Responsible Credit in the EU

Udo Reifner

Sintesi a cura di Luisa Crisigiovanni

Partendo dal presupposto che l'accesso al credito fosse un diritto di tutti i cittadini europei, la Direzione mercato interno della Commisisone europea si è adoperata affinché l'offerta di credito al consumo in Europa si lasciasse alle spalle vincoli storico-culturali che connotavano negativamente l'indebitamento, in parte ignorando il fatto che di questa offerta non potessero in egual misura beneficiare i consumatori di tutte le classi sociali. Sullo sfondo esiste infatti il grande problema del sovraindebitamento, che ha preso piede prima di tutto in America e successivamente in Inghilterra, Germania e Francia; paesi come la Grecia, l'Italia e la Spagna stanno invece attualmente sperimentando gli effetti di un settore la cui espansione non è regolamentata. Mentre il mercato rimane di fatto diviso tra cattivi pagatori e non, le banche rimangono le principali protagoniste: concedono finanziamenti, rifinanziano il credito e sviluppano il proprio business di servizi accessori.

Nel frattempo, nella terza versione della proposta di direttiva in discussione a livello europeo[1] si fa strada il cosiddetto "nuovo approccio", che prevede un'armonizzazione totale, che richiama il principio del mutuo riconoscimento, ovvero del controllo del paese d'origine dell'impresa che offre il credito, nella convinzione che, laddove esista una libera scelta, il mercato sappia regolarsi da sé, e questo sia sufficiente per prevenire il sovraindebitamento. Contemporaneamente s'introduce in questa proposta il concetto di "prestito responsabile", formula che potrebbe, questa sì, segnare l'inizio di una forma matura di prevenzione del sovraindebitamento. Tale principio origina dalla normativa vigente in Belgio e in Svizzera, dove il credito al consumo viene concesso solo a coloro che forniscono garanzie per la restituzione del debito che si trovano a contrarre in specifiche circostanze. Diversamente da quanto previsto in Svizzera, però, la proposta di direttiva riduce questo concetto alla consultazione di una banca dati, in cui verrebbero conservate le informazioni sull'esposizione totale di ciascun consumatore e sulle eventuali insolvenze nei pagamenti. Ciò rischia di essere un quadro retrospettivo, e proprio per questo incompleto, delle potenzialità di ripagare un debito di una famiglia.

Nonostante la Commissione avesse commissionato parecchie ricerche per lo studio e la prevenzione del sovraindebitamento, i risultati sono stati nella maggior parte dei casi ignorati dai dibattiti sulla riforma della Direttiva europea sul

[1] www.europa.eu.int.

Udo Reifner
IFF Hamburg
Luisa Crisigiovanni
Altroconsumo
Associazione Indipendente di Consumatori

credito al consumo (87/102/CEE), che aveva avuto il merito di migliorare l'informazione ai consumatori introducendo il TAEG (Tasso Annuo Effettivo Globale), prevedendo l'informativa sulla possibilità di restituzione anticipata del credito negli Stati membri in cui questo non fosse stato ancora previsto, senza compromettere con ciò la più ampia tutela offerta da altri ordinamenti, essendo basata sul principio di un'armonizzazione minimale. In Belgio, per esempio, in calce al contratto, di fianco alla firma, deve essere riportata la frase: "*Non firmare mai un contratto incompleto*"; in Gran Bretagna si richiede di ammonire sempre i consumatori affinché sottoscrivano contratti solamente nel caso abbiano la reale possibilità di ripagare la somma presa in prestito. Laddove la proposta di direttiva prevede un semplice *click* per la conclusione di un contratto, il *Code de la Consommation* francese impone la forma scritta, pena la nullità del contratto stesso ecc...

Quello relativo alle informazioni ai consumatori è dunque un aspetto centrale della discussione sul credito al consumo: l'obiettivo è quello di favorire la concorrenza tra gli operatori, incrementando la possibilità effettiva di confronto e scelta tra diversi prodotti da parte dei consumatori, che può derivare loro solo da una maggiore conoscenza dei prodotti stessi e dei propri diritti, tra i quali, per esempio, il diritto a essere informati sulla possibilità di recesso.

Un altro aspetto che è fondamentale considerare quando si parla di credito è il fenomeno del sovraindebitamento. Sebbene in molti paesi esista un monopolio delle banche nel settore del credito al consumo, la Gran Bretagna e l'Irlanda, e per certi versi anche il Belgio, permettono ad altre entità di erogare crediti senza che siano soggetti a grandi controlli. La legge belga prevede il pagamento di un deposito: in questo modo coloro che non possono rifondere il prestito, possono accedere al deposito; l'approccio inglese si focalizza invece sull'informazione data al consumatore. La maggior parte dei paesi del sud Europa non ha regole sul sovraindebitamento, a testimonianza del fatto che il modo in cui ciascun paese definisce la soglia di usura dei tassi d'interesse e le relative sanzioni, dipende anche dalla tradizione e dalla cultura del paese stesso.

Tradizionalmente i paesi anglosassoni, di cultura calvinista, sono favorevoli al credito e hanno un approccio contrapposto a quello dei paesi a tradizione cattolica, più inclini a una regolamentazione del credito che tuteli i cittadini dal rischio del sovraindebitamento.

Consapevole delle molte differenze che caratterizzano le normative vigenti negli Stati membri, la Commissione europea fatica ad armonizzare i differenti approcci. È interessante ricordare che, da una parte, la Commisione ha ritenuto la legge italiana antiusura (Legge 108/96) una violazione del principio di libera circolazione dei capitali, dall'altra, nella proposta di legislazione sul TAEG, ha previsto fossero indicati tutti i costi che compongono l'indicatore, rimandando però a ulteriori disposizioni di legge eventualmente esistenti e vincolanti, a seconda dell'ammontare del credito, quali appunto quelle della legge sull'usura. Ci sono così paesi che collegano il TAEG ai tetti massimi di usura, dando adito a

fraintendimenti circa il valore preciso dell'indicatore e causando l'innalzamento dei tetti dei limiti di usura stessa.

Attualmente in 10 Stati membri dell'Europa a 15 è vigente una legislazione sui debitori insolventi: solo la Grecia, l'Irlanda e la Spagna non hanno ancora cominciato a lavorare seriamente a questo tipo di regolamentazione. Possiamo quindi affermare che tale regolamentazione sta sempre più diventando parte integrante della tradizione giuridica europea.

