AK EUROPA

Position Paper
October 2021
Consumers

Consumer Credit Directive

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Executive summary

The single market concerning the granting of consumer credits can only be guaranteed to function if the right conclusions are drawn from the experience gathered in recent years. The practice of the credit market in Austria from the consumers' point of view proves that central elements of the regulatory objectives set out in Directive 2008/48 EC have so far been clearly missed. For example, the timely provision of meaningful and easily understandable pre-contractual information in order to promote comparisons between credits and to foster competition. There is also need for action in particular with regard to advertising concerning credits which indicates any figures relating to them. AK has been observing marketing activities of Austrian lenders for many years and has also taken legal action against such infringements before the courts on several occasions. Finally, to sum up, it must be said that hardly any advertising concerning credits which indicates any figures relating to them has complied with the legal requirements.

AK therefore especially proposes a **simplification and streamlining of credit information points:**

- Deleting the newly proposed general information pursuant to Article 9.
- deleting the newly proposed Standard European Consumer Credit Overview pursuant to Article 10(4). Duplication of information is counterproductive and should be avoided in any case.
- modifying the order of the pre-contractual information so that the points of information which are foreseen for the Standard European Consumer Credit Overview are placed at the beginning of the form of the "Standard European Consumer Credit Information" and the annual percentage rate of charge (APR) is highlighted (planned Standard European Consumer Credit Overview as a new page 1);
- Creditors should be required to use the standard information form when making a credit offer with individual terms to consumers prior to the conclusion of a credit agreement. This could solve the widespread problem of (not) handing out the standard information in time.
- advertising concerning credits which indicates any figures should always be made exclusively with the information and in the form of the representative example. This would help to prevent unrealistically low loss-leader offers for loans.

Furthermore, **protective rights** should be expanded and special provisions issued for specific cases:

- Withdrawal options for guarantors, pledgers and warrantors should be introduced to allow for a cooling-off period even in the case of assumption of liability for third-party debts.
- In the case of agreements for pledged items, there should be an obligation to state the annual percentage rate of charge in advertising and in contracts.
- Protection gaps and information deficits in the area of matured loans should be eliminated by requiring specified minimum information for repayment agreements and by requiring detailed account information to be provided at least once a year.
- With regard to data protection rules, it is essential to follow the opinion of the European Data Protection Supervisor (EDPS). Among other things, the types of data that can be permissibly used must be conclusively regulated, which also applies to the data sources. From AK's point of view, "sensitive" data according to Art 9 GDPR or information from social media must not be processed under any circumstances. Third-party databases must meet quality requirements and be certified before banking institutions are allowed to access them. The right to human evaluations instead of evaluations by artificial intelligence must be provided for at the request of the consumer as well as the prohibition of automated personalized offers without the prior consent of consumers, who must also be able to choose standard offers.

The AK's position

AK comments on the following points:

Article 10: Pre-contractual information

Consumer advocates across Europe agree that the existing rules on pre-contractual information are not sufficient and are not respected enough in practice. Unfortunately, the proposed extension of the information documents for consumers is not helpful, but rather – on the contrary – confusing and not practical. It also causes extra work and higher costs for creditors, which can have a knock-on effect on the costs for consumers, and it impacts on the environment.

The **information in the newly envisaged Standard European Consumer Credit Overview**, which merely duplicates existing information elements, **should be placed at the beginning of the standard information**, as this central information which is visible at a glance makes it easier for consumers to grasp the essential content of a credit agreement. This modified standard information would also be well suited for online contracts and on mobile phone screens because the important information points are displayed on the first page of the document.

From the consumers' point of view, standard pre-contractual information only makes sense if it does not have to indicate the APR merely by means of a representative example, but if **individual information is provided in line with an individual offer.** The creditor may provide a commitment period for this offer if it so chooses. Otherwise it is a non-binding offer. This information should also be visible on the first page of the standard information.

In order to enable comparison with offers from other creditors and to promote (cross-border) competition, both of which are intended to be achieved as they constitute main objectives of the proposal for a directive, creditors are to be obliged to provide this improved standard information. Any other offers, which may only contain incomplete information about the credit and especially about the credit costs, should no longer be allowed.

Articles 8 and 9: Advertising

The main reason why the existing regulation for advertising concerning credits which indicates any figures is inadequate is that tempting offers are still being made which are not informative and are misleading. Europe's consumer advocates also agree on this. Creditors advertise attractive monthly rates and low borrowing rates which, first of all, borrowers with average creditworthiness cannot get. In addition, every effort is made to hide the standard legal information as well as possible.

