

RESPONSE TO DEPARTMENT OF FINANCE CALL FOR OBSERVATIONS ON THE REVISED 'CREDIT FOR CONSUMERS' DIRECTIVE

FREE LEGAL ADVICE CENTRES, APRIL 2006

Free Legal Advice Centres is an independent human rights organisation dedicated to the realisation of equal access to justice for all, and it campaigns through advocacy, strategic litigation and authoritative analysis for the eradication of social and economic exclusion

Introduction

One of the current strategic priorities of Flac's work is the reform of debt and credit laws in Ireland. To this end, we have worked closely with the Money Advice and Budgeting Service (MABS) for over a decade and the points in this submission were discussed with its national development team.

Point 9 - Maximum harmonisation

It seems to us that maximum harmonisation is essentially a tool to enable the smooth functioning of the internal market and will ensure in this case a level playing field for financial service providers. Arguably, this should not be confused with consumer protection. Indeed, minimum harmonisation with the scope that it leave for Member States to introduce more favourable protection for the consumer is perhaps more useful, especially where the maximum harmonisation measure is too weak in terms of consumer protection but leaves a veritable straitjacket for States in terms of doing more. It is tempting to suggest that this 'one size fits all' approach is designed to facilitate the financial services industry and that the consumer is to be protected only insofar as s/he is a useful economic actor in terms of the extension and consumption of credit whether on a cross border basis or otherwise.

Points 9a and 9b clarify to some extent the limitations of the maximum harmonisation approach. States can only introduce further protection in matters outside the scope of the directive. Thus, if a range of requirements No 1,2,3,4,5 and 6 are generally provided for in the directive in relation to credit agreements, but in relation to a specific form of credit agreement only requirement no 1 is allowed for, states have no discretion in relation to introducing 2 – 6 in their own legislation. Equally, they cannot create additional protections 7, 8 and 9, as this might distort the market. However, if they choose to regulate other forms of credit agreement not covered by the directive, that will be permissible.

If this interpretation is correct, the maximum harmonisation approach will continue to allow the Irish Consumer Credit Act 1995 to regulate mortgages in the limited way that it does, given that the revised directive specifically excludes mortgages from its scope. Equally, communications by creditors with borrowers (s.45 and 46 of the current act and

badly in need of revision) may be similarly regulated. However, with a partially regulated credit agreement such as an overdraft where we might wish to enhance consumer protection because we have a specific problem in a given area, we are precluded from further measures. It would be useful if the Department of Finance would clarify that this is the case.

Point 15a and Point 28– Payment protection and APR

This point does not appear to alter the situation whereby the APR will only include the cost of payment protection where it is compulsory. The directive should be more proactive on this issue. In theory, many credit agreements state that PPI is optional, in practice it is sometimes portrayed as a compulsory product. It would be useful if APR was quoted with and without PPI where the borrower is paying PPI from their own as opposed to borrowed funds. This would give borrowers more detailed information to compare different offers of credit, the essential purpose of APR in the first place.

Point 26 (b) – Rebates

It should be noted by the Department that the CCA 1995 (implementing the original directive) has been in place for almost a decade (since May 1996) and still no formula or formulae providing for the calculation of rebates for different classes of credit agreement has been prescribed by the Central Bank under Section 52 of the Act. This has allowed creditors to adopt at their discretion a formula such as the Rule of 78 or more restrictive versions of it which have arguably provided consumers with more limited rebates than those contemplated by the directive. Is the European Commission aware of this?

The Department might clarify whether it is intended to remedy this situation, let alone limit the indemnity claimed by the creditor as envisaged in this article.

Article 2 (c) - Hire purchase agreements exclusion

As currently worded, Article 2 (c) may leave Hire Purchase agreements in Ireland outside the scope of the Directive. The current wording excludes a hiring agreement where '***no obligation to purchase the object of the agreement is foreseen***'. In the CCA and in hire purchase agreements in practice in Ireland, there is no such **obligation**. Rather, there is a right if all the terms of the agreement are complied with to purchase the goods with the final instalment, an option that the hirer is not **obliged** to exercise. Indeed, s.63 of the CCA gives the Hirer the right to terminate the agreement early, hand back the goods and pay up to half the Hire Purchase price.

