

## Updating the Consumer Credit Directive: Will this prove to be the key to ensuring the success of eEurope?

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The Lisbon European Council<sup>1</sup> set the objective for the European Union to become the most competitive and dynamic knowledge-based economy in the world by 2010, reflecting the overall objective of eEurope<sup>2</sup> to bring Europe online as fast as possible.<sup>3</sup> In many respects, eEurope 2002<sup>4</sup> may be seen as having laid the foundations for this process by reshaping ‘the regulatory environment for communications networks and services for e-commerce.’<sup>5</sup> eEurope 2005 is the latest action plan in the eEurope initiative and represents a change in focus. In drafting this latest action plan<sup>6</sup> the Barcelona European Council felt that it was necessary to follow eEurope 2002 with a strategy that focused on ‘*the widespread availability and use of broadband networks throughout the Union by 2005...and the security of networks and information, eGovernment, eLearning, eHealth and eBusiness.*’<sup>7</sup> Consequently, eEurope 2005 aims to place users at the centre of its activities.<sup>8</sup>

However, the eEurope Benchmarking Report<sup>9</sup> has revealed a number of statistics which place a question mark against the European Union’s success in encouraging its citizens to take full advantage of this e-commerce environment. Whilst Internet penetration in EU households increased significantly during 2000/2001, (18% - March 2000, 28% - October 2000, 36% in June 2001),<sup>10</sup> concern has been expressed at the possibility that penetration may now have levelled out at around 40% of households.<sup>11</sup> Eurobarometre 56.0 would appear to support these findings in terms of consumer use of the Internet. The study revealed that cash still remains the preferred means of payment<sup>12</sup> for transactions conducted within individual Member States, closely followed by the use of cards.<sup>13</sup> Perhaps more significantly though, when assessing the relative success of the Commission’s eEurope initiative, cash and cards continue to dominate

<sup>1</sup> See: The Lisbon Strategy – Making Change Happen’, COM(2002) 14.

<sup>2</sup> See: eEurope Benchmarking Report: eEurope 2002, COM(2002) 62 final, p3, which states ‘The assumption behind the 64 targets of eEurope was that they would have an impact on Internet penetration and eventually Internet use which are central objectives of eEurope.’

<sup>3</sup> There have been two previous reports assessing the progress of the eEurope strategy. See: Nice: The eEurope Update, COM(2000) 783, November 2000; Stockholm: Impacts and Priorities, COM(2001) 140, March 2001. (Both reports have described the various policy measures and assessed their impact). Progress updates are currently published on the eEurope website:

[http://europa.eu.int/information\\_society/eeurope/benchmarking/index\\_en.htm](http://europa.eu.int/information_society/eeurope/benchmarking/index_en.htm)

<sup>4</sup> The Fiera European Council endorse the eEurope 2002 Action Plan in June 2000

<sup>5</sup> eEurope 2005, Executive Summary, p1.

<sup>6</sup> The eEurope 2005 action plan succeeded the eEurope 2002 action plan endorsed by the Fiera European Council in June 2000.

<sup>7</sup> Barcelona European Council, Presidency Conclusions, paragraph 40, (<http://ue.eu.int/en/Info/eurocouncil/index.htm>)

<sup>8</sup> One examples of this is the fact that on 14<sup>th</sup> January 2003, the European Council passed a Resolution regarding eAccessibility and the improvement of access for people with disabilities to the Knowledge Based Society. This followed an Opinion on the 14<sup>th</sup> November 2002 by the Committee of the Regions, which endorsed the main conclusions and recommendations presented in eEurope 2002. (For further discussion see: J.Westwell, S.Malloch & A.Mansoor, ‘EU Update’, p142-145, Computer Law & Security Report, 19(2), 2003.)

<sup>9</sup> Op cit, n2

<sup>10</sup> Op cit, n5, at p4

<sup>11</sup> The report revealed that Internet penetration in businesses is far higher than the household rate. Data suggests that approximately 90% of businesses (with 10+ employees) have Internet access. Over 60% have a website.

<sup>12</sup> Rising from 42% in 1997 to that of 47% in 2001

<sup>13</sup> The use of cards also rose from a figure of 30% to that of 34%.

the means of payment when reviewing payments conducted abroad. Furthermore, Eurobarometre 56.0 revealed that 56% of EU consumers refuse to contemplate the use of 'electronic purses' whether to perform transactions at home or abroad.<sup>14</sup> In some respects it is hard to reconcile this particular figure with the findings of the *eEurope* Benchmarking Report which states that:

'*eEurope* has triggered a major industry-led smartcard initiative backed £100m research funding. The market prospects for smart cards...are positive.'

