

Proposal COM(2021) 347 of 30 June 2021 for a Directive of the European Parliament and of the Council on consumer credits.

PROPOSAL FOR A NEW CONSUMER CREDIT DIRECTIVE

cepPolicyBrief No. 4/2022

LONG VERSION

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A. Key Elements of the EU Proposal

1 Context and Objectives

- ▶ In the "New Consumer Agenda" [see [cepPolicyBrief No. 10/2021](#)], the Commission announced its intention to adapt European consumer credit law.
- ▶ The current Consumer Credit Directive [2008/48/EC] already obliges credit providers and credit intermediaries to supply consumers with (pre-)contractual information and to carry out a creditworthiness assessment.
- ▶ The Commission sees the need for adjustments to the now 14-year-old Directive, mainly due to advancing digitalisation: about one third of consumers conclude credit agreements online. [p. 1 and 8]
- ▶ The current Consumer Credit Directive is to be repealed and replaced by the present proposal for a Directive [Art. 47 and Recital 86].
- ▶ With the revision of consumer credit law, the EU Commission wants to strengthen the internal market and ensure a high level of consumer protection [p. 3]. The new Directive includes [p. 6-7]
 - an extension of the current scope of the Directive,
 - a ban on discrimination,
 - adjustments to the current information requirements,
 - new regulations on tying and bundling practices, as well as on unsolicited credit sales,
 - new advisory obligations, conduct of business obligations, as well as staff competence requirements,
 - a modified creditworthiness assessment and
 - the obligation for Member States to introduce caps on interest rates, as well as on the annual percentage rate of charge and the total cost of the consumer credit.

2 Extension of the Scope of the Directive

- ▶ The EU Commission wants to extend the current scope of the Directive. It will now also cover the following forms of financing [Art. 2, Art. 3 (4), Recitals 15, 17 and 18, p. 6-7]:
 - all loans up to € 100,000 (previously there was a lower limit of € 200 and an upper limit of € 75,000);
 - credit that is free of interest and charges (e.g. "0% financing" or "buy-now-pay-later" offers, where usually no interest is charged and repayment takes place at a later date);
 - overdraft facilities with a repayment deadline of up to one month;
 - leasing agreements where there is no obligation to purchase the leased asset either in the agreement itself or in a separate contract;
 - credit services provided by a crowdfunding platform to facilitate the granting of credit, unless the platform already qualifies as a lender or credit intermediary; and
 - credit that is repayable within three months and for which only insignificant charges are incurred.

3 Ban on Discrimination

- ▶ The EU Commission wants to include a ban on discrimination in the Directive [Art. 6].
- ▶ Member States must ensure that consumers are not discriminated against on the grounds of nationality, place of residence or any of the grounds referred to in Art. 21 EU Charter of Fundamental Rights [Art. 6].

4 Adjustment of the Information Requirements

- ▶ The EU Commission wants to adjust the information requirements vis à vis consumers [Art. 7-13]:
 - Consumer credit advertising must be explicitly fair, clear and not misleading [Art. 7].
 - Creditors, credit intermediaries and crowdfunding credit service providers (hereinafter "providers") must provide consumers with general information about their credit offers in a clear and comprehensible manner, on paper or other durable medium [Art. 9].
 - Providers must provide pre-contractual information containing all essential information at least one day - previously: in good time - before the conclusion of the contract. Failing that, within one day after conclusion of the contract, the consumer must be explicitly notified of the right to withdraw. [Art. 10 (1)]

- In future, in addition to the extended "Standard European Consumer Credit Information" form, providers must also supply the one-page "Standard European Consumer Credit Overview" form containing pre-contractual information [Art. 10 (3) and (4)].
- Providers must now provide adequate explanation of the contracts so that consumers can assess whether they meet their needs and financial situation [Art. 12].
- In future, providers must inform consumers when they make them an offer of credit based on automated data processing [Art. 13].

5 Tying and Bundling Practices and Unsolicited Credit Sales

- ▶ Member States may allow bundling practices. They must prohibit tying practices unless these bring a "clear benefit to the consumers" [Art. 14 (1 and 3), p. 10]:
 - In the case of tying practices, the conclusion of a credit agreement is linked to the conclusion of further financial products or services [Art. 3 (16)].
 - In the case of bundled practices, it is possible to conclude a credit agreement separately from other financial products or services but not necessarily on the same terms [Art. 3 (17)].
- ▶ Providers must replace "default options", e.g. pre-ticked boxes leading to the purchase of ancillary services, with an unambiguous and informed declaration of intent [Art. 15].
- ▶ Member States must prohibit credit sales made without the request of a consumer [Art. 17].