In light of this, we would again be obliged if the Department would clarify that this leaves the Irish legislature free to maintain and revise existing legislation on hire purchase under the CCA 1995.

Article 2 (e) – Agreements with insignificant charges exclusion

Although consumer credit agreements of three months or less would be extremely thin on the ground, the use of the words ‘*with only insignificant charges*’ in this sub section is very loose and undefined and could potentially be used to limit a consumer’s rights.

Article 3 (db) – Global credit

This is not a term with which we are familiar. How appropriate is it to describe what is involved? We take it that this is a reference to a running account agreement. Is this not a better title for it?

Article 3 (e) – Credit Intermediaries

We would be concerned at the removal of the words ‘*on behalf of the creditor*’ from this sub-section. In cases where a credit intermediary has mishandled an agreement or exploited a consumer, we have occasionally heard the creditor try to distance itself from the intermediary by saying that it is not responsible for the intermediary’s actions, despite having to provide that intermediary with a letter of recognition for authorisation purposes under the CCA 1995. It is arguable that there is a relationship of agency between the two and this should be reflected in the directive.

Whilst it may be the case that this revised definition is attempting to widen the definition of credit intermediary by not prescribing that the fee comes from the creditor, we feel that the essential nature of this relationship – that the intermediary is lining up customers for the creditor in return for a consideration – should be encompassed in the definition.

Article 4 – Standard information for advertising

Amendments to Section 2 of this article appear to have lead to a situation where the amount and frequency of payments will be omitted from what is a standard information (and therefore maximum harmonisation?) provision in relation to the advertising of credit. So the borrower will be entitled to know:

- the amount borrowed whether in cash or the value of goods and services
- the APR
- the length of the agreement
- the amount of any advance payment (such as a deposit) and
- the total amount payable

However, s/he will not be entitled to know whether payments are weekly or monthly and how much has to be paid at each instalment. We would agree that the above information is critical in comparing offers and assessing the true cost of credit but we cannot see the logic in not completing the picture by including instalments.

Article 5 – Pre-contractual information

It is difficult to say whether the change of wording from ‘shall adhere to the principle of responsible lending’ to ‘shall apply the principle of responsible lending’ makes much difference here, although arguably the revised wording is weaker. Given that responsible lending does not seem to be defined anywhere, it is hard to know what the creditor is applying apart from a vague concept that the consumer’s creditworthiness might be checked.

In the context of the dangerously overheated consumer credit market in Ireland, this article is a disappointment. Whilst access to credit is now an essential, a balance must be struck so as to reduce the likelihood of consumer over-indebtedness. It is also notable that this article is ‘sanctions free’. What exactly will the penalties be for failure to apply the responsible lending principle or provide the pre-contractual information required? On a technical note, why is the necessity to provide details of the duration of the credit agreement not required in the case of a telephone communication? Surely the duration of the agreement is an essential piece of information to put the other pieces of information in context?

Article 9 – Information that must be included in credit agreements

We note that the necessity to include details of the formalities that the creditor or credit intermediary might follow if it is making use of out of court dispute resolution has been removed. However, there is no mention of the consumer’s access to such out of court procedures in this article although it is mentioned in Article 23. In our view, the directive should provide that credit agreements contain information about the consumer’s right to refer a complaint.

In the Irish context, for example, a credit agreement might specifically state ‘if you are unhappy with the conduct of this financial service, you are entitled to make a complaint and if this complaint is not resolved to your satisfaction, you may refer the matter to the Ombudsman for Financial Services’.

Article 15 – Early repayment

The revised wording in paragraph 1 of this article looks useful from a consumer perspective. In our experience, many consumers right to a fair rebate has been compromised by a failure on the State’s part to put in place consumer friendly formulae.

However, the rewording in paragraph 2 (b) looks considerably less consumer friendly. For example, in the case of personal loans to purchase motor cars at fixed rates which exceed one year, it would appear that the creditor may claim a fair and objective indemnity. How this will be calculated is not developed. Given the prevalence of hire purchase agreements in Ireland in the area of car finance, it is particularly critical to determine (as already noted at page 2 of this submission) whether the directive applies or not as the interest charged is invariably fixed in these agreements.