The representative example is usually found in a small-print footnote text of an advertisement, which means that this information – regardless of whether it is a newspaper advertisement or a television advertisement – **cannot be read or noticed. Only the boldly advertised borrowing rate or an attractive monthly rate is noticed.**

In order to achieve the regulatory purpose, it therefore appears essential to no longer allow conventional advertising concerning credits which indicates any figures, and to permit **advertising concerning credits which indicates any figures only on the basis of the standard legal information.** In contrast to the previous regulation, the APR should be highlighted. Additional figures beyond the representative example should no longer be permitted. Furthermore, AK argues that there should be fully harmonised specifications for the representative example in the sense of the two-thirds rule as practised in Germany.

Article 9: General information

If advertising and pre-contractual information are provided in the form of individual offers in a streamlined form and in an effective manner as suggested by us, then there is no longer any need for an obligation to provide general information under Article 9. In our view, this provision could be dropped.

Obligation to state the disbursement amount, sample amortisation table, statements of account:
The counselling experience in the Austrian Chamber of Labour (AK) consumer advice centres shows that many consumers are unclear about the amounts and values indicated in credit documents. Many enquiries also show that even in the current credit relationship there are deficits in information on the charging of interest and the amount of the current outstanding balance. Article 34 rightly proposes financial education measures, in particular for consumers taking out consumer credit for the first time. From AK's point of view, it would make sense to tighten up the information content because this could facilitate pre-contractual credit comparisons on the one hand and contribute to a better understanding of the product on the other.

The information on the total amount of credit, which has been obligatory up to now, is in itself insufficient to do justice to the transparency and simple credit comparisons intended by the proposal for a directive. Since creditors charge the various credit costs in different ways (surcharge or deduction from the credit amount or even both mixed), consumers often cannot understand which amount of money is actually paid out. The different charging methods also result in numerically different annual percentage rates of charge. Both of these factors make credit comparisons more difficult. **For this reason, it is proposed that – in addition to the total amount of credit – the disbursement amount should also be indicated in the standard pre-contractual information** (as part of the first page proposed above), **as well as in the draft credit agreement and in the credit agreement.**

Article 21(2): Amortisation table

Amortisation tables are only really useful if they fully reflect the credit agreement with all its details. AK proposes to prescribe a **sample amortisation table** which must contain all payments and debits as well as the respective **indication of the outstanding residual debt.** The **disbursement amount** to be paid out to the consumer should also be indicated in the amortisation table, as suggested for the other credit documents.

Credit account statements:
An obligation to **provide an annual account statement containing the full set of entries** should be introduced. The creditor shall inform the consumer of all payments and debits and of the current balance as of 31 December of each year. At the start of the credit, the disbursement amount should also be specified. In the case of credit concluded online, the consumer should also be able to access the daily updated status of the credit account at any time in the personalised area of the creditor's online portal – instead of the annual statement of account.

Article 3(5) and (7), Article 15: Total cost and annual percentage rate of charge

AK consumer advice centres repeatedly register problems of borrowers with credit insurances. The consumers concerned repeatedly report that the conclusion of a contract for credit insurance offered by the bank was not voluntary; nevertheless, the premium was **not** included in the total cost or the annual percentage rate of charge.

We therefore advocate that the flexible legal provision on voluntary conclusion of contracts or ancillary costs of the credit be deleted and, in particular, that credit insurance – **whether taken out voluntarily or required by the creditor – always be included in the percentage rate of charge or the total cost.** The existing criterion of voluntary ancillary services is not suitable because the line between open commitment, urgent recommendation and voluntary conclusion of a contract induced by the bank is far too narrow. A field test by the Vienna Chamber of Labour of credit advisory talks in Viennese banks in the course of anonymous test purchases (mystery shopping) in July 2021 showed that account managers in banks repeatedly, openly and actively suggested credit insurance and made it a fixed component of the credit agreement. In this way, the characteristic of voluntariness has de facto – due to the pressure to sell and the repeated reference to insurance – regularly fallen by the wayside.

AK doubts that the newly proposed provision of **Article 15** will fulfil its objective. According to this Article, creditors, credit intermediaries and providers of crowdfunding credit services may not infer the agreement of the consumer for the purchase of ancillary services presented through default options. Default options also include pre-ticked boxes. In our opinion, this could at most only be applied in the case of credit applications that are filled out by consumers themselves or online. This provision **would be obsolete if the feature of voluntariness were deleted** and ancillary services were always included in the APR as well as in the total cost.

Article 2: Scope

We welcome the **extension of the scope of application** because it will close existing loopholes. For example, by removing the lower limit and allowing credits to be taken out free of charge and all leasing financing to be taken up.