Dal momento che il credito al consumo sta espandendosi anche nei paesi dell'Europa meridionale e in quelli che sono entrati a farne parte solo nel 2004, appare sensato che tutti gli Stati membri, nel disciplinare il credito al consumo, prendano altresì in considerazione il problema del sovraindebitamento e dell'armonizzazione delle legislazioni nazionali che vi si riferiscono. La riabilitazione dei debitori come attori economici, la creazione di un piano di rientro del debito, l'accesso a una consulenza legale senza costi proibitivi e la possibilità di risoluzione delle controversie mediante procedure stragiudiziali sono conseguentemente gli aspetti chiave di cui dovrebbe tener conto una regolamentazione di questo settore a livello europeo. Infatti, gli Stati membri non potranno introdurre propri provvedimenti che vadano oltre quelli già presenti nella proposta di direttiva europea, che cerca di raggiungere un livello massimo di armonizzazione, in controtendenza, quindi, rispetto alle direttive precedenti che si basavano sempre sul principio dell'armonizzazione minima. È quindi indispensabile prendere atto di tutte queste differenze e armonizzare le regole al livello più alto possibile, se si desidera rendere l'Unione europea qualcosa di più di una società basata sul denaro, dove le aziende che erogano il credito siano al servizio del cittadino-consumatore e non il contrario.

Da tale analisi discendono alcuni principi fondamentali per il settore del credito al consumo che sarebbe auspicabile fossero fatti propri dal legislatore europeo:

- la tutela legale degli interessi dei consumatori che accedono al credito al consumo per essere efficace deve essere estesa a ogni forma di richiesta di credito a fini non commerciali;
- la regolamentazione dell'erogazione del credito deve riguardare l'intero processo d'acquisto attraverso cui un consumatore arriva a stipulare un contratto di credito;
- occorre rendere il più possibile trasparenti e comprensibili le relazioni creditore-debitore, ciò facilita il confronto tra i prodotti e la scelta più conveniente. Il che si riassume nell'indicazione standardizzata del TAEG, nell'informazione pre-contrattuale sulle modalità di ripagare il debito, nella possibilità di godere di un periodo di riflessione durante il quale recuperare consigli indipendenti sulla convenienza delle condizioni di credito offerte;
- il prestito deve essere responsabile ed equo: ovvero chi presta denaro deve offrire tutta l'informazione necessaria al contraente del debito e rispondere nei suoi confronti nel caso d'informazione mendace o incompleta. Prestito

responsabile significa non sfruttare le debolezze o le ingenuità del contraente più vulnerabile; significa consentire e prevedere un piano di rientro del prestito concesso senza penali;
- la gestione dei fallimenti e del sovraindebitamento dovrebbe essere una questione d'interesse pubblico, volta a riabilitare chi si fosse sovraindebitato, per consentirgli di continuare a essere produttivo; così come dovrebbe essere garantito l'accesso al credito indipendentemente dall'area geografica o dalla classe sociale di appartenenza;
- infine, equo è altresì garantire a chi ha contratto un debito mezzi adeguati di tutela dei propri diritti in caso di controversia col creditore. Un possibile strumento potrebbe esser rappresentato dalle *class action*, laddove è piuttosto verosimile immaginarsi che proprio i consumatori più vulnerabili economicamente siano i meno propensi a ricorrere in giudizio.

Introduction

At nearly the same time Europeans and Americans are caught in a contradiction between the federal and the national level on questions of consumer credit and debt prevention. While a number of states in the US have passed legislation to curtail predatory lending the American congress intends to monopolise these questions through federal legislation which would replace national regulation by form but not by contents. At the same time the European Commission has presented three nearly opposing drafts of a new consumer credit directive.

The already visible influx of new products and new providers onto the continental consumer credit market in Europe is marked by the typical ingredients of unregulated credit markets like credit card credit, payday lending, doorstep lending, lending by non-banks, credit by mouse click, flipping, revolving credit, variable rate credit and especially cross selling of useless high price insurance products together with usurious prices disguised as risked based pricing and a multitude of lenders which escape bank supervision. Parallel to these efforts the European Commission is pressing continental states to abolish state monitored credit extension through public banks as a form of forbidden subsidies.

Claiming that everybody should have access to credit the quality of credit products is increasingly freed from all cultural rules that historically defined consumer debts as a dangerous product. More access will lead to more competition and cut prices so that "the consumer" will profit. This is the neo-liberal message from DG Market in Brussels. But also the European Commission has to admit that the advantages of more competition will not be shared equally by all classes of society. Overindebtedness has become a major problem first in America then in the UK, Germany and France. Now countries like Greece (8% in default), Italy or Spain experience the negative effects of unregulated credit extension. The poor pay significantly more after liberalisation than before. Indebted households experience less consumer freedom and choice and have to accept products that

seemingly help them to overcome their personal crisis. Caught in a trap they face the dilemma that predatory lenders may be their only help. While the market is split into lenders for risky consumers and those who get better prices the background is still the same: banks are in charge of the whole market and either refinance this credit or create own subsidiaries for this kind of business.

While credit regulation was always strongly connected with two principles: an informed decision for credit as well as the provision of products and services that will prevent over indebtedness the new approach in Brussels not only assumes that free choice and markets are in itself a prevention of over indebtedness but even makes this believe binding for national legislation. All drafts intend to replace national rules by European or foreign legislation introducing a maximum harmonisation principle that limits and voids opposing national legislation and introduces the principle of mutual recognition which favours the export of such legal systems that require a minimum of compliance with product and quality regulation. The intention to open the Internet for credit and debt by abolishing the handwritten signature, the light systems favouring especially revolving credit card debt and the enormous exemptions for such forms as leasing, employer or so-called social credit as well as disclosure rules which leave up to 50% of the price disguised in linked products as well as new duties of consumers to inform the creditor threaten the national acquis of consumer and debtor protection especially in continental Europe. It is no secret that the Commission openly favours even the abolishment of rate ceilings in Germany, Italy, France, the Netherlands, Belgium and Poland claiming that they hinder competition while empirical research reveals that they efficiently social losses and provide access to affordable credit especially for those who most need credit to bridge gaps in earnings and expenditure.

