undue delay and no later than within 30 calendar days after having sent the notification of the withdrawal to the creditor. The interest shall be calculated on the basis of the agreed borrowing rate. The creditor is not entitled to any other compensation from the consumer in the case of withdrawal, except compensation for non-returnable charges paid by the creditor to public administration.

MAIN CRITICISM

Apart from "*compensation for non-returnable charges paid by the creditor to public administration"*, the creditor is not entitled to any other compensation.

JUSTIFICATION

Lenders incur administrative costs. These costs, provided they are reasonable, should be reimbursed by the borrower. If not, the risk is high that the lenders will charge all borrowers (regardless of any withdrawal); this will drive up the average cost of credit, which goes against the objective of the Directive.

EUROFINAS' PROPOSAL

The lender should be compensated for all the (reasonable) administrative costs it incurs.

* * *

TEXT OF COMMON POSITION (ART. 14 - CONTINUED)

6. This article is without prejudice to national law establishing a period of time during which the execution of the contract cannot begin.

MAIN CRITICISM

Unless the exercise of the right of withdrawal is fully harmonised, national regulations that prevent borrowed sums from being made available during the withdrawal period will be maintained. In those countries, consumers will have to wait 14 (or 7) days before receiving the money that will enable them to make their purchase.

This goes against the original objective of the proposal.

JUSTIFICATION

The concept of right of withdrawal does not have the same consequences throughout Europe:

- In certain Member States, the right of withdrawal allows the borrower to pay back to the lender the amount made available under the credit contract.

- In other Member States, the right of withdrawal prevents the lender from making the credit available to the borrower during the withdrawal period. Although this is referred to as a "withdrawal right", it is in practice more a period of reflection.

The proposed wording would result in:

- an adverse impact on consumers' (purchasing) plans;
- different applications of the right of withdrawal across both Member States and credit products;
- suppliers having to wait 14 days before selling goods financed with a credit.

EUROFINAS' PROPOSAL

To allow lenders to make credit available to borrowers before the end of the withdrawal period

* * *

1.4. LINKED CREDIT AGREEMENTS

TEXT OF COMMON POSITION (ART. 3)

(n) "linked credit agreement" means a credit agreement where:

(i) the credit in question serves exclusively to finance an agreement concerning the supply of specific goods or the provision of a specific service; and

(ii) those two agreements form from an objective point of view a commercial unit; a commercial unit is deemed to exist where the supplier or service provider himself finances the credit for the consumer or, if it is financed by a third party, if the creditor uses the services of the supplier or service provider in connection with the conclusion, or preparation, of the credit agreement.

MAIN CRITICISM

The definition of "*commercial unit*" in Art 3-n-ii) is incomplete and therefore much too broad.

The proposed wording creates the risk that a large number of credits could be defined as "*linked credit agreements*", without any of the parties having intended to give this effect to the agreement.

JUSTIFICATION

In some Member States, jurisprudence has helped to determine when two commercial transactions form an economic unit from an objective point of view.

The relevant criterion is to be found in the consequences derived from the loss of such a "causality" link: if one of the two agreements happens to be cancelled or terminated, the other one loses its purpose and falls too, i.e. cannot be maintained in the absence of the other. The mere reference to specific goods or services in the credit agreement does not render credit agreements "legally linked". A simple financing function of the credit agreement is not sufficient to create such a link. This is in line with Recital 35 according to which *in the case of linked credit agreements a relationship of interdependence exists between the purchase of goods or services and the credit agreement concluded for this purpose.*

EUROFINAS' PROPOSAL

The last part of the definition under Article 3-n-ii) should be completed as follows (bold):

A "commercial unit" is involved where:

- the supplier or service provider himself finances the credit for the consumer or, if it is financed by a third party, if the creditor uses the services of the supplier or service provider in connection with the conclusion, or preparation, of the credit agreement; ***and,***

- if the credit agreement makes reference to the specific goods or services to be financed with the credit.

* * *

TEXT OF COMMON POSITION (ART. 15)

1. Where the consumer has exercised a right of withdrawal based on the Community law concerning a contract for the supply of goods or services, he shall no longer be bound by a linked credit agreement.

2. Where the goods or services covered by a linked credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract for the supply of goods or services, the consumer shall have the right to pursue remedies against the creditor if the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled according to the law or the contract for the supply of goods or services.

Member States shall determine to what extent and under what conditions these remedies shall be exercisable.

MAIN CRITICISM

The liability regime proposed is close to a joint and several liability regime. This cannot be justified under the circumstances.

JUSTIFICATION

The proposed regime is unusually harsh.

The regime of Article 11 of the 1987 Directive is more balanced as the conditions implying a lender's liability in case of a "*linked credit agreement*" are cumulative. This approach was endorsed by the Parliament at first reading.