Nevertheless, both studies are in agreement when it comes to an analysis of purchases made online. Eurobarometre states that 81% of consumers have no experience with distance payment by telephone, proprietary computer systems or the Internet. The Benchmarking Report goes on to highlight the fact that:

'In October 2000, 31% of EU Internet users had purchased online and this rose to 36% by November 2001...However, only 4% of users classified themselves as frequent purchasers and this is a major problem for e-Commerce.'<sup>15</sup>

In light of these statistics, Eurobarometre 56.0 concludes that:

'the trend is clear: as the opportunity for using such means has dramatically increased (56% had had no opportunity in 1997),<sup>16</sup> the feelings of insecurity have increased significantly (the score was 10% in 1997).<sup>17</sup> This picture is found in all Member States).'

In many respects, these figures would appear to suggest that there is still a considerable way to go before the objective of *eEurope* is realised. As Miller notes:

'Currently, business-to-consumer Internet transactions comprise only 20% of European Union e-commerce. The principal reason for this lag is thought to be a lack of consumer confidence in shopping online.'<sup>18</sup>

However, it would be incorrect to suggest that this slow uptake has been due solely to risks associated with security<sup>19</sup> and/or privacy.<sup>20</sup> Consumer confidence is also dependent on concerns relating to payment mechanisms that may be used online. In this regard, the use of cards still remains the most important payment mechanism used in online purchases and Miller suggests the current lack of consumer confidence may be attributed to the concern:

'that merchants, having received payment, will not perform their side of the contract or perform it defectively, and consumers fear being left without a remedy or with a remedy that is difficult to enforce.'<sup>21</sup>

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<sup>14</sup> This trend appears to have remain relatively constant over time – (1997: 56%, 1999: 50%, 2000: 60%)

<sup>15</sup> Op cit, n2, p13

<sup>16</sup> 22% indicated an absence of opportunity in 2001

<sup>17</sup> 25% indicated that a sense of risk or danger was a reason for not using these means of payment in 2001.

<sup>18</sup> S.Miller, 'Payment in an On-Line World', in L.Edwards & C.Waelde (eds), 'Law & the Internet', p57, Hart Publishing, 2000.

<sup>19</sup> The Commission has attempted to address such concerns through the e-Commerce Directive, (Directive 2000/13/EC of the European Parliament and of the Council of 8<sup>th</sup> June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market), but progress is still slow. This has been support by other initiatives including the electronic signature directive (Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures) See: (OJ L 013, 19/01/2000, 12-20).

<sup>20</sup> For further discussion relating to the tension (potential conflict) between money laundering legislation and the Data Protection Act, see: C.Rees & K.Brimsted, 'Charybdis or Scylla? Navigating a course between money laundering law and data protection', p25, Computer Law & Security Report, 19(1), 2003.

<sup>21</sup> Ibid.

This concern is reflected in the data collected by the eEurope Benchmarking Report on the perceived disincentives for consumers to purchase online.

‘Another factor is trust, how confident are consumers in being able to obtain redress in the event of an online dispute.’<sup>22</sup>

This is the key factor. Consumers are concerned with the level of protection that they can expect to receive in the event that goods/services supplied by an online merchant prove to be unsatisfactory. As a point of interest, the Report goes on to note that ‘[t]he relatively higher online consumption of the UK... may benefit from greater familiarity using credit cards.’ It will be noted later that the UK is regarded as having one of the most effective pieces of consumer credit legislation<sup>23</sup> within the EU. This may in turn account for the greater level of consumer confidence in the protection provided to them and as such the higher usage of cards on the Internet.

To date the Commission’s response, (which forms part of its overall ‘eEurope’ initiative)<sup>24</sup> has been to take a series of measures, together with Member States, to improve electronic commerce security focusing on ‘awareness raising, technology support, regulation and international co-ordination’.<sup>25</sup> However, this forms only part of the solution to ensuring consumer confidence in the e-Commerce environment.