The commission further intends to introduce the home country control principle which in fact means foreign country control for the consumer side. While unregulated markets in the UK and the US show that interest rates skyrocket and between 13 and 17% are excluded from access to bank products the EU Commission still wants to export this system which may guarantee higher rate of returns for some banks but will probably exclude local banks from competition as well as burden social budgets with additional subsidies for over indebted families. Especially on the local level debt advice has become a major factor in social welfare and while credit is just accelerated in times of personal hardship social welfare has to provide the remedy.

Instead continental Europe has still a rich and active history of protection against usurious credit practices which are not limited to interest rates. It is mostly not part of the consumer credit legislation which followed the first EU Consumer Credit Directive but is part of the tradition of civil law with its rules on bona fide and good morals, on anatocism, default interest, early repayment, improvident credit extension and limits to usurious refinancing practices. This legislation still in force starts from the assumption that for ordinary people less debt is better than much debt and that debt which does not represent actual investments is dangerous for people and families.

This legislation has remained national while at the EU level the additional legislation on information and choice in consumer credit had been passed harmonizing the national law. This was a somehow easy task because most countries had no law on choice and information. Using and economic legal language (consumer credit instead of loan) allowed to cover all legal cultures alike regulating especially pre-contractual relations which traditional civil law had thought to be outside the contract.

While the contents of the new Draft of a consumer credit Directive as well as the Draft of the Payment Directive which will allow credit card companies which do not underlie bank supervision to extend credit under a "light regime" point to less control and more market freedom the draft introduces a new formula: responsible lending. This formula could be a principle covering the historical achievements of prevention of over indebtedness by requiring a productive investment of consumer credit into consumer households.

Responsible Lending in EU Law

Art. 5 of the 2005 Draft of the Directive now states: "The creditor and, where applicable, the credit intermediary shall adhere to the principle of responsible lending. Therefore, the creditor and, where applicable, the credit intermediary, shall comply with their obligations concerning the provision of pre-contractual information and the requirement for the creditor to assess the consumer's creditworthiness on the basis of accurate information provided by the latter, and, where appropriate, on the basis of a consultation of the relevant database."

This principle is derived from Belgian and Swiss law. According to Swiss rules creditors have the obligation to deny credit if the applicant has no "credit capability" as "creditworthiness" is circumscribed in art. 22 of the Swiss law on consumer credit from 1992. A debtor is presumed to be "incapable" if the total amount of credit divided by 36 month (irrespective of the true lifetime of the credit) would not leave him more of his earning than the part which can be garnished by law.

The Swiss law assumes that such restrictions prevent over indebtedness. Obviously this is far from what practical experience shows. Swiss law excludes bank loans especially to those who need refinancing of a debt burden which as it is usually the case have become too high during the lifetime of the credit because earnings dropped significantly by unemployment, illness or other mishaps. It takes away remedies from the over indebted to bridge difficult times. It ignores the basic message of all credit investment that is productive if the capital borrowed produces additional income which compensates not only for the interest but help the household to increase wealth. Credit to poor people as it is assumed in Microlending schemes therefore may help to escape over indebtedness especially in cases where such people are not "creditworthy".

Without regard to the important body of empirical research on consumer debt the EU-Commission assumes that stricter rules for credit extension and less regulation for the product as well as the servicing and collection of debts would help to prevent over indebtedness. But unlike Swiss law it reduces the principle of responsible lending to an inquiry into databases where data on default as well as on the amount of credit taken by a customer are stored. Besides these databases are questionable. They tell nothing about private debts (15% according to a German survey), are often incomplete and especially retrospective without concern for the future potential of a household. The scores derived from those data bases for each household increasingly are not the basis for credit denial but more for the higher prices for poorer clients in risk based credit pricing systems. It thus achieves the opposite: the debt burden of the over indebted is higher with than without "responsible lending" which leads to a self-fulfilling prophecy: higher risk equal higher cost, equal an increased debt burden which again increases over indebtedness.

Responsible Credit in National Law[2]

The European Coalition on Responsible Credit a loose network of especially consumer and social organisations which collaborates with the American National Coalition on Community Reinvestment and their Global Fair Finance Initiative uses a broader approach to consumer credit than the EU-Commission does. Instead of restricting credit extension which theoretically furthers exclusion of the most needy from equal access but practically furthers especially usurious and non-bank credit of predatory lenders of those who now legitimately are kept out of the system it applies the notion of responsible credit. From is literal meaning responsible lending comprises both: the extension of credit as well as the development and marketing of credit products as well as the process in which credit and debt is used and paid back. The same is true for the French or Italian version. "Prêt responsible" or prestito responsabile is literally translated responsible credit but the German Version "verantwortliche Kreditvergabe" contradicts this broader approach and restricts lender responsibility to credit extension.

Instead the national regulations on credit and debt focus on all steps in consumer credit: starting from the development of products, its marketing, the way the contract is concluded as well as its pricing, form and time and covers also the way it is repaid or adapted in critical situations including default charges, limitations on early termination and bankruptcy schemes where in countries like France, Germany, Netherlands, Belgium and the Scandinavian countries over indebted consumers can get discharge from their debts.

Responsible credit therefore covers the whole national regulatory acquis in coping with credit and debt that may lead to unwanted social consequences. It

[2] The following information is taken from: Reifner, Niemi-Kiesilainen, Huls, Springeneer, Study of the Legislation relating to Consumer Overindebtedness in all European Union Member States - Contract Reference N. B5-1000/02/000353, Hamburg 2003, 257 pp, with country reports annexed (available under www.responsible-credit.net/index..php?id=1980&viewid =32520).

is not only a principle which intends to prevent unconscious borrowing (and lending) but it wants to adapt credit to the needs and social circumstances of consumers to make render it productive for them. This national regulations incorporate the wisdom of several thousand years in handling personal debts when they for example limit anatocism fix interest rate ceilings and regulate duties to care for the families and their living conditions if credit turns from a promising investment into mere debt. Unlike the new maximum harmonisation principle as well as the new principle of mutual recognition such historic rules on credit and debt remained untouched art. 15 of Directive 87/102/EEC whose minimum harmonization principle left national consumer protection untouched.