EUROFINAS' PROPOSAL

To delete Article 15.2 and replace it by the text below:

"2. Where:

(a) in order to buy goods or obtain services the consumer enters into a credit agreement with a person other than the supplier of them, and

(b) the creditor and the supplier of the goods or services have a pre-existing agreement whereby credit is made available by that creditor to customers of that supplier for the acquisition of goods or services from that supplier, and

(c) the consumer referred to in point (a) obtains credit pursuant to that pre-existing agreement, and

(d) the goods or services covered by the credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract to supply them, and

(e) the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled,

the consumer shall have the right to pursue remedies against the creditor. Member States shall determine to what extent and under what conditions these remedies shall be exercisable."

* * *

1.5. CREDIT INTERMEDIARIES

TEXT OF COMMON POSITION (ART. 3)

(f) "credit intermediary" means a natural or legal person who is not acting as a creditor and in the course of his trade, business or profession for a fee, which may take a pecuniary form or any other agreed form of financial consideration:

(i)presents or offers credit agreements to consumers; or
(ii) assists consumers by undertaking preparatory work for credit agreements other than that referred to in (i); or
(iii) concludes credit agreements with consumers on behalf of the creditor;

MAIN CRITICISMS

The definition of 'credit intermediary' is too broad.The term "credit intermediary" should be restricted to any natural or legal person whose *principal activity* consists in offering and/or concluding credit agreements for remuneration (e.g. brokers, agents, etc).

It should not apply to entities that practice credit mediation as an ancillary activity (i.e. sellers/dealers involved in the distribution of credit at the point of sale but whose main activity is the sale of goods or services other than credit).

JUSTIFICATION

Unless it is restricted to any natural or legal person whose *principal activity* consists in offering and/or concluding credit agreements for remuneration, the definition of 'credit intermediary' will also apply to sellers/dealers whose main activity is the sale of goods or services other than credit. This is not appropriate in view of the role the latter play in the credit distribution process. This would negatively impact the distribution of credit at the point of sale, once again to the detriment of consumers, distributors and credit providers alike.

Also this would go against the objective of the Directive to facilitate the cross-border provision of credit: like e-credit and the internet, point of sale finance allows creditors to provide credit cross-border without the need to establish a branch or a subsidiary.

EUROFINAS' PROPOSAL

To amend Article 3(f) (i) as follows:

(*i): as a main activity presents or offers credit agreements to consumers*

* * *

1.6. HARMONISATION AND IMPERATIVE NATURE OF THE DIRECTIVE

TEXT OF COMMON POSITION (ART. 22)

1. Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce provisions other than those laid down in this Directive.

2. Member States shall ensure that consumers may not waive the rights conferred on them by the provisions of national law implementing or corresponding to this Directive.

3. Member States shall further ensure that the provisions they adopt in implementation of this Directive cannot be circumvented as a result of the way in which agreements are formulated, in particular by integrating drawdowns or credit agreements falling under the scope of this Directive into credit agreements the character or purpose of which would make it possible to avoid its application.

4.. Member States shall take the necessary measures to ensure that consumers do not lose the protection granted by this Directive by virtue of the choice of the law of a third country as the law applicable to the credit agreement, if the credit agreement has a close link with the territory of one or more Member States.

MAIN CRITICISM

It is very unclear which elements of the Common Position are fully harmonised. This lack of clarity opens the door to various interpretations. This in turn will result in regulatory fragmentation, which is contrary to the original objective of the Directive.

Recitals 4 and 7 of the Common Position state that:

The (…) situation resulting from (…) national differences leads to (..) obstacles to the internal market where Member States have adopted different mandatory provisions more stringent than those foreseen in Directive 87/102/EEC. (…); and

In order to facilitate the emergence of a well-functioning internal market in consumer credit, it is necessary to make provision for a harmonised Community framework in a number of core areas (…)

Full harmonisation is necessary in order to assure all consumers in the Community a high and equivalent level of protection of their interests and in order to create a genuine internal market. Yet, as evidenced by the examples given below, the Common Position falls short of fully harmonizing a number of elements that are key for the development of a single market for consumer credit. In these circumstances, it is doubtful whether the Directive will deliver its single market objective.

JUSTIFICATION

The Common Position introduces an ambiguous approach to harmonisation, combining full harmonisation with provisions favouring forms of regulatory “flexibility” in certain areas.

This flexibility, when applied to elements that are key for the development of a single market for consumer credit, is an obstacle to the functioning of the Internal Market.

For instance:

- Article 4 on standard information for advertisement is fully harmonised, so normally Member States cannot introduce more stringent measures. However, according to Recital 17 "*Member States should remain free to regulate information requirements in their national law regarding advertising not containing information on the cost of credit*".-

- The list of elements in the SECCI is longer than in the 7th October 2005 version (elements quoted in Article 5-1-a / 5-1-s). Furthermore, this list is to be combined with the possibility of providing the consumer with "*additional information*" (end of Article 5-1).

