



SVERIGES KONSUMENTRÅD
THE SWEDISH CONSUMERS' ASSOCIATION

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“Modified proposal for a new Directive on Consumer Credit”

The Swedish Consumers' Association has been invited to reply to the government consultation “Modified proposal for a new Directive on Consumer Credit”.¹ Given the inherent international character of this consultation, our reply shall be written in English, with a summary in Swedish included. This summary, as well as our reply in its entirety, is also made available on our website.²

Introduction

The Swedish Consumers' Association has for some time worked with financial services in general. We have in this context previously demanded that the granting of mortgages and other credits must not discriminate those that are temporarily employed, or the recipient of sickness or unemployment benefits. Moreover, financial services must be made available to all, regardless of age, gender, financial status, habitation, ethnicity or disablement. Further, the duty of banks and other financial institutions to provide information must be extended. Finally, we have also demanded that the legal regulation in this area must be extended to include all consumers.

Some of these questions are dealt with in the new Directive. Most of them fall, however, outside its scope and remain unresolved. In short, at large, much work remains in the field of financial services and consumer protection.

The existing Directives on Consumer Credit have become outdated and obsolete.³ For that reason alone, the work with a revised Directive in this field is much

¹ COM(2005) 483 final.

² www.sverigeskonsumentrad.se

³ 87/102/CE, 90/88/CE and 98/8/CE.

welcomed. However, that is not the same as saying that the content of the new Directive is altogether positive.

The Swedish Consumers' Association wishes to further elaborate its opinions regarding the revised Directive, positive as well negative, further below.

1. Legal basis

The primary legal basis selected for the directive is Art. 95.⁴ This is in line with the aim of the directive being "to facilitate the emergence of a well-functioning internal market in consumer credit"⁵. However, The Swedish Consumers' Association believes that the measure should further aim at establishing a high level of consumer protection and to deal with over-indebtedness. Therefore, the legal basis of the directive should be Art. 95 in conjunction with Art. 153 of the Treaty, which, while including measures for the completion of the internal market, extends to protection of consumers' economic interests.

2. Full-harmonisation

The amended proposal appears to rely primarily on full harmonisation and mutual recognition. In the areas not coming within the scope of the directive, member states would presumably continuously be allowed to adopt and apply national rules.

While full harmonisation may be positive in a number of respects for both consumers and business, such as simplifying for companies to engage in cross-border business with the consumer-benefit of increased competition, it may still be negative for consumers in other respects. This is so in particular where it leads to a decrease in consumer protection in certain member states. In other words, while full harmonisation might be desirable, it might not always be the best method for consumers and ensuring consumer protection. The Swedish Consumers' Association have therefore difficulties in supporting the language of the Directive, concluding that, "[F]ull harmonisation is necessary in order to assure all consumers in the Community a high and equivalent level of protection of their interests..."⁶.

To a large extent, these possible negative consequences are dependant on the type of area that is being regulated. As far as the field of consumer credit is concerned, The Swedish Consumers' Association are worried that full harmonisation may in fact lead to difficulties. This is so for the following reasons:

- The credit market is rapidly changing. Full harmonisation in this area must take this into consideration. If this is not appreciated, the inescapable consequence that member states are denied to adapt their national framework to respond to important market changes, might have dire consequences for consumer protection. Moreover, the fact that directive 87/102/CEE proved to be behind the market more or less as soon as it was adopted, gives clear evidence of the potential difficulties that follow with full harmonisation in this area.
- One must keep in mind that many member states have adopted provisions in their respective national consumer credit legal framework, that offer a higher level of consumer protection than the one provided for in the proposal. As a consequence, we fear that the overall impact on consumer confidence might prove negative, unless a number of provisions are clarified and/or amended.
- It is commonplace to say that not all European consumers have the same level of awareness of and familiarization with credit, given that the consumer credit market opened up with significant time gaps in the various Member

⁴ Preamble of the new Directive.

⁵ Reasons, pt. 7.

