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The EU Commission amends its Proposed Consumer Credit Directive

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The amended version of the Commission's proposal for a Consumer Credit Directive that was presented on the 28th of October showed once more the distance that still remains with the European Parliament when it comes to the regulatory requirements needed to underpin a functioning consumer credit market in the EU.

In its first reading within the co-decision procedure, which took two years of heated discussion, the European Parliament had adopted a whopping 152 amendments to the 30 articles of the proposal. Some of these amendments modified the very essence of the Commission's proposal, displaying a rather different take on the regulatory needs in the field of consumer credit for Europe.

The Commission did take into account the Parliament's views, introducing several changes to its proposal, but it stuck to its guns in several key areas.

The first of these fundamental elements is the return to the maximum harmonisation approach that characterised the original proposal, the underlying assumption being that full harmonisation remains the most effective means of achieving market integration. Today, differences between the national laws applicable in the field of consumer credit still represent a major hurdle for cross-border lending. The persistence of these differences comes partly as the result of the minimum harmonisation approach adopted by the current directive 87/102 and of the member states' consumer protection policies that stemmed from it. The way to harmonise all these national laws, the reasoning goes, is to introduce a maximum harmonisation directive, which would have to be transposed in the same terms in each member state.

In contrast to the Commission's criterion, the EP agreed in its first reading to retain the minimum harmonisation approach, which allows member states to legislate beyond the limits set in the directive. The reason adduced was the difficulty of finding a one-size-fits-all solution for heterogeneous and fast-changing national markets. Moreover, the process of passing a piece of EU legislation is usually a time-consuming and burdensome one, making it ill-suited for the kind of swift adjustments that modern, rapidly-evolving markets need. Putting itself in the member states' shoes, the EP also argued that national legislators should not be prevented from granting a greater level of consumer protection to their own citizens if deemed necessary. Most consumer associations supported this view, especially in light of the fact that the level of consumer protection set in the proposal would have represented a step backwards in comparison to that afforded by many national laws.

It is certainly true that the minimum harmonisation approach had allowed important differences to co-exist in the national regulations on consumer credit, with a negative effect in market integration. However, one should keep in mind that consumer lending is affected also by other sets of laws and policies that are currently not harmonised (for instance, laws regarding debt collection or personal bankruptcies, etc.), and that all of these constitute additional legal obstacles to cross-border lending. Harmonisation of consumer credit laws would contribute to the achievement of a single EU consumer credit market, but will not in itself be enough to bring about substantial changes in the field. Moreover, the two years of fierce negotiations on the proposal show that maximum harmonisation is today politically unviable. The only option in the current climate would be targeted harmonisation of a few main issues. For all of these reasons, market integration in the field of consumer credit needs long-term action. One step in the right direction could be to increase inter-

state cooperation on the application of comitology, which could speed up the process of legal convergence, eventually leading to the degree of legal harmonisation needed to achieve a single market.

The choice for full harmonisation sets the tenor for the whole directive. As member states are prevented from legislating beyond the limits set in the text, the level of consumer protection set in the Directive needed to be kept at the highest possible level. This is reflected in several provisions. First, the time given to consumers to exercise the right of withdrawal has been maintained at 14 calendar days (calculated from the day a copy of the credit agreement is transmitted to the consumer). Second, the principle of responsible lending (in which creditors assess creditworthiness, provide substantive pre-contractual information and establish the most appropriate type and amount of credit for the consumer) has been retained, but without clear reference to the concept of responsible borrowing. The ability of the creditor to assess the consumer's creditworthiness is partially conditional on the quality and accuracy of the information provided by the latter. Also in the case of early repayment, the consumer is entitled to an equitable reduction in the cost of credit; but the creditor is entitled to claim "fair and objective" indemnities. Lastly, the scope of application has been reduced compared to the original version, but still the regime established is clearly more protectionist for consumers than that approved in the EP.

A valiant effort has been made by the Commission to reconcile its original proposal with the flow of inputs coming from a number of different actors over the last two years. The controversial Article 5 by means of which negotiation of credit outside business premises was banned has been deleted. The text has also been improved so as to avoid inconsistencies with applicable EU legislation and some of the articles that were thought to increase bureaucratisation and put additional strains on the lending business have been amended. For instance, the duty of the member states to create national databases has been substituted by the right to request information from any existing database on a non discriminatory basis (Article 8) and the provision on processing of data for lending purpose has been deleted.

The new developments in the regulatory process for a new consumer credit directive require a new debate among the actors involved. Member states are currently deciding on national positions. Discussion will now resume in the Council. But one thing seems sure: there is little chance that the proposed consumer credit directive will be rapidly approved.