Consumers require ‘better and more harmonised consumer protection rules in the EU, in particular in relation to “new technologies”’.<sup>26</sup> As such, any proposal to revise the Consumer Credit Directive<sup>27</sup> must address this issue in order to enhance confidence in the online market. However, reform must also be considered alongside the objectives of eEurope 2005, which is to:

‘review and adopt legislation at national and European level; to ensure legislation does not unnecessarily hamper new services [and] to strengthen competition and interoperability.’<sup>28</sup>

It may be suggested that pursuit of a similar objective,<sup>29</sup> when the original Directive was passed, led to a number of the problems/concerns currently being experienced by the consumer credit market.

Whilst the original Consumer Credit Directive<sup>30</sup> was passed in 1987<sup>31</sup> it was based on a 1979 Commission proposal intended to establish a Community framework for consumer credit and in turn the creation of a common market in credit.<sup>32</sup> However, it was a product of its time in so

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<sup>22</sup> Op cit, n2

<sup>23</sup> In so much as it provides consumers with a greater level of protection than the minimum common rules set out in Directive 87/102/EEC. For further details see: infra, n52

<sup>24</sup> For further details on the Commission’s ‘eEurope’ initiative refer to the Action Plan and eEurope 2005.

<sup>25</sup> Security of Payments, [http://europa.eu.int/comm/comsumers/cons\\_int/e-commerce/secur\\_en.htm](http://europa.eu.int/comm/comsumers/cons_int/e-commerce/secur_en.htm)

<sup>26</sup> Eurobarometer 56.0, ‘Europeans & Financial Services’, p1

<sup>27</sup> 87/102/EEC

<sup>28</sup> Op cit, n5, p3

<sup>29</sup> Directive 87/102/EEC was based on the approximation of the laws, which set to establish minimum common rules on consumer protection.

<sup>30</sup> Supra, n27

<sup>31</sup> Deadline for implementation of the legislation: 1/1/1990. The European Commission Report of 11<sup>th</sup> May 1995 on the operation of Directive 87/102/EEC [COM(95) 117 final] noted that the majority of the Member States had adopted stricter provisions than those laid down in the Directive for consumer protection. This was followed up by European Commission Report of the 24<sup>th</sup> September 1997 on the operation of Directive 87/102/EEC [COM(97) 465 final] and provided an overview of the comments made by Member States, the financial services industry and consumer organisations.

<sup>32</sup> See: Consumer Credit Rules for the 21<sup>st</sup> Century, <http://europa.eu.int/rapid/start/cgi/guestin.ksh>, in which it is stated that ‘the provisions of the 1987 Consumer Directive (87/102/EEC) effectively go back to the “cash society” of the 1970’s.’

much as it simply introduced minimum common rules on consumer protection through the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit.<sup>33</sup> The Directive has been amended twice, initially in February 1990 by way of Council Directive 90/88/EEC<sup>34</sup> and then in February 1998 with the European Parliament & Council Directive 98/7/EC<sup>35</sup> but has nevertheless generated considerable criticism and dissatisfaction.

The most significant criticism of Directive 87/102/EEC has been that the market, which it was intended to regulate, has changed significantly since its introduction in the later 1980's, resulting in the fact that it 'seems out of step with these trends'.<sup>36</sup> Secondly, the general thrust of European Commission reports<sup>37</sup> on the operation of Directive 87/102/EEC has been that there is a real need to 'encourage the provision of consumer credit across national borders'.<sup>38</sup> This is supported by other aspects of these reports, which note that consumer groups have consistently expressed the view that there is a need for legislative measures to harmonise the area of consumer credit across the EU.<sup>39</sup> In 1997 a summary on the reactions and comments to the 1995 report<sup>40</sup> was produced which prompted the Commission to conclude that the Directive was 'no longer sufficiently in step with the situation of the consumer credit market and that it should therefore be revised'.<sup>41</sup> In order to address this marginal growth in the European frontier-free market in consumer credit, it was decided that the legal framework needed to be reviewed in order to allow consumers<sup>42</sup> to exploit fully this single market. In particular, it was noted that any revision of the Directive needed to rebalance the rights and obligations of both credit grantors and credit consumers, to ensure a high level of consumer protection and to adapt to the new credit techniques that had developed. As Internal Market Commissioner Frits Bolkestein noted:

'A new consumer credit directive has long been on the to-do list of actions for building the Internal Market in financial services and improving opportunities for e-commerce.'