There is no question that the consumer credit directive from 1987 with its amendments concerning the APR disclosure brought progress to many countries in so far as credit disclosure and early repayment was concerned. But its most important effect was that national legislation untouched by these rules were amended increasingly with the knowledge of regulations in other countries. Thus a thorough investigation in the existing regulation instead of the application of a pure market ideology could develop equal standards for responsible credit as it has been the case in for transparency and information. It is not a 26th regime developed out of own political convictions who can achieve a European Unity in diversity but only the look into the tendencies and achievement of national regulations. The following overlook gives some hints derived from a research which was originally mandated by the European Commission to study rules preventing over indebtedness which was then officially ignored and hidden from the official discussion on consumer credit reform.

Product information

Product information is an important area for credit whose services are abstract and difficult to measure with regard to the intended investment as well as the effects on the personal household especially in revolving credit schemes and overdraft which have no natural barriers to anatocism and credit for credit ("flipping").

In France, for example, since the "MURCEF Law"[3] was passed, it has been compulsory to provide consumers with written terms and conditions when they open an account. Any changes must be notified three months before they come into effect. Simply displaying general terms and conditions in the credit institution concerned no longer suffices.

However, the duties of life insurance providers in Great Britain go much further. They must make "Key Features" available to consumers prior to conclusion of the agreement and, where distance selling is involved, the documents must be sent to consumers within five working days. These "Key Features" were drafted by the Financial Services Authority[4]. Every insurance company must use the same format. The objective is to enhance competition by improving

[3] *Act n. 2001-1168 of 11 December 2001.*

product comparability, but at the same time there is an explicit attempt to assist consumers to gain an improved knowledge of the product and to ensure that it is possible to compare the products of different companies. In addition to the purely factual contents of the "Key Features", they also include the necessary information about them, frequently in the form of questions and answers. For example, there is an explanation that growth rates only represent examples and that they are dependant on future growth. They explain that there is a risk that an insurance agent may highly recommend a product because it pays him/her the highest commission and they set out the effect of costs on the investment. If these "Key Features" are indeed read by consumers, they promote their level of financial literacy because the statements they contain are simply expressed and understandable to "the man in the street", and they provide information about all significant aspects of life assurance policies.

Information as to rights

Most national legislation relating to consumer credit includes already a right of withdrawal and in addition a provision for consumers to be advised of that right in the body of the agreement. In France, art. 311-15 Code de la Consommation *also provides, in addition to information as to the existence of the right of withdrawal, for a detachable form in the credit agreement (*offre préalable*) for exercising it. This relieves consumers of the need to formulate the notice of withdrawal themselves, something which is often difficult for non-lawyers to do. All consumers have to do is fill out the form, sign it and send it to the lender. The legal technicalities involved in the exercise of a right are also prescribed in other jurisdictions. In Germany, § 692 I, n. 5,* ZPO *(*Zivilprozessordnung - *Civil Proceedings Rules) contains a form for defending a writ. Existence of such forms lowers the barrier to exercising the right of withdrawal[5]. It is made easier for consumers to exercise their right to withdraw. In France, use of the form is not, however, compulsory; consumers may also withdraw from the agreement by using their own letter, the only requirement being that it must make clear that they wish to withdraw[6]. The form therefore has only advantages for consumers. It makes withdrawal easier and, for less well-educated consumers in particular, it amounts to an improvement in the enforcement of their rights. Addition of a form also suggests to consumers that exercise of the right is not unusual, reducing psychological barriers.*

[4] http://www.fsa.gov.uk/consumer/shop_around/products_services/mn_insurance_info_get.html.
[5] *Kemper, Verbraucherschutzinstrumente, p. 376; Calais-Auloy, Le Crédit à la Consommation en France, p. 110.*
[6] *Calais-Aulo, Le Crédit à la Consommation en France, p. 110; Pétel-Teyssié, Prêt à intérêt, n. 111.*

Information

Because current European Directives, the new draft Consumer Credit Directive and the Code of Conduct on pre-contractual information relating to home loans already require or at least mention comprehensive information about the cost of credit. However, national legislatures have still found some scope for adding to these provisions:

In Germany, under § 492, par. 1, n. 1, BGB, the net amount of credit must be stated. Under § 491, II, n. 1, BGB the legal definition is given as the actual amount of credit paid to the consumer[7]. This clarifies to consumers the common practice of deducting some of the costs and fees from the amount of the loan before it is paid over. The net amount of credit enables consumers to compare the amount they have to repay with the amount they actually receive. The difference between the total amount of the instalments to be paid and the net amount of credit corresponds to the total amount paid by consumers for credit[8]. However, this tells consumers nothing at all about the actual commitment they are taking on in relation to their liquidity, so it is of little significance in terms of the prevention of over indebtedness.

Art. 14, § 3, n. 11, of the Belgian Consumer Credit Act[9] requires that the default interest rate be stated. Such information as to the consequences of breaches of the agreement gives consumers information precisely in situations of crisis. Stating of the rate of interest on arrears makes clear to consumers that their debt will continue to mount up if they fail to make payments on time.

In Belgium, where a purchase is made by instalments, the amount of any deposit due must also be stated[10]. This information is of considerable importance to consumers, because payment of this deposit is usually a condition for the loan. If the deposit cannot be paid, the loan is not made. For precisely that reason, this information is less important in the prevention of over indebtedness through information. If consumers cannot pay the deposit, the loan will not be made and cannot therefore lead to over indebtedness. If the consumer is already in a situation of over indebtedness, and cannot therefore pay the deposit, over indebtedness has nothing to do with the loan in respect of which the deposit was to be paid.

Form of Bargaining

With regard to formal requirements the national legislatures have introduced a series of different formalities in terms of written form and certification, applicable to various types of transaction and in different situations, in addition to those only prescribed by European law.

Additional two weeks on delays in payments

In Germany, under § 498, par. 1, sub-par. 1, n. 2 BGB, lenders must allow borrowers a two-week extension in the event of a delay in payments of a consumer

[7] cf. Bülow, Verbraucherkreditgesetz, § 4 margin note 64.
[8] Bülow,: Verbraucherkreditgesetz, § 4 margin note 68.
[9] Act of 12 June 1991 relating to consumer credit.
[10] Hofmeister, Rechtssicherheit und Verbraucherschutz - Form im nationalen und europäischen Recht, p. 45.

loan to enable them to make up the outstanding amount. This amounts to a suspension period. Lenders may only terminate the agreement upon expiry of this period. Lenders must send a notice stating that the total amount outstanding (previously not due for payment) will be demanded if the borrower does not pay the arrears within the time limit.