- In Article 10-1 (2nd sentence) on contractual information, it is clear that Member States are entitled to introduce additional requirements which are not included in the list of requirements of Article 10-2, although the latter is already very long: "*This Article shall be without prejudice to any national rules regarding the validity of the conclusion of credit agreements, which are in conformity with Community law*".

- Art 14-6 allows Member States to prevent borrowed sums from being made available during the withdrawal period. Furthermore Recital 9 allows Member States the possibility of "*maintaining or introducing national provisions on the cancellation of the contract of sale of goods or supply of services if the consumer exercises his right of withdrawal from the credit agreement*".

EUROFINAS' PROPOSAL

No flexibility should be left to Member States in core areas such as the ones mentioned in the examples above.

2. OTHER MATTERS OF CONCERN

2.1. EARLY REPAYMENT

TEXT OF COMMON POSITION (ART. 16)

1. The consumer shall be entitled to discharge fully or partially his obligations under a credit agreement at any time. In such cases, he shall be entitled to a reduction in the total cost of the credit, which consists of the interest and the costs within the remaining duration of the contract.

2. The creditor shall be entitled to compensation for possible costs directly linked to early repayment of credit provided that the early repayment falls within a period for which the borrowing rate is fixed and the creditor proves that the reference interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half year in question is lower at the time of the early repayment than at the time of conclusion of the credit agreement. For a Member State which is not participating in the third stage of economic and monetary union, the reference rate shall be the equivalent rate set by its national central bank.

This compensation shall be determined by the creditor and may not exceed 1% of the amount of credit repaid early, if the period of time between the early repayment and the agreed termination of the credit agreement exceeds one year. If the period does not exceed one year, the compensation may not exceed 0.5% of the amount of credit repaid early. The compensation shall not exceed the amount of interest the consumer would have paid during the period of time between the early repayment and the agreed termination of the credit agreement.

3. No compensation shall be claimed if:

(a) the repayment has been made under an insurance contract intended to provide a credit repayment guarantee or in case of overdraft facilities; or

(b)) the early repayment falls within a period for which the borrowing rate is not fixed.

4. Member States may provide that this compensation can be claimed by the creditor only on the condition that the amount of the early repayment exceeds the threshold defined by the national law. That threshold shall not exceed EUR 10,000 within 12 months.

MAIN CRITICISM

The 1% and 0.5% compensation caps appear to be arbitrary and cannot be justified in economic terms.

The EUR 10.000 threshold also cannot be justified in economic terms.

JUSTIFICATION

The fulfilment of the need for the lender to structure accurately its refinancing liquidity and cash flow depends on the borrower’s commitment to repay in accordance with the underlying agreement. It would be unfair to burden the lender unilaterally with the risk of a sudden termination of the contract by early repayment that might jeopardize the management of interest rate risk.

EUROFINAS' PROPOSAL

In case of early repayment, borrowers should compensate lenders for all losses which have arisen from the prepayment.

* * *

2.2. INFORMATION REQUIREMENTS

TEXT OF COMMON POSITION (ART. 10 -2-i)

where capital amortisation of a credit agreement with a fixed duration is involved, a statement of account in the form of an amortisation 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; where the interest rate is not fixed or the additional costs may be changed under the credit agreement, the amortisation table shall contain in a clear and concise manner an indication to the fact that the data of the table are only valid until the subsequent change to the borrowing rate or the additional costs according to the credit agreement;

MAIN CRITICISM

We are strongly opposed to any introduction of amortisation tables. They would serve no useful purpose and would radically increase the length and complexity of the document.

JUSTIFICATION

For many credit products it would be impossible to produce amortisation tables at the time the contract is concluded. This is because computers are needed to work out the figures and print the tables with any degree of efficiency. According to a scoping exercise conducted by a lender, for a ten-year unsecured loan, the amortisation table would run to 360 lines or four pages of A4.

In addition, research from the FSA (FSA Consumer Research Paper 8 "Choosing a Mortgage" (June 2001)) suggests that amortisation tables are not understood by consumers. The overall effect would, therefore, be to damage market function. Some lenders would find it impossible to comply, whilst others would face extra costs (which would have to reflect in prices) to produce tables that consumers did not understand.

EUROFINAS' PROPOSAL

To delete the requirement for amortisation tables.

* * *

2.3. SCOPE

TEXT OF COMMON POSITION (ART. 2)

2. This Directive shall not apply to the following credit agreements:

(c) credit agreements involving a total amount of credit less than EUR 200 or more than EUR 100 000;

(f) credit agreements which are free of interest and without any other charges and credit agreements under the terms of which the credit has to be repaid within three months
(…)
3. In the case of credit agreements on the basis of which credit is granted in the form of an overdraft facility and has to be repaid on demand or within three months…

MAIN CRITICISM

The EUR 100.000 (previously EUR 50.000) threshold is too high.

