

Position

Directive on Consumer Credits

Proposal of the European Commission submitted
on June 30, 2021



#weareready

Berlin, February 2022

Preliminary remark

The German Association of the Automotive Industry (VDA) represents the interests of the German automotive industry at national, European and international level. As the representative of the key sector of the German economy, the VDA exercises its responsibility for around 600 member companies.

The automotive industry also includes the financial services and leasing companies (automotive financial services providers) that are structurally integrated into the automotive groups as subsidiaries. These automotive financial services providers are an indispensable partner of the vehicle manufacturers in the marketing of passenger cars and commercial vehicles. Only a uniform business model among manufacturers and automotive financial services providers ensures that the automotive value chain and therefore the interplay between production, sales and sales promotion are optimally exploited by financial services. In this way, manufacturers and financial services providers make a significant contribution to Germany's real economy.

On 30 June 2021, the European Commission (EU COM) published a Proposal for a Directive on Consumer Credits. The VDA very much welcomes the objective of ensuring a high level of consumer protection and facilitating the emergence of a functioning internal market in consumer credit. However, the proposed Directive also involves a number of modifications and new regulations that are very unfavourable for the automotive financial services sector. These are briefly listed below and should be taken into account by the European Parliament in the negotiations on the Directive.

General remarks

The revision of the Consumer Credit Directive with numerous modifications and new regulations is very extensive in its entirety. For this reason, the VDA points out that the present statement of opinion is not conclusive and, against the background of what will be a considerable impact on the real economy, suggests that further consultations be carried out as part of the legislative process, allowing a longer period for the submission of comments and opinion. After an initial cursory review, the following points must be seen as giving cause for deep concern, since they will have considerable repercussions on the real economy.

The critical points in detail:

- Extension of the scope of the Directive to cover leasing contracts. The VDA is of the opinion that the Directive needs to be made more specific as to whether and what type of leasing contracts are to be covered. In this context, the requirements for leasing, which are characterised by lending law, should also be adapted where appropriate.
- Trade organisations must not be procedurally overburdened by minimum knowledge and skills requirements for credit intermediaries.
- Sanctions (administrative fines) amounting to at least 4% of the annual turnover of the creditor or credit intermediary. In the view of the VDA, a very high level of consumer protection exists at least in Germany.
- Pre-contractual information must be provided one day before the contract becomes binding (Article 10 of the Directive). If it is not provided, the consumer must be reminded, no later than one day after the contract is concluded, of his or her right to withdraw from the agreement. This would result in considerable administrative requirements for the financial industry without any added value for the consumer. On the contrary, the consumer's desire to purchase would be significantly inhibited, even though the consumer is already adequately protected by the more stringent creditworthiness assessment and the option of withdrawal.
- Extension of the obligations to fulfil warranty rights to the creditor (Article 27 (2) of the Directive). It should be clarified that the regulations may not go beyond the enforcement of objections in connection with linked credit agreements (Section 358 of the German Civil Code).
- The explanation of caps for the total amount of the credit (Article 31) is unclear. These cannot refer to an individual amount per consumer, but only to a relation between the net credit amount and the total costs. In addition, it is not clear what happens in the case of a net credit of more than EUR 100,000 (Article 2(2)(c) of the Directive). Moreover, it should be made clear that the case law practice in Germany about relative indication of the interest rates is a transposition in line with the Directive.
- The VDA assumes that distinctions made on an objective basis do not violate the prohibition of discrimination (Article 6 of the Directive). For example, the European Member States allow for different options as regards security and enforcement.

Against this background of imminent, further intensifying regulation governing consumer credits, we consider the following comments, which have already been presented in the past, to be of utmost importance. In order to ensure the ability of the financial sector to operate effectively in the future in the domain of consumer credits, the implementation of the following measures is urgently required:

Limitation of the right of withdrawal is urgently required

The revision of the Consumer Credit Directive should be taken by the European legislature as an opportunity to limit the right of withdrawal for consumer credits to 12 months and 14 days, along the lines of the Consumer Rights Directive. This would create legal certainty for both consumers and creditors. In its current version, the Consumer Credit Directive does not provide for any limitation of the withdrawal period. In legal practice within many Member States, this leads to a „perpetual right of withdrawal“.