This notice gives consumers the opportunity to reflect on the consequences of their default to the extent that the time allowed makes possible reflection and comparison and this could give rise to a form of self-teaching. But this represents an ideal situation which would not arise in reality. Threats to terminate loans do not in most cases lead to financial literacy.

Offer of discussion where there are arrears

Simultaneously, where there are arrears, lenders in Germany must offer borrowers the opportunity of a discussion (§ 498, par. 1, sub-par. 2, BGB). This enables borrowers to explain their circumstances and breaks down their natural tendency to shy away from discussions with lenders. The contents of these discussion are, however, as unregulated as are the penalties for failing to offer them at all. Offering a discussion does not operate to validate a notice of termination for default[11]. However, the underlying motive of bringing the parties together before termination of the agreement because of arrears, with a view to investigating potential ways of resolving the situation, makes a great deal of sense. This is further supported by the fact that information is made available to consumers at the very time when they most need it[12]. This right thus presents one of the few forms of information targeted at consumers in crisis. If such a discussion were in practice constructively carried out, it would be a perfect opportunity for educating consumers and potentially providing them with protection from overindebtedness, assuming it were not already too late.

Notarisation

Although not inside the EU Swiss law may also be pointed to as a potential model of another national legislation, where guarantees above 2000 Swiss francs must be certified by a notary public in accordance with art. 493 II Obligationenrecht *(the Law of Obligations). Combined with the warnings and the evidential aspects generally associated with formal requirements, the purpose of this provision is to ensure that guarantors receive advice as to their rights[13]. This is very much to be welcomed, especially for personal guarantees which are fraught with danger and can have incalculable consequences. However, this does involve additional costs[14], usually borne by the borrower. The extent to which notarisation really en-*

[11] Hofmeister, Rechtssicherheit und Verbraucherschutz - Form im nationalen und europäischen Recht, p. 45.
[12] Hofmeister, Rechtssicherheit und Verbraucherschutz - Form im nationalen und europäischen Recht, p. 45.
[13] Hofmeiste, Rechtssicherheit und Verbraucherschutz - Form im nationalen und europäischen Recht, p. 43.
[14] Kemper, Verbraucherschutzinstrumente, p. 223.

sures that the transaction is explained is also questionable. Certainly, the process should verify that the agreement accords with the actual wishes of the parties[15], but ultimately it is impossible to explore the basis of those wishes and whether in fact the parties are clear about the possible consequences of a guarantee.

Hand-written endorsement

While the Directive will even allow a mouse click in France, art. 313-7 of the Code de la Consommation requires a handwritten declaration, whose text is prescribed by law, in order for a guarantee to take effect. Failure to observe this requirement renders the guarantee null and void[16]. It is intended that this will make guarantors aware of the significance of the transaction and the seriousness of the situation[17]. No deviation from the statutory formulation of the text is permitted[18]. Guarantors must state that they are prepared to be held liable for a specified amount, for the payments, interest, penalties for breach and interest on arrears should the principal debtor default and the text is kept short enough for it to be written out without taking an inordinate amount of time[19]. Guarantors are simultaneously given the substantive contents of the guarantee. The extent of their potential liability is made clear, as well as the fact that their entire income and assets are at risk. In addition, having to write out the declaration ensures that guarantors have really taken notice of this information, and it is done without additional cost.

The use of hand-writing is also used in France in purchases by instalment, where the borrower waives the right of withdrawal in order to have immediate delivery of the goods purchased (art. 311-24, Code de la Consommation). The waiver must, in addition to the express wish to have immediate delivery, contain a declaration as to awareness of the reduction of the period for withdrawal to three days from a maximum of seven days (=the usual period for withdrawal under art. 311-15), ending upon delivery of the goods[20]. This is a formal requirement which goes beyond the formalities prescribed by European Directives, but in general terms it leads to a restriction on the period for withdrawal which has not hitherto been envisaged by the Consumer Credit Directives and which therefore remains permissible.

In Belgium, handwriting is even required to a limited extent for conclusion of a consumer credit agreement. Consumers must not only sign the credit agreement, but also write under their signature the words "read and approved for ... euros on loan[21]".

[15] Hofmeister, Rechtssicherheit und Verbraucherschutz - Form im nationalen und europäischen Recht, p. 45.
[16] Pétel-Teyssié, Prêt à intérêt, n. 122.
[17] Kemper, Verbraucherschutzinstrumente, p. 223.
[18] Pétel-Teyssié, Prêt à intérêt, n. 122.
[19] The wording of the original is as follows: "En me portant caution de X..., dans la limite de la somme de ... couvrant le paiement du principal, des intérêts et, le cas échéant, des pénalités ou intérêts de retard et pour la durée de ..., je m'engage à rembourser au prêteur les sommes dues sur mes revenus et mes biens si X... n'y satisfait pas lui-même".
[20] Pétel-Teyssié, Prêt à intérêt, n. 109.
[21] Art. 17 of the Act of 12 June 1991 in relation to consumer credit: "Iu et approuvé pour ... euros à crédit" or "Gelezen en goedgekeurd voof ... euro op krediet".

Statutory contract forms

In addition, financial service providers in a number of countries[22] are obliged to use statutory forms of contract which will be threatened if the maximum harmonisation principle gets through. Its aim is to improve comparability of products by prescribing that certain minimum items of information can be found at the same place in the contract, thus ensuring that, if contracts are set side by side, they can be compared at a glance[23].

In the case of the "offre préalable", prescribed in France and Belgium in relation to consumer credit, lenders are compelled to make potential borrowers and guarantors (assuming they are a natural person) a binding offer in writing and in duplicate. The lender is bound by this offer for 15 days[24]. Unlike under current European law which the proposal intends to improve, those providing security are given the same information as the borrowers themselves. The offre préalable must contain a number of items of information. In France, this binding offer is subject only to acceptance of the borrower personally[25], which in practice is usually the case[26]. Acceptance of the offre préalable otherwise gives effect to the agreement[27]. In addition to the prescribed form of the contract in France, art. R. 311-6, par. 2, of the Code de la Consommation requires that it be clear and legible and in a minimum of font size 8. This demonstrates that even statutes are able to affect the design of contracts. A compulsory minimum font size is feasible for all contracts and would at least introduce a verifiable minimum standard in terms of clarity of presentation.