Conclusion of consumer credits through crowdfunding platforms:
The credit market in Austria is highly developed and there are many possibilities for external financing (consumer credit, finance leasing, overdraft, credit card credits, etc.). Therefore, the proposed extension of the scope to crowdfunding platforms does not seem necessary in practical terms. Credit agreements have always been subject to strict legal standards with the objective that both creditors and borrowers enjoy a special level of protection. **This level of protection should not be weakened. Therefore, AK advocates that lending between consumers (peer-to-peer lending) through crowdfunding platforms should not be allowed.** If the regulation is introduced as envisaged, it is demanded that operators of such platforms may only conduct their business activities **as a credit institution or bank with a corresponding licence or as authorised credit intermediaries with a trade licence, which are liable for the advice or mediation.**

Scope – Special provisions:

- In order to create a minimum of transparency and comparability, the **indication of the annual percentage rate of charge** should be made compulsory in advertising and in agreements for **pledged items.**

- For many years, practice in Austrian consumer advice centres has shown that there are **loopholes and information deficits in the area of matured loans.** Repayment agreements should have a **specified minimum content** (e.g. interest rate on arrears, instalment amount, term and other costs broken down). The aim is to ensure that such instalment agreements are affordable and sustainable or that the minimum information makes it clear that insolvency is to be assumed and that consumers can be referred to an advice centre for debtors. **During an ongoing repayment agreement, mandatory information (account statement)** with all entries and a current balance should be submitted at least annually.

- The same information requirements should apply to **credits** concluded **as a settlement before a court.**

- Sureties are just as worthy of protection as borrowers when a liability is assumed for a third-party debt. In such situations, ill-thought out actions occur again and again in practice. Consumers are also usually not sufficiently informed about the legal consequences of suretyship. Very few people are aware in advance of the consequences that such an assumption of liability can actually lead to and that it has an impact on their own credit score. Therefore, a **right of withdrawal for guarantors, pledgers and warrantors** should be introduced in the Consumer Credit Directive.

Right of withdrawal from the credit intermediation agreement:
In AK counselling, the problem often arises that consumers want to withdraw from signed credit intermediation agreements, which is not possible according to the current legal situation. This proves that a cooling-off period is also necessary in this area. In order to ensure the same level of protection as for the withdrawal from credit agreements concluded directly with credit institutions, a right of withdrawal from credit intermediation agreements should be introduced which allows consumers to withdraw free of charge.

Article 6: Non-discrimination

In Austria, there are repeated complaints from elderly people or people in retirement stating that they cannot obtain a credit from a bank because of their advanced age. The proposed provisions on non-discrimination should mean that negative decisions on credit agreements based on age shall be prohibited. The conclusion of credit agreements should therefore be based exclusively on creditworthiness checks.

Article 17: Ban on unsolicited credit sales

Unsolicited credits and credits sold by way of doorstep transactions and via cold calling constitute a grievance. For many years there have been frequent complaints from consumers who have been taken by surprise, but these are usually only brought to the attention of the consumer advice centres after the withdrawal period has expired. The existing right of withdrawal is apparently not sufficiently wellknown and not effective in these cases. These complaints often concern goods that are completely overpriced or ultimately useless for the customer, and the financial damage often amounts to several thousand euros. **We therefore expressly welcome this ban on sales.**

Article 3(5) and Article 29: Early repayment

A possible deterioration of the legal position of consumers through the newly inserted sentence that all costs imposed by the creditor are taken into account in the reduction is firmly rejected. AK calls for a **clarification** that, in line with the ECJ decision "Lexitor" (C-383/18), all costs imposed on the consumer are to be taken into account when reducing the total costs.

Article 24 and Article 25: Obligation to provide information on the creditor's right of termination and repayment obligation in the case of overdrafts

Many years of counselling experience in AK consumer advice centres show that very many consumers have a glaring lack of information about the creditor's right of termination in case of overdrafts and that, as a consequence, the credit has to be repaid within a very short period of time. It would therefore be very reasonable to introduce an obligation to provide information with all forms of overdraft on the **creditor's** contractually agreed or statutory **termination options and the resulting obligation to repay the overdraft at the interest rate on arrears.** In the case of overdraft facilities pursuant to Article 24, the information should be provided on the statements of account to be issued on a regular basis. In the case of overrunning pursuant to Art 25, this information would by all means be very useful as part of the existing information in the case of significant overrunning.

Article 31: Caps

The obligation for Member States to introduce caps on the cost of credits is welcomed. Instead of the proposed options, however, this rule should be fully harmonized to the only meaningful and practical parameter of the APR. Debit interest rates are not meaningful because, through pricing and the introduction of other costs, they can be low even for expensive loans. Also, capping the total amount does not seem to be helpful, as it does not provide much protection.