⁶ Reasons, pt. 11.

States. Denying Member States the right to adapt its legislation to fill the needs of consumers might thus prove contrary even to the aim of the Directive.

- In the areas falling within the scope of the directive and being, therefore, fully harmonised, it is proposed that mutual recognition will apply. In effect, therefore, the lender will be able to claim that a fulfilment of the directive as enacted in his country of origin would be sufficient in cross-border cases. This will cause problems for consumers given that the directive allows a degree of flexibility on how it is to be implemented by each member state. As a consequence, national rules will come to differ even on such fundamental matters as pre-contractual information or Early Repayment Fees.

Further, given that there will inevitably be differences between national rules in different Member States, someone will have to face the problem of knowing, understanding and applying the rules of another country in cross-border cases. At the end of the day, naturally, that choice will come to stand between lenders and consumers. The Swedish Consumers' Association strongly urge that the lenders are in a far better situation to bear this responsibility.

In summary, therefore, for all of these reasons The Swedish Consumers' Organisation is opposed to regulating the area of consumer credit by means of full harmonisation measures. Instead, a high-level minimum harmonisation directive, where consumers are provided with clear and transparent information enabling them to make informed decisions, is the only method that allows consumers to profit from enhanced choice through an integrated internal market.

3. Scope of the directive and definitions (art. 2 and 3)

The new proposal is substantially reduced in scope. In particular this is so in relation to the new forms of credit that are constantly appearing. In short, 'financial innovation' appears not to be covered.⁷

While most of the reductions in scope are questionable, there are exceptions. Both mortgages in general, and so-called 'equity releases' in particular, have been excluded from the ambit of the Directive. The latter, the institute of equity release, is entirely a construction originating from the English common law and it is, therefore, in order to avoid confusion to the Swedish consumers, positive that it is not included. The main reason for both of these exclusions is the fact that the Commission is presently preparing a separate initiative in the field of mortgage credits. The Swedish Consumer's Association wishes to stress the need for this work to be continued, ensuring that a regulation covering all types of consumer credits becomes a reality.

However, other reductions of the Directive are difficult to describe as anything but shortcomings. While being understandable in terms of achieving a compromise, these shortcomings raise questions as far as the usefulness of the Directive is concerned. In particular, the following reductions are particularly regrettable.

- It is clearly regrettable that surety agreements have been excluded from the scope of the directive.⁸ The guarantor under such an agreement will have the same need of information and protection, given the possibility of having to reimburse in place of the borrower.
- According to Art. 2 (d) leasing agreements, which do not create any obligation to purchase the object of the agreement, are excluded from the

⁷ "Consumer Credit amended proposal – BEUC preliminary position", BEUC/508/2005, p. 5.

⁸ Art. 2.2. (a).

scope of the Directive. Worthy of notice is the fact that this is in line with Section 3, 2 para. of the Swedish Consumer Credit Act.⁹ In effect, Art. 2 (d) will naturally lead to the exclusion of many leasing agreements. The Swedish Consumers' Organisation wishes to express its worries that, in order to escape the application of the Directive, it will be very easy for the market to draft documents that will bear the title of hiring agreements and will reserve the property with the leasing company, although in reality most of the capital will be amortized to the consumer.