Use of standard forms of agreement can thus give consumers a fundamentally improved picture of the information with which they must be provided.

Cooling-off periods

In France, lenders must send a written offer by post, free of charge to prospective borrowers and guarantors (assuming that they are natural persons) in the case of loans secured on real estate, and that offer must contain specified information[28]. The offer cannot be accepted by the prospective borrower before the expiry of 10 days following receipt of the offer[29]. Consumers are thus compelled to have a cooling-off period. This procedure is feasible at least in relation to larger loans. It also entails a certain amount of coercion of consumers. However, where loans are secured by a charge over land, which are in any case subject to some delay because of the various formalities involved, a compulsory cooling-off period could

[22] Eg. France and Belgium.
[23] Calais-Auloy, Le Crédit à la Consommation en France, in Hörmann, "Verbraucherkredit und Verbraucherinsolvenz", p. 108; Kemper, Verbraucherschutzinstrumente, p. 207; Bräunig, Der Konsumentenkredit im französischen Recht, p. 60.
[24] France, Code de la Consommation, art. L. 311-8; Belgium, Act of 12 June in relation to consumer credit, art. 14 § 1; Calais-Auloy: Le Crédit à la Consommation en France, in Hörmann, "Verbraucherkredit und Verbraucherinsolvenz", pp. 107f.; Bräunig: Der Konsumentenkredit im französischen Recht, p. 58.
[25] Code de la Consommation, art. L.311-15; Calais-Auloy, Le Crédit à la Consommation en France, in Hörmann, "Verbraucherkredit und Verbraucherinsolvenz", p. 111; Pétel-Teyssié, Prêt à intérêt, n. 105.
[26] Calais-Auloy,: Le Crédit à la Consommation en France, in Hörmann, "Verbraucherkredit und Verbraucherinsolvenz", p. 112.
[27] Code de la Consommation, art. L.311-15.
[28] Code de la Consommation, art. L.312-7, L.312-8.
[29] Kemper,: Verbraucherschutzinstrumente, S. 227; Code de la Consommation Art. L.312-10.

force consumers to consider the seriousness of their decision and encourage them to make careful product comparisons. This could prevent impulsive borrowing and thereby potential over indebtedness through making premature commitments.

Express warnings

In Belgium lenders must add to the amount written down by borrowers adjacent to their signature, in a separate line and in bold type, the following sentence: "Never sign an incomplete contract[30]".

In Great Britain, consumers must be warned in wording prescribed by the Secretary of State and contained in information handed out prior to conclusion of the agreement, that they must be sure, before entering into the agreement, that they are able to repay the sums borrowed[31].

Although both of these warnings certainly contain important statements and the Belgian one at least, because of where it is and its bold type, is more likely to be noticed by the consumer, it is still questionable whether these simple warnings will be taken seriously, or whether they will merely be dismissed as a burdensome formality. Moreover, this form of emphasis on a single warning notice creates the hidden danger that all other information will be perceived as being of lesser importance and thus hardly taken into account at all.

Art. 14 of the "loi MURCEF"*[32] from 11 December 2001, modifying art. L. 311-9 of the Code de la Consommation requires that all cards enabling consumers to borrow at a time of their choosing must be defined as "credit cards" (*cartes de crédit*). This provision is intended to protect consumers from taking out unintended loans in the form of the ever-increasing numbers of in-store cards and cards issued by other lenders.*

Social Consumer Protection

All Member States have basically incorporated the regulations of the Consumer Credit Directive in its present form. As to its effectiveness, it has to be kept in mind that very different systems of credit extension and credit supervision exist. While most countries have a bank monopoly in consumer credit, the UK, Ireland as well as most of the new accession states as well as, to some extent also, Belgium allow other or nearly all other persons to extend credit which seemingly needs less supervision than savings. This assumption is socially discriminatory because the lower 40% of the German population has a negative savings rate which means that they save after and not before they achieve goods or services. Thus costly bank supervision profits only the upper half of society. This is partly also true for instalment purchase credit in rural areas which is by definition a by-activity of retailers and not of banks. In the other countries, the strict bank administrative

[30] *Art. 14 § 4 no. 2 of the Act of 12 June 1991 in relation to consumer credit: "Ne signez jamais un contrat non rempli".*

[31] *Consumer Credit (Quotations) Regulations 1989, Schedule 1, n. 18, "Be sure you can afford the repayments before entering into a credit agreement."*

[32] *Act n. 2001-1168 of 11 December 2001.*

bank supervision gives quite effective controls. If in these countries the Directive is not effective, it is because systematic misinterpretations or sophisticated products to circumvent its prescription (such as linked credit products with investment, insurance or payment services in particular) have been marketed. In those areas of small credit suppliers the lack of effectiveness lies more with ignorance or deviant behaviour of short term suppliers which are difficult to control.

Debtors' protection is especially important in Belgium, France, Germany, *the* Netherlands *and* Luxembourg. *The* Southern *European countries and to some extent also* Austria *have little specialised rules concerning over indebtedness in consumer credit* Spain *and* Greece *have some old rules of debtors' protection especially in non-bank credit. Somehow in between are the* Scandinavian *countries with little general clauses which are applied by a special body of consumer protection agencies. The UK-approach is instead focussed on information, rational choice and only recently the government claimed that social consumer protection would harm the weakest most.* Ireland *instead allows non banks to issue credit but regulates them just as Greece which fixes the limits of interest rates of such credit so low that in fact it equals an interdiction of non-bank loans. A similar system is in force for pawn brokers in Germany.*

An important role play interest rate ceilings which in different ways under different forms of supervision cap interest rates according to market rates for contractual as well as default interest rates. Instead of the traditional idea of usury as exploitation they assume that high interest rates reflect market failures. The rates are fixed at a ceiling between 30% (Latin countries) and 100% (Germany) of the average market rate for all consumer credit contracts. Countries with interest rate caps show very low exclusion rates while countries with unlimited interest rates discriminate more against the poor which are led to new costly forms of credit like payday loans while the rate ceiling countries offer cheap and socialised overdraft credit to provide short term credit with low amounts.