Article 35(3) and (4): Cap on charges arising from a default

Why it should be possible for creditors in the event of default by the consumer to impose higher charges than necessary to cover the damage caused by default is not comprehensible and is expressly rejected by AK. Article 35(4) should therefore be deleted and (3), which provides for a cap on charges arising from a default to the amount of the damage caused by the default, should be implemented on a mandatory basis by Member States.

In AK counselling, there are repeated enquiries from over-indebted or heavily indebted persons who are confronted with high interest rates on arrears, as can be seen from submitted writs of execution. These interest rates on arrears range from 14% to 19% and often result in a very high interest burden, which often leads to a spiral of debt. For this reason, too, it makes much sense for interest rates on arrears to be capped.

Data protection deficits

On 26 August 2021, the EU Data Protection Supervisor (EDPS) called for significant improvements in the draft (EDPS Opinion 11/2021), which has a significant impact on the protection of the rights and freedoms of individuals. The EDPS demands

- that the full applicability of the GDPR to any processing of personal data falling within the scope of the Proposal is explicitly confirmed in the draft.
- to specify the categories of data that may (not) be processed.
- to regulate the sources that may be used for the purpose of credit assessment. Is shall also be clarified which sources are excluded (e.g. social media, third party databases that do not meet legal quality criteria).
- that the processing of "sensitive" data is explicitly prohibited under Article 9 GDPR.
- that the requirements, roles and responsibilities of credit databases or third parties providing credit scores are regulated. There is a need for fundamental clarifications in which cases the consultation of external sources is necessary and proportionate.
- that consumers receive meaningful prior information if their credit score is based on profiling or other automated processing. They should also be able to request and receive a human assessment.

- that there are limits to the types of data that can be used in automated personalized offers. In addition, there would be a need for an obligation on the part of the lender to provide information about the specific parameters used that have an influence on conditions.

- that the EU draft legislation on artificial intelligence ensures that consumer credit and data protection rules are verified by independent third parties before CE marking in the conformity assessment procedure.

The demands of the EDPS are in line with the concerns of AK. They are essential to ensure respect for fundamental rights in the course of the ongoing digitization of the credit sector and to protect consumers from excessive or abusive monitoring.

Articles 13, 18 and 19: Data Protection Requirements

The provisions on creditworthiness assessment are primarily aimed at safeguarding the stability of the banking sector. Nevertheless, some of the requirements do serve to protect consumers' fundamental rights. Article 18, for example, describes protective measures for automated individual decisions, which, however, are already essentially provided for in the General Data Protection Regulation (GDPR). From AK's point of view, the draft offers the opportunity to define the scope of permissible data processing for the purpose of checking a person's creditworthiness in a legally secure manner. This opportunity should definitely be seized! A precise definition of the scope of permissible data types and data sources protects consumers from excessive data use. However, it also serves the uniform application of the GDPR and thus fair competition within the EU internal market. This is because data controllers can very easily transfer their processing operations to where the GDPR is least strictly interpreted. Moreover, the general data protection principles are applied quite differently across the EU. The maximum permissible retention period for payment or insolvency data, for example, varies widely from member state to member state. The length of time during which data may be processed (after settlement of the debt, discharge of residual debt, etc.) depends, of course, on the circumstances of the individual case. However, data protection authorities and courts have now developed blanket guard rails that diverge significantly (range from 3 to 10 years). These decisions are based on the legally regulated storage periods of insolvency registers, the EU Capital Adequacy Regulation 646/2012, and many more. It is therefore essential to regulate the maximum historical observation period that may be used to estimate the probability of default of a receivable on a risk basis. The data minimization principle must be observed (only as long as absolutely necessary).

Article 13: Personalised offers on the basis of automated processing

Lenders, credit intermediaries and providers of crowdfunding loans must therefore inform consumers if they personalize offers through profiling or other forms of automated data processing. Information obligations alone are not enough: Firstly, it should be worked out to what extent the information obligations of other legal acts are supplemented in a meaningful way (Consumer Rights Directive 2011/83/EU with the same provision for the area of distance selling transactions; GDPR with much more extensive information obligations for profiling). Secondly, it must be clarified that offers based on individual data are only possible if data subjects have previously consented to this purpose. Thirdly, since automated decisions are inherently subject to transparency and discrimination risks, consumers should always be able to reject personalized offers and choose from standard offers without disadvantage.