- According to the definition of 'consumer', as described by the Directive in Art. 3 (a), only such agreements a natural person enters into outside his trade, business or profession would come within the scope of the Directive. Noting that the distinction between private and mixed purposed consumption is increasingly becoming blurred, The Swedish Consumers' Association wishes to express its doubts regarding the appropriateness of the definition. In particular, it is regretful that credits that are mainly, albeit not exclusively, for private purposes, such as the purchase of a computer occasionally used to prepare professional texts or a car used occasionally for business travel, would not come within the scope of the Directive.
- The parallel work of the Commission on mortgage credits is also the reason for limiting the scope of the Directive to credits below 50,000 Euros.¹⁰ However, despite the fact that mortgages are excluded from the scope, this ceiling is somewhat difficult to understand, given that many credits would be excluded from the scope of the proposal. Further, it again illustrates the weakness of the Directive in dealing with financial innovation and developments on the market. The fact that Art. 24 (3) stipulates for a revision every 5 years of the thresholds in the Directive, does neither explain this limitation, nor does it seem appropriate considering the extensive amount of time that has been spent on reaching agreement on the current proposal.
- A number of credit agreements are subject only to 'lighter' requirements as to information and explanation. For example, according to Art. 2. 4. (a) this is so for agreements involving a total amount of credit not exceeding 300 Euros. The Swedish Consumers' Organisation believes that this exclusion is particularly regrettable, especially considering that it is likely that these 'minor' consumers may very well be the ones with the greatest need of information.
- As far as the definition of "*total cost of the credit to the consumer*" is concerned,¹¹ we fear that problems might occur. Firstly, it does not appear obvious what fees that "*are known to the creditor*" mean. Secondly, problems of proof are likely to strike the consumer when bearing the burden of proving that the lender in fact did not "*know*", i.e. inform the consumer, regarding a certain fee.

4. Pre-contractual information (art. 5, 6 and 7)

We are broadly positive to the fact that the Directive introduces a regulation for ensuring that certain standard information has to be provided to consumers at all times. Consumers must receive accurate and relevant information prior to the time of sale. In

⁹ "*Konsumentkreditlag*" (1992:830).

¹⁰ Art. 2.2. (b).

¹¹ Art. 3 (f).

particular, introducing the principle of ‘responsible lending’, tightly connected to the great problem of over-indebtedness, is most welcomed. However, the method in which this has been introduced, at the same time raises a number of difficulties, difficulties that might ultimately prove to defeat the purpose of the rules.

Firstly, the exact meaning of the concept of ‘responsible lending’ remains unclear. The original proposal dealt with this issue specifically in Art. 9, but it has now instead been moved to be covered by Art. 5.1. and 5.5. The original proposal received heavy criticism regarding this issue, and regrettably the rules remain somewhat unclear in the revised proposal. In particular, it has to be clarified what is meant by the requirement that creditors must provide the consumers with adequate explanation and advice. Is this requirement fulfilled by handing to the consumer a standard leaflet containing terms and conditions, or could the consumer demand more direct and personalised information?

Secondly, we find it highly regrettable that the basis for establishing the consumer’s creditworthiness, and therefore determining whether the requirement as to responsible lending has been fulfilled or not, is information provided by the consumer himself.¹² We fear that this rule might lead to the escape of responsibility on the part of lenders. Instead, there is nothing unfair or unreasonable in putting the responsibility of assessing the creditworthiness of the consumer on the lenders, in line with the principle of ‘responsible lending’.

Thirdly, Art. 6. of the revised proposal contains specific rules for the information the lender must provide. Although positive as such, we fear that consumers might be put in a difficult position if this information is not standardised in form. In the case of cross-border cases, the information provided by the lender, although fulfilling the requirements of the Directive, might still cause great problems to the consumer. We would in this connection like to direct attention towards the European Standardized Information Sheet provided in the Voluntary Code of Conduct on Pre-contractual information for Home Loans.¹³

Finally, The Swedish Consumer’s Association would like to take this opportunity to highlight the difficulties contained in Swedish consumer law specifically, concerning the remedies available to the consumer in case of violation by the lender of his obligations. This issue was recently subject to a government investigation, an investigation to which the Swedish Consumers Association was happy to be given the possibility to respond to and participate in.¹⁴ The investigation dealt specifically with the lack of available remedies available to the consumer, were the lender to violate his duty of responsible lending. The investigation presented an interesting and positive proposal to deal with this issue, as well as others. The Swedish Consumer’s Association wishes to stress the need for these issues to be highlighted and resolved by the legislator, prior to the enter into force of the present Directive.