On the 11<sup>th</sup> September 2002, the Commission adopted a proposal for a revised Consumer Credit Directive.<sup>43</sup> The aim is to:

'promote the development of a more transparent, more effective market providing a high enough degree of consumer protection so that the freedom of movement of credit can take place in better conditions for supply and demand.'<sup>44</sup>

In many respects this would appear to target the two main criticisms of Directive 87/102/EEC as well as the conclusions of Eurobarometer 56.0. However, if successful, this will be achieved

<sup>33</sup> See: <http://europa.eu.int/scadplus/leg/en/lvb/132021.htm>. See also the recitals to Directive 87/102/EEC, OJ No L 42, 12.2.87, pp.48 et seq.

<sup>34</sup> Deadline for implementation of the legislation: 31/12/1992. European Commission Report of 12<sup>th</sup> April 1996 on the operation of Directive 90/88/EEC [COM(96) 79 final] noted that the formula outlined in Annex II of the Directive had been adopted by all the Member States as the method of calculating the annual percentage rate of charge, except in Germany, France and Finland.

<sup>35</sup> Deadline for implementation of the legislation: 20/04/2000

<sup>36</sup> Discussion paper for the amendment of Directive 87/102/EEC concerning consumer credit, p4

<sup>37</sup> European Commission, Report on the operation of Directive 87/102/EEC, [COM(95) 117 final]

<sup>38</sup> Consumer Credit Directive,

[http://europa.eu.int/comm/consumers/cons\\_int/fina\\_serv/cons\\_directive/index\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/fina_serv/cons_directive/index_en.htm)

<sup>39</sup> Perhaps not surprisingly, the financial services industry favours the introduction of codes of conduct as opposed to further legislative measures.

<sup>40</sup> European Commission, Summary report of reactions and comments, [COM (97) 465 final]

<sup>41</sup> Communication from the Commission – Financial Services: Enhancing consumer confidence – Follow-up to the Green Paper on 'Financial Services: Meeting consumer's expectations', COM(97) 309 final.

<sup>42</sup> As well as companies.

<sup>43</sup> See: Op cit, n32

<sup>44</sup> Summary Document, Discussion paper for the amendment of Directive 87/102/EEC concerning consumer credit, p2

at the expense of one of the original directive's main objectives – that of minimum harmonisation.<sup>45</sup> As the proposal goes on to state:

‘the achievement of these objectives would involve contemplating moving on from minimum harmonisation to maximum and optimal harmonisation’.

Whilst it is hoped that this would guarantee a high level of consumer protection across the EU, it represents a significant change in approach to that originally adopted. If one refers back to the Commission's reports on the operation of Directive 87/102/EEC,<sup>46</sup> it may be noted that only consumer groups favoured legislative measures. Rather, the data reveals that Member States did not unanimously support Community-level harmonisation of provisions governing consumer credit. Equally, it may be argued that the objective of eEurope 2005 to ‘ensure legislation does not unnecessarily hamper new services’ does not sit easily alongside a Directive based on maximum harmonisation.

Given this potentially significant alteration to the area of consumer credit, the Committee has outlined six guidelines in accordance with which any revision of the Directive should take place.<sup>47</sup> These may be summarised as follows:

1. redefinition of the Directive's scope in order to adapt it to the new market situation in this area and better tracking of the demarcation line between consumer credit and real estate credit;
2. inclusion of new arrangements taking account not only of the creditors but also of credit intermediaries;
3. introduction of a structured information framework for the credit grantor in order to allow him to better appreciate the risks involved;
4. more comprehensive information for the consumer and any grantors;
5. more equitable sharing of responsibilities between the consumer and the professional;
6. improvement of the arrangements and practices for processing payment incidents by the professionals, both for the consumer and for the credit grantor.

If one returns to the issue of consumer confidence and concerns relating to the effectiveness of the Consumer Credit Directive in providing an effective framework for redress, then the wording of Article 11 would appear to be unsatisfactory. During its initial proposal for a Directive 87/102, the Commission considered providing the consumer with the option of taking action directly against the lender without obliging them to first institute proceedings against the supplier of the goods/services.<sup>48</sup> However, the eventual wording was the result of a compromise.

Article 11 states that in certain circumstances the consumer can request payment from the lender if the complaint against the supplier is justified and the latter does not indemnify the consumer.<sup>49</sup> To date this has resulted in a wide variety of responses by the Member States.

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<sup>45</sup> For further discussion refer to: *Op cit*, n29

<sup>46</sup> *Op cit*, n31

<sup>47</sup> *Op cit*, n32

<sup>48</sup> This approach is based on the notion that the signing of a contract of supply of goods/services is conditioned by the existence of a