The way different countries define rate ceilings and sanctions when they are ignored depends on their tradition. While most view such ceilings as a frame for the market which leads only to the avoidance of the illegal surplus interest some countries follow moral values and incriminate high interest rates as usurious exploitation using a tradition over more than 2000 years.

The Roman laesio enormis *has been the basis for case law in Austria, Switzerland and Germany while France, Italy and Belgium as well as the Netherlands have implemented interest rate ceilings which express a less moral and a more macro-economic outlook, in which high interest rates are seen as an obstacle to the general productivity of small entities. Scandinavian countries seem to manage usury through their procedural mechanisms of a general bank moral and a tough consumer interest representation, because even without an explicit ceiling they do not have usury. On the other hand, the UK restricts the verdict of usury to a form of individual exploitation which in fact still allows interest rates in this market which would not be enforceable anywhere else. Instead the UK tries to limit these undesirable outcomes through more detailed supervision of financial*

services. In the USA, usury laws remain within the competence of national legislation, while truth in lending legislation is a matter for federal law. However, the national approach has weakened this legislation and let to its gradual abolition. The Calvinistic pro-credit cultures in the Anglo-Saxon countries, where there are virtually no rules on anatocism, usury and little social regulation on default, can be contrasted with the Catholic (and Islamic) tradition of extensive credit regulation to protect individuals from over indebtedness.

In its proposal, the Commission does not try to harmonise these rules, although from a European perspective the difference between maximum interest rates in France for small business start-ups (less than 10% p.a.) and the UK (unlimited reaching as high as 500% p.a.) is certainly a significant obstacle to the free movement of capital and services which would need at least some harmonisation. It is interesting to note that the Commission assumes that Italian usury law[33] violates the free movement of capital[34] which questions their willingness to save usury ceilings from liberalisation policies. But it does especially not, however, recognise that usury regulation is only a small fraction of social consumer protection rules for debtors in the member states. Besides the loopholes left in the proposed APR legislation where the amount of cost disclosed through the future APR depends on the statutory agreements and its wording are directly significant for social regulation. Many countries attach their usury ceilings to the APR so that falsified APR disclosure means in fact higher usury ceilings.

The rate ceiling countries do not limit their protection to the contract itself. They provide also strict rules for early termination and especially for rules applying to default. Germany even legislates a lower default than contractual rate and gives priority of capital amortisation for payments in default to limit the creation of interest out of unproductive failed investments which burden the livelihood of families. Restrictions on anatocism as well as restrictions to recover the cost of debt collection from the debtor are an effective way to take away any incentive for creditors to turn credit contracts into default relations.

Unlike the present proposal of a Directive which not even mentions the prevention of over indebtedness as its goal even consumer information rights in national legislation are often linked to this goal. They provide information on present and future liquidity (amortisation tables or total amount of credit) instead of mere prices for market comparison. This focus is the relation between assumed consumer income and future instalments while the other countries follow the Directive's approach to give price information, which make the comparison of products on the market easier. France *has also a quite effective system of preliminary binding offers which give consumers a chance to seek advice while the right to withdrawal in other countries is often compromised by the fact that the consumer already received the capital and cannot return it in order to make the withdrawal effective. As far as additional costs are concerned, the mentioned group provides restrictions*

[33] *Law n. 108 of 7 March 1996; Decree n. 394 of 29 December 2000 and Law Gesetz n. 24 of 24 February 2001.*

[34] *Press release of the European Union dated 25 July 2003.*

on all kind of additional fees like especially broker and insurance fees and limits the way variable rate are defined and refinancing can be done.

In Scandinavia, *there are a number of incentives to continue and adapt credit contracts with consumers in default. They top in some respect the approaches of the first group to restrict the termination of credit contracts. Instead of automatic acceleration clauses justified reasons for early termination have to be put forward and communicated i.e. a minimum of outstanding debt by size and time and the enumeration of justifications. They also oblige suppliers to mediate or at least introduce a waiting time giving debtors the chance to continue the old contract by paying the outstanding arrears even after cancellation.*

All these rules have to be seen in light of the ruling market culture in these countries which is influenced by ethics of suppliers, the strength of (subsidised) consumer organisations, the existence of additional public consumer protection mechanisms like the ombudsman or mediators and a general culture of social care for the poor. There are especially differences between a more administrative approach in France *and more judicial approaches in* Germany *and the* Scandinavian *countries.*

Insolvency Protection

Today ten out of 15 Member States have consumer insolvency legislation. Both Italy *and* Portugal *are in the process of preparing such laws. In France too, where discharge of debt has been possible only to a limited extent, this principle has been enacted recently for those consumers who have no assets. Only* Greece, Ireland *and* Spain *have not started a serious legal policy discussion on consumer insolvency regulation.*

Thus we can conclude that consumer insolvency law has become a part of a European legal tradition. As the consumer credit market is expanding to the Southern Member States as well as to the new Member States that will join the European Union in 2004, it is important to emphasize that the problems of over indebted debtors must be taken seriously in all Member States and that the need for consumer insolvency legislation is acknowledged.

By consumer insolvency law we refer to such laws that provide for a partial or total discharge of debt, that are accessible to consumers and other private debtors at reasonable cost and that include debtor's assets, future income and all debts in the same arrangement.

The laws are quite different. No harmonization has taken place so far. It has to be pointed out however, that access to discharge is limited in some countries, especially in France, the United Kingdom and to some extent in Sweden, which gives some reason for concern in these countries.

The general principles in European laws are rehabilitation, earned start through a payment plan, access to insolvency proceedings without prohibitive costs, availability of counselling and a preference for out-of-court or pre-court procedures.

Rehabilitation of debtors as economic actors is the core of consumer insolvency law. It is mainly achieved through discharge from excessive debt burden, but

it would be wrong to conclude that discharge is the only measure for achieving rehabilitation. It is equally important to note the role of debt counselling and other social services that are available in European countries.

Essential for the European rehabilitation concept is that the discharge should be as broad as possible. To offer a real chance of rehabilitation, the discharge should cover almost all the debtor's debts. Only alimony payments are commonly excluded from discharge and some countries limit this exception to alimonies paid directly to the child. In some countries, tort claims for deliberate damage and fines are also excluded from discharge. Notwithstanding these limited exceptions, discharge in European context covers most debts. Also, some debts are given preferential treatment in consumer insolvency. Priorities have been reduced in general insolvency and bankruptcy law and in consumer insolvency law they are even fewer. It has to be noted that European laws do no accept affirmation agreements, that is, agreements between the debtor and a creditor about payment of a debt notwithstanding discharge.