5. Information on the borrowing rate (art. 10)

In opposition to the original proposal, Art. 10 does not mention that the consumer has to be informed about the new rate and amortisation table, something we find highly regrettable. Further, the phrase “*the consumer shall be periodically informed of change to the borrowing rate*” appears unclear. While it is positive that the consumer must be informed regarding changes that are “*significant*”, clarification is still needed regarding what is meant by “*periodically*” and indeed also “*significant*”.

¹² Art. 5.1.

¹³ Commission Recommendation 477 of 1 March 2001 endorsing the European Agreement on a voluntary code of conduct on pre-contractual information for home loans.

¹⁴ “*Konsumentskyddet på det finansiella området*” (Fi2005/1958). The submitted consultation is available on our website; www.sverigeskonsumentrad.se

6. The right of withdrawal (art. 13)

We strongly welcome the fact that the consumer has a period of fourteen calendar days to withdraw from the credit agreement without giving any reason. The same holds for the possibility to inform the creditor of an intention to withdraw before the consumer actually exercises his right to withdraw permanently. Despite the fact that the wording of the two sections might appear slightly confusing, it might still provide the consumer with a possibility to renegotiate the credit before the end of the 'reflection period'.

However, despite the good intention of the article, we would further like to stress the need for this procedure to run smoothly. The lender should be obliged to both inform and assist the consumer regarding the right to withdraw, thereby securing that the rule does not become an empty shell.

This position was decided by the Executive Committee of the Swedish Consumer's Association. In its preparation participated Jens Henriksson, International secretary, and the undersigned.

Stockholm, dated as above

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Sammanfattning (Summary)

Sveriges Konsumentråd har givits möjligheten att svara på Departementspromemorian "Ändrat förslag till nytt konsumentkreditdirektiv". Direktivet, som är ett reviderat förslag till det som beslutades i september 2002, behandlar ett ämnesområde som Sveriges Konsumentråd arbetat aktivt med under en längre tid.

Det tidigare direktivet på detta område har blivit föråldrat och obsolet. Av den anledningen välkomnar vi arbetet med en uppdatering. Det finns dock samtidigt delar av direktivet, både vad gäller dess legala basis och bakgrund, samt specifika regler överväganden, som vi finner skäl att ifrågasätta.

I kategorin positiva inslag, vill vi särskilt lyfta fram reglerna för att säkra att tillräcklig förhandsinformation ges till konsumenterna (art. 5,6 och 7). Även om nämnda regler i vissa avseenden måste klargöras och stärkas, är ambitionen både positiv och oerhört viktig.

I den positiva kategorin skall även nämnas den obligatoriska ångerrätt på fjorton dagar som tillskrivs konsumenten (art. 13). I detta sammanhang vill vi dock samtidigt poängtera vikten av att konsumenterna informeras om denna rättighet, främst av långivarna själva.

Vid sidan om dessa positiva inslag i direktivet, finns det som nämnts även delar av direktivet där vi inte delar lagstiftarens synsätt.

Av flera orsaker, som kreditmarknadens föränderliga natur samt de skillnader i vana och syn på krediter som finns i Europa idag, anser vi det vara olyckligt att direktivet utformats som ett så kallat maximidirektiv. Även frågor kring exempelvis informationsskyldighet kompliceras ytterligare av denna konstruktion.

Vidare är flera av de avgränsningar som gjorts av direktivets tillämpningsområde olyckliga. Både den beloppsgräns som har införts för tillämpning av direktivet (art. 2.2. (b); krediter till ett värde under 50,000 Euro), samt det faktum att direktivet lämnar lite utrymme för nya kreditinstrument, är inslag som Sveriges Konsumentråd menar är tvivelaktiga.

Slutligen anser Sveriges Konsumentråd det vara särskilt negativt att den valda rättsliga grunden för direktivet är art. 95. Mot bakgrund av att direktivet även bör syfta till att ta itu med överskuldssättning och säkra ett starkt konsumentskydd, bör direktivet även baseras på art. 153.

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