A statutory maximum period is also intended for real estate consumer credits, whereby there is no apparent objective justification for the distinction in relation to general consumer credits. It is true that the new regulation introduced by the German Act on the Implementation of the Residential Real Estate Credit Directive is based on an autonomous decision by the German legislature to avoid a „perpetual right of withdrawal“ in the event of defective or omitted communication about the right of withdrawal. However, the regulation nevertheless complies with the requirements of EU law, because the relevant Residential Real Estate Credit Directive – unlike the Consumer Credit Directive – does not stipulate any requirements with regard to the withdrawal period.

This is a considerable risk for the real economy, especially in the case of so-called „linked transactions“. If the customer revokes his or her credit or leasing agreement, the entire linked transaction, and therefore the purchase contract as well, is reversed due to the excessive national implementation of the relevant Directive. The customer receives the down payment and the paid instalments from the bank and in return hands back the purchased product. In the case of the „perpetual right of withdrawal“, this means that the consumer can return a product without restriction, even after years of use or possibly even after paying off the credit debt. Following the judgment of the Ravensburg Regional Court delivered on 07.08.2018 (case no.: 2 O 259/17), it is no longer certain that the consumer will have to pay compensation for any deterioration in value, since the case law of the German Federal Court of Justice (BGH), which is in part positive in this respect, will most likely be the subject of a (further) submission to the European Court of Justice (ECJ). In a surprise ruling, the German Federal Court of Justice itself held in part that there is no obligation to pay compensation for lost value (cf. judgment of 08.06.2021, case no.: XI ZR 165/20). If there is no longer a legal basis for consumers having to pay for goods and services, the economic principles and functioning of the European economy will be seriously jeopardised.

The European Court of Justice (ECJ) is currently also dealing with the right of withdrawal in the cases C 33/20, C 155/20, C 187/20 and C 232/21, among others. If the ECJ follows the opinion of the Advocate General, all concluded credit agreements in the market and even all credit agreements that have already been processed in the past would in principle be revocable in Germany. The financial consequences for both creditors and dealers, especially in the midst of the ongoing coronavirus pandemic, would pose a threat to their existence.

Specification of the mandatory information is necessary

Lenders and credit providers are often accused of making „mistakes“ in their drafting of the notification about withdrawal or the mandatory information. In fact, it is impossible to formulate both documents – especially the mandatory information – in such a way that they are not contestable. The statutory requirements contain a large number of unspecific legal terms and thus leave room for interpretation by the courts. This leads to considerable legal uncertainty as to how the statutory requirements are to be implemented correctly.

As the numerous current questions referred to the ECJ show (e.g. C 33/20, C 155/20, C 187/20, C 232/21), the mandatory information is currently not regulated in a way that creates legal certainty. In his Opinion on Case C33/20, the Advocate General states that the default interest rate must be indicated as an absolute figure, although the Directive is „far from explicit“ (recital 53). The German Federal Court of Justice, the European Commission and all the market players in Germany take a different view of the former.

The European Commission also confirms with its Proposal for a Directive under discussion here that Directive 2008/48/EC in its previous form was only partially effective with regard to its objectives (ensuring high consumer protection standards and promoting the development of an internal market for consumer credit) due to imprecise wording of particular articles (recital 3).

The mandatory information urgently needs to be clarified in order to create legal certainty for both those who offer credit and those who require it. For example, a type of SECCI (Standard European Consumer Credit Information) would be conceivable for the mandatory information, i.e. standard information would be predefined by the legislator to create transparency for consumers and creditors.

In view of the fact that, in addition to the possibility of withdrawal, there is also a threat of considerable further financial sanctions in the future, there is a need for immediate action. The Proposal of the European Commission for a Directive on Consumer Credits therefore points the way forward.

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