The EUR 200 threshold is too low.

Overdrafts fall within the scope of the Common Position and are subject to an extensive, ill-adapted, information regime including three different sets of information to be provided to the borrower (Articles 6, 12 and Annex III).

JUSTIFICATION

Small amounts of credit should be fully excluded. Even a 'lighter' information regime would make such credits too expensive and potentially unprofitable for lenders to keep offering them.

The EUR 100.000 amount does not reflect the reality of the consumer credit market. Indeed, according to an ESBG research study[3], the average yearly amount of credit per EU inhabitant is no more than EUR 2000.

Overdrafts are very often an integral part of current account functionality and they are seen more as payment facilities than credits. Overdraft facilities should remain what they are, simple and low-cost products.

EUROFINAS' PROPOSAL

Small amounts of credit should be fully excluded up to an amount of EUR 500.

The upper threshold should be EUR 50.000, as originally proposed by the Commission.

Overdraft facilities should be fully excluded from the scope of the Directive.

Credits that are to be repaid within a period not exceeding three months should all (and not only those without the payment of any interest or other charges) be excluded from the scope of the Directive as they are liked by consumers for their simplicity and low cost and would become too costly if captured by the Directive.

* * *

TEXT OF COMMON POSITION (ART. 2)

2. This Directive shall not apply to the following credit agreements:
(a) credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property;

[3] European Savings Banks Group - calculation based on statistical data from EU National Banks and Eurostat (2000-2004).

MAIN CRITICISM

Unsecured home loans are not excluded from the scope of the Directive.

JUSTIFICATION

Loans used for renovation purposes were excluded from the scope of the 1987 Consumer Credit Directive. This is justified, as unsecured housing loans are also long-term products with the same characteristics[4] as mortgage loans.

EUROFINAS' PROPOSAL

Unsecured home loans should be excluded from the scope of the Directive.

* * *

TEXT OF COMMON POSITION (ART. 2-2-j)

This Directive shall not apply to the following credit agreements: (…) credit agreements which relate to the deferred payment, free of charge, of an existing debt;

MAIN CRITICISM

The exclusion should encompass deferred payments "*with interest*" as well.

JUSTIFICATION

The distinction between deferred payment 'free of charge' and 'with interest' is not justified, and will cause problems in practice, to the detriment of the borrower. Indeed, a situation may arise during the lifetime of the credit agreement or when the loan matures, in which the borrower is temporarily unable to meet his obligations due to a short-term lack of liquidity, for example. As a matter of practice, it is often possible temporarily to suspend the borrower's payment obligations by concluding a debt deferral or repayment agreement, without this involving any additional bureaucratic hurdles and without any additional costs.

EUROFINAS' PROPOSAL

Deferred payments "with interest" should be excluded from the scope of the Directive as well.

* * *

[4] In France, unsecured housing loans are loans granted under a "single financing package", which encompasses one principle secured loan complemented by a number of smaller unsecured loans. The common feature shared by the principle secured loan and the smaller unsecured ones is that both are long-term products with their own specificities and granted to finance the same property. From the lender's risk management perspective, these loans are granted in a context where the lender considers that the collateral pledged for the principle secured loan provides him with a sufficient guarantee.

In Germany, unsecured loans can be granted as individual loans and are as such independent from another secured loan. These loans are similar to mortgage loans not only because they are long-term products, but also because they are taken out for investment purposes. The value of the financed object is always equivalent in the real estate.

2.4. CREDIT DATABASES ACCESS

TEXT OF COMMON POSITION (ART. 9)

2. If the rejection of the credit application is based on the consultation of a database, the creditor shall inform the consumer immediately and without charge of the result of such consultation and of the particulars of the database consulted unless providing such information is prohibited by other Community legislation or is against objectives of public policy or public security.

MAIN CRITICISMS

Information to the consumer should not be immediate and without charge.

JUSTIFICATION

Informing the consumer is not cost-free. Hence, at the very least, the information should be provided by the lender only at the request of the consumer. Doing otherwise would, again, drive up the average cost of consumer credit which is contrary to the objective of the Directive.

EUROFINAS' PROPOSAL

To specify that the result of the database consultation is to be provided, free of charge, only upon the request of the consumer.

* * *

2.5. COMMITTEE

TEXT OF COMMON POSITION (ART. 25)

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 5 a (1) to (4) and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. The Committee shall adopt its rules of procedure.

MAIN CRITICISM

The use of comitology for such issues is not appropriate, as these issues are key issues that should be fully harmonized.

JUSTIFICATION

Leaving such a grey zone for such key issues would be in contradiction with the main purpose of the Directive, i.e. full harmonization.

EUROFINAS' PROPOSAL

To delete Article 25.

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