6 Other Obligations: Advisory Services, Conduct of Business Obligations, Staff Competence

- ▶ In future, providers must inform consumers whether they (can) offer advice on consumer credit [Art. 16 (1)]. If they do so, this advice must, in particular,
 - include information on whether the recommendation is based only on their own product range or also on other products on the market, as well as information on the fee payable by the consumer for the advice [Art. 16 (2)];
 - take into account the consumer's financial situation, preferences, objectives and needs and be "in the best interests of the consumer" [see inter alia Art. 16 (3)]; and
 - include a warning if, considering the consumer's financial situation, a credit poses a particularly high risk to the consumer [Art. 16 (5)].
- ▶ Providers must ensure that, with respect to all relevant activities - especially the manufacturing of credit products, granting of credit and providing advisory services -,
 - they act "honestly, fairly, transparently and professionally" (conduct of business obligations); this must also be reflected in staff remuneration [Art. 32 (1) and (2)]; and
 - the staff entrusted with performance of the activities possess and keep up-to-date an appropriate level of knowledge and competence [Art. 33 (1)].

7 Assessment of Creditworthiness

- ▶ The Directive provides for more comprehensive rules on the obligation of the credit provider or crowdfunding credit service provider to assess the consumer's creditworthiness [Art. 18]. In particular:
 - the assessment must, in future, be carried out explicitly "in the interest of the consumer" [Art 18 (1)];
 - the credit provider or crowdfunding credit service provider must obtain "relevant and accurate" information on the consumer's income and expenses [Art. 18 (2)];
 - the credit may only be made available if the assessment shows that the consumer is "likely" to be able to fulfil the obligations under the contract - exceptions to this are only possible in "specific and well justified circumstances" [Art. 18 (4)];
 - the consumer will in future have the right to request human intervention if the assessment is based on profiling or automated processing of personal data [Art. 18 (6)];
 - personal data such as data found on social media platforms or health data "should" not be used in the assessment [Recital 47].

8 Caps on Interest Rates, on the Annual Percentage Rate of Charge and on the Total Cost of the Credit

- ▶ Member States must introduce caps on interest rates applicable to consumer credit as well as on the annual percentage rate of charge and on the total cost of the consumer credit [Art. 31 (1)].
- ▶ If a Member State has already laid down such caps in its national legislation, it can maintain them [Recital 65].

B. Legal and Political Context

1 Status of Legislative Procedure

30 June 2021 Adoption by the Commission

Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

2 Options for Exerting Political Influence

Directorates General: DG Justice and Consumers (leading)

Committees of the European Parliament: Internal Market and Consumer Protection (leading), Rapporteur: Kateřina Konečná (United European Left Group, CZE)

Federal Ministries: Justice (leading)

Committees of the German Bundestag: Legal Affairs (leading)

Decision-making mode in the Council: Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

3 Formalities

Basis for legislative competence: Art. 114 TFEU (Internal Market)

Type of legislative competence: Shared competence (Art. 4 (2) TFEU)

Procedure: Art. 294 TFEU (ordinary legislative procedure)

C. Assessment

1 Economic Impact Assessment

As elsewhere, digitalisation has also brought about numerous changes in the consumer credit markets, making it much easier to grant consumer credit across borders. New forms of financing, such as crowdfunding credit services or buy-now-pay-later loans, ensure greater diversity of supply and thereby strengthen competition. All this is in the interests of consumers as they are thus able to benefit from more attractive conditions. At the same time, however, the developments also pose new risks for consumers because the new digital distribution channels have made the availability of and access to credit more straightforward for consumers, and the lending process has accelerated. Consumers sometimes buy more impulsively, especially in the online environment, and realise too late or not at all that the expenditure is not covered by their household budget. In general, these developments are not always adequately addressed by current EU consumer credit law. Revision of the Directive is therefore overdue and the resulting inclusion of numerous new credit providers and credit types is appropriate.