Article 18: Obligation to assess the creditworthiness of the consumer

In-house credit checks:
creditors are required to subject credit applicants to an "in-depth" review and to "adequately" consider "factors" that are "of concern". Such vague terms open unacceptably wide room for interpretation. The draft only emphasises that this assessment would not only be in the interest of the creditor (minimisation of default) but also of the credit applicant (protection against over-indebtedness).

It must be clarified whether the processing of creditworthiness data by credit institutions is based on Article 6(1)(c) (compliance with a legal obligation) or (f) (overriding legitimate interest) GDPR. In order to take into account both interests (in secrecy or disclosure of data), the GDPR (Art 6 (2)) determines what legal bases such as the present draft have to regulate: the conditions for data processing to be "lawful and fair", the types of data, their storage period and the entities to which or the purposes for which the data may be disclosed.

The draft does not meet these requirements: the extent and limits of permissible interference with the data protection rights of credit applicants are

not defined. Against this background, creditors will not be able to base their processing practices on Article 6(1)(c) of the GDPR without further ado. Basing credit assessments on Article 6(1)(f) entails disadvantages for both lenders and credit applicants: In each individual case, the lender would have to weigh the interests against each other and inform the data subjects about the outcome of the proportionality test.

Recital 47 refers to European Banking Authority Guidelines EBA/GL/2020/06. Therein, we miss the claimed taxative enumeration of the relevant data categories. On the contrary: "Where conclusive and appropriate, for example in the case of the use of automated models in lending, institutions and lenders .... may use other types and sources of economic or financial information and data for the assessment".

AK therefore demands that the types of data in the draft be named conclusively, taking into account the principle of data minimization. The same applies to the maximum storage period, which in AK's view would be appropriately measured at 3 years from the date on which the payment objection was resolved. If it is not possible to specify the types of data, storage periods, de minimis limits and simplified legal protection in the Directive itself, Member States should be authorised to do so themselves.

Verification of information:
Credit institutions must again critically assess the creditworthiness information obtained via internal and external sources "if necessary, by inspecting independently verifiable documents." What documents these are, is unclear. There is reason to be concerned that credit institutions will claim disproportionate access to registers, documents of consumers' contractual partners, etc., based on the obligation to verify consumers' selfdisclosures. Since fundamental rights may only be interfered with in the least intrusive way, self-disclosure should be given unconditional priority over obtaining information from third parties. Sources from third parties can only be included if there are grounds for suspicion.

Probability forecasts:
Loans may only be granted if repayment is probable. Probability forecasts are expressed as a percentage or as a total number of points. A secured repayment is expressed by 100 percent or the maximum number of points that can be achieved. The draft fails to answer at what score repayment should be considered no longer probable.

Profiling and automated decisions:
Essentially, the draft only reproduces the protection and transparency provisions of the GDPR. This is unsatisfactory. The safeguards (intervention of a person, presentation of the consumer's point of view, contestability of the decision) only apply to data processing based on the consent of the data subject or contractual necessity. EU rules may also provide for the use of profiling and automated individual decision-making, provided that they "include appropriate measures to safeguard the rights and freedoms and legitimate interests of the data subject." However, these are missing from the draft. One of the most glaring omissions is that the processing of "sensitive" data (Art 9 GDPR) or information from social media (poor data quality) is not explicitly prohibited. In addition, there is no "easy access to justice" in the sense of a mandatory arbitration body to which consumers can turn if they are not satisfied with the transparency or the result of algorithmic assessments.

Creditworthiness assessment with the help of artificial intelligence:
The draft does not address the draft AI regulation, which after all lists creditworthiness assessments among the high-risk applications. The fact that there are overlaps (which are not conducive to legal certainty) is also acknowledged by Recital 48. Affected parties should be able to reject an AI assessment from the outset in favor of a human assessment.

Art 19: Databases

It also provides for non-discriminatory access to "credit databases" for the banking sector in cross-border lending. The requirement that the databases should show "at least arrears" is too little. Excessive data collection by credit bureaus should not be encouraged under any circumstances. This requires qualitative requirements for databases and their operators and appropriate certification. Banks should only use databases that meet these requirements. Providers of databases should only grant access if the credit institution has informed the consumer of the intended query (the draft only provides for this in the event of refusal). The database operator would also have to check whether there is a legitimate reason for the query (credit application by the data subject).

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About us

The Austrian Federal Chamber of Labour (AK) is by law representing the interests of about 3.8 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore, the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The main objectives of the 1991 established AK EUROPA Office in Brussels are the representation of AK vis-à-vis the European Institutions and interest groups, the monitoring of EU policies and to transfer relevant Information from Brussels to Austria, as well as to lobby the in Austria developed expertise and positions of the Austrian Federal Chamber of Labour in Brussels.