These general principles apply only to unsecured debt. Some countries protect home owning debtors (especially Finland, France *and* Norway*).* Austria *and* Germany *accept contract-based wage assignments made before the insolvency proceedings. It should be noted that consumer insolvency laws do not affect the legal situation of persons who have given personal guarantees for a loan or who are co-debtors on some other grounds.*

The second principle of European consumer insolvency law is earned start through a payment plan. None of the Member States allow for a quick fresh start without a mandatory payment plan. On the contrary, a payment plan is an essential requirement for achieving discharge. The duration of the payment plan is usually five years. It is generally accepted in the Member States that the payment plan should be onerous. The debtor is obliged to use all his income that is not required for living costs to pay off the debts. The living costs of the debtor and his family are calculated using the minimum level of social assistance as a starting point. Part of this rigorous, almost punitive attitude, is the regulation of what assets the debtor may keep. In many countries reference is made to the regulations forming part of debt enforcement law, which in turn enumerates domestic assets and the tools for trade in a restrictive way.

Open access to insolvency proceedings without prohibitive costs is a third principle that can be distinguished in European insolvency laws. All laws contain some restrictions for debtors who do not act in good faith. These restrictions are more numerous and restrictive in the Nordic countries than in Central European countries. The principle of no prohibitive costs is, on the contrary, generally accepted.

Most Member States have expressed a clear preference for out-of-court or pre-court procedures over formal insolvency proceedings in the courts. The only exceptions seem to be Denmark *and the* United Kingdom *where no pre-court attempts at settlement are required.*

The EU Commission seems to assume that personal bankruptcy schemes and consumer credit regulation have nothing in common. In fact the way perso-

nal bankruptcy is regulated in most countries in Europe shows that the credit contract just continues with some support by the court system who transfers unrecoverable destructive debts into a manageable debt load which gives hope to the families concerned. An especially interesting system it the Dutch system of Volkskrediet Banks run by the cities where over indebted households get competent debt advice as well as new credit for investment into their future. Thus the problem that cutting off poor people from credit cuts them off from progress and productivity in society is taken serious and result seem to be very promising. Different from microlending schemes real banks serve the borrower and there are close connections between these banks and the commercial banking system.

The Threat to National Law: Maximum Harmonisation and Foreign Country Control

These national achievement are threatened by the new EU *approach in regulating consumer issues. Article 21 of the draft says:*

- *insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce provisions other than those laid down in this Directive;*
- *when implementing and applying article 5(1), (2) and (5), article 13, article 14(1) and (2), articles 15, 17, 19 and 20, and without prejudice to necessary and proportionate measures which Member States may take on grounds of public policy, Member States shall not restrict the activities of creditors established in another Member State and operating within their territory in accordance with this Directive either through freedom of establishment or free provision of services.*

This move is totally new. Previous directives on consumer protection always used In the first preliminary draft the proposal expressly referred openly to "maximum harmonisation". This is a significant change in EU *regulation. Harmonisation of consumer protection rules in the past have always been based on rules of minimum harmonisation rules like art. 14 of the Distance Contracts Directive 97/7/*EC*, art. 15 of the Consumer Credit Directive 87/104/*EEC *or in art. 8 of the Standard Contract Terms Directive 93/13/*EEC *with words like "*Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection*" (97/7/*EC*).*

*This new approach came along with the Internet which the Commission erroneously thought to become an own new European state which needed supranational rules. The internet today has instead evolved to a supplementary tool used within traditional face to face contacts. It is still trust which rules consumer behaviour and trust is still closely related with where somebody lives and acts. The Amsterdam treaty acknowledged this insight when art. 153 of the Amsterdam Treaty gave priority to national consumer protection law: "*Member states

cannot be prohibited to keep or develop stricter measures of consumer protection than provided for by paragraph 4".

The same is true for art. 5 of the EU Rome treaty of applicable law from June 19, 1880 ("Rome I")[35] which gives the consumer a right to the application of the rules of his or her home state where he or she leaves and participates in the creation of laws and commercial customs.

Unlike the American process of unification, where the idea of a unified nation in a melting pot is prevalent and federal law increasingly replaces state law, Europe is built upon the principle of cultural diversity as a driving force for creativity and the protection of the cultural heritage. This principle is normally referred to as the subsidiarity principle. In the preface of the Draft for a new European Constitution "diversity in unity" is indeed the main principle governing the European Union of the future.

Consumer protection, especially in financial services, is part of this cultural heritage and art. 153 par. 5 as well as art. 5 of the Rome I treaty are therefore a special homage to cultural diversity in consumer protection. In so far prevention of over indebtedness and exploitation through mere money services has deep cultural roots which have to be preserved and adapted according to the national pace of the development in consumer credit which today is extremely different within the EU. Problems that had long been settled in Germany now appear in Greek while those settled in the US appear in Germany. If regulation is premature it hinders development. If it is absent at the time when the problems occur it increases discrimination and exploitation. Credit needs more than an informed choice. It needs understanding and a feeling for investment and money matters. This has to be developed in each country through financial education public discussion and offers which adapt to the customs and believes of the people. In this respect also religious differences play an important role.

If the European Union should be more than a money society where the contact of people is easy but empty through money relations credit services have to be adapted to the existing differences. DG Market factually in charge of credit regulation shows little ability to cope with these problems. Consumers are defined as users, instead of listening to concerned citizens in the member states the Commission nominates so-called advisors in a so-called User group. Experts for consumer issues are appointed by the Commission more on their English language skills than on their knowledge of national differences. Large conferences have been organised by DG Market during the last two years which have been solely stuffed by representatives of the supplier side and their state control agencies which all share a common believe that credit is a business and not a tool to manage family life. No efforts have been made to use existing empirical and social research. Even other departments of the commission have been kept outside like DG Social Policy or DG Enterprise. It is time that consumers and other non-profit users of financial services voice their concerns and ask for a more transparent, knowledgeable and sustainable process of credit and payment regulation in Europe. Europe is either in its member states or no where.

[35] *Extended to non contractual relations through tre Rome II proposition of July 2003.*