Information requirements for credit providers vis-à-vis consumers are appropriate because compact and comprehensible information on consumer credit helps to reduce information asymmetries between the contracting parties and thus enables consumers to make an informed decision on credit. However, the addition of yet another form - the "Standard European Consumer Credit Overview" - to the already very extensive pre-contractual information requirements should be rejected. Firstly, although it only consists of one page, it manages to overburden consumers with information that is already available in the existing pre-contractual

information - the "Standard European Consumer Credit Information" form. Rather than adding value, this in fact only creates additional confusion. Secondly, it results in unnecessary, additional red tape, prolongs the lending process and increases the cost of credit. Instead of opting for an additional form, the existing form should be improved by highlighting the credit information that is absolutely essential.

Assessing creditworthiness is useful for both credit providers and consumers. It allows credit providers to assess whether a consumer is (potentially) able to service a loan, which in turn can prevent insolvencies of credit providers. A thorough assessment is therefore in their own interest. As for consumers, it may prevent them from taking out a loan they cannot (actually) afford. This is particularly vital for "vulnerable" consumers, such as those affected by illness or unemployment. Thus, consumer protection may be strengthened by the fact that a creditworthiness assessment will now also be required for loans that have not so far been part of the scope of the Directive - e.g. loans of less than 200 euros or 0% financing. However, the new creditworthiness assessment requirements are problematic for two reasons in particular: It is inappropriate that, as envisaged, the same standard of assessment applies to all consumer credits within the scope of the Directive, regardless of whether they are micro-credits - e.g. less than 200 euros - or involve large credit sums. The high standard of scrutiny unnecessarily delays the lending process for very small sums, causes disproportionately high costs and makes access to such loans more difficult. In addition, raising the level of scrutiny to that set out in the Mortgage Credit Directive [2014/17/EU, see [cepPolicyBrief](#)] - "credit obligations are likely to be met" - is unreasonable, especially for micro-credits. In principle, tiered provisions would be appropriate, requiring a less extensive creditworthiness assessment for loans involving small sums than that required for large-value credits.

When assessing creditworthiness, credit providers must use information on the financial and economic situation, but data from social media as well as health data "should" not be used. The specifications are too imprecise and give rise to legal uncertainty. The Directive should be more specific about what information can and cannot be used. In line with the principle of data minimisation of the EU General Data Protection Regulation (GDPR) as well as the ban on discrimination, the assessment should be based on what is absolutely necessary. The use of behavioural data or special categories of personal data, such as health data listed in Article 9 (1) GDPR, for the creditworthiness assessment, is undesirable. For the purposes of assessing the creditworthiness of consumers, information on their financial and economic situation, such as regular income and expenditure, is sufficient.

The goal of preventing excessive interest rates and avoiding household indebtedness are laudable but caps are the wrong approach. If set above the market result, they are unnecessary and, in cases of doubt, may be used as an anchor thereby increasing the cost of credit. Setting them below the market result may, on the one hand, jeopardise the availability of credit products so that the range of offers will decline and that the risks associated with the credit, e.g. default risks, will no longer be adequately reflected. On the other hand, caps below the market result also boost the demand for consumer credit and may therefore in fact encourage (vulnerable) consumers to enter the consumer credit market in the first place. A cap on interest rates, on the annual percentage rate and on the total cost of credit therefore represents a major intervention in free pricing and inhibits the realisation of an efficient market outcome. The Commission should therefore refrain from introducing such caps. These may be justified, if at all, where a credit provider has an unassailable market position.

2 Legal Assessment

The proposal for a Directive is unproblematic with regard to competence, subsidiarity and proportionality vis-à-vis the Member States. Thus, the EU aims to promote the interests of consumers and ensure a high level of protection [Art. 169 (1) TFEU], in particular by taking measures to achieve the internal market in accordance with Art. 114 TFEU. Digitalisation, in particular, simplifies the provision of cross-border consumer credit so appropriate consumer protection will be more effective if it is at EU level.

With regard to compatibility with EU law in other respects, it should be noted that the proposal for a Directive - just like the current Consumer Credit Directive [2008/48/EC] - contains no provisions regarding the expiry of the right of withdrawal in the event that the provider fails to give proper information in this regard. EU consumer law does, however, contain corresponding regulations elsewhere, e.g. in Art. 10 of the Consumer Rights Directive [2011/83/EU]. In this respect, for the sake of legal clarity, legal certainty and coherence, a corresponding provision should also be included in the new Consumer Credit Directive.

Discrimination against EU citizens is prohibited, particularly on the basis of Art. 18 TFEU and Art. 21 Charter of Fundamental Rights. The provision in Art. 6 of the proposal for a Directive, which orders, among other things, compliance with the ban on discrimination under Art. 21 Charter of Fundamental Rights, is therefore appropriate. This does not, however, give rise to any "obligation to contract". The situation in the case of consumer credit is also fundamentally different to, for example, that of payment accounts:¹ Thus, according to Art. 16 Payment Accounts Directive [2014/92/EU], there is a right to open and use a payment account. According to Art. 15 Payment Accounts Directive - which corresponds to Art. 6 of the proposed Directive - consumers may not be discriminated against on the basis of any of the criteria listed in Art. 21 Charter of Fundamental Rights. These criteria also include property. Thus, with regard to payment accounts, credit institutions are in principle obliged² to contract with insolvent persons.³ This proposal for a Directive, however, rightly contains no such obligation to contract. An encroachment of that sort upon the freedom of contract can only be justified for contracts that are vital for the conduct of a person's life - thus, for example, in addition to the aforementioned payment account, contracts for the supply of electricity.⁴

D. Conclusion

Advancing digitalisation has changed consumer habits. They are increasingly seeking credit from emerging providers such as "buy-now-pay-later" lenders, who are not adequately covered by the current Consumer Credit Directive. With the new providers come risks to "vulnerable" consumers, whose impulsive tendency to borrow can lead to increasing indebtedness. Thus, it is appropriate to widen the scope of the Directive in order to keep pace with the trend and strengthen consumer protection. In the course of digitalisation, information asymmetries between contracting parties have also increased considerably. The information requirements for credit providers aim to reduce these asymmetries. Thus, the Commission has also proposed the introduction of another form - the so-called "Standard European Consumer Credit Overview" - which, rather than adding value, in fact only creates additional confusion. It would be appropriate to expand and optimise the existing "Standard European Consumer Credit Information" form with respect to absolutely essential credit information. The creditworthiness assessment is useful for both consumers and providers. However, it is inappropriate that the same standard of assessment applies to all consumer credits within the scope of the Directive. In principle, tiered provisions on the assessment of creditworthiness would be appropriate, with varying degrees of stringency depending on the total amount of credit. Furthermore, there is a need to clarify and specify the categories of data that may be used for the assessment of creditworthiness. It is undesirable, particularly in view of the principle of data minimisation, to use behavioural data or special categories of personal data, such as the health data listed in Article 9 (1) of the GDPR. Information on the consumer's financial and economic situation, such as regular income and expenditure, is sufficient. Caps on interest rates, on the annual percentage rate and on the total cost of credit may reduce the range of offers and have the effect that risks associated with the credit, e.g. default risks, are no longer adequately reflected. The Commission should therefore refrain from introducing them.

¹ On this, see Lüttringhaus (2018), *Vertragsfreiheit und ihre Materialisierung im Europäischen Binnenmarkt*, p. 369 et seq.

² For further information on permitted exceptions, refusals and terminations, see Lüttringhaus (2018), *Vertragsfreiheit und ihre Materialisierung im Europäischen Binnenmarkt*, p. 370, fn. 233.

³ For full details on this see Lüttringhaus (2018), *Vertragsfreiheit und ihre Materialisierung im Europäischen Binnenmarkt*, p. 369 et seq. with further references.

⁴ On this see Heinlein/Weitenberg, in: Theobald/Kühling (eds.), *Energierrecht*, 112. EL 2021, EnWG, § 36, para. 3 and para. 7 and Lüttringhaus (2018), *Vertragsfreiheit und ihre Materialisierung im Europäischen Binnenmarkt*, p. 369. Cf. in this regard Art. 3 (3) Electricity Directive [2009/72/EC]. This Directive was repealed with effect from 1 January 2021. Reference should now therefore be made to Art. 27 Electricity Directive [(EU) 2019/944]. This facilitates and secures access to those contracts in a particular manner for some consumers; see Lüttringhaus (2018), *Vertragsfreiheit und ihre Materialisierung im Europäischen Binnenmarkt*, p. 369. With regard to consumer credit, the current situation is that the range of credit has become more diverse and new credit instruments have appeared, especially in the online environment, that are seeing increasing use; see also, for example, Recital 7 of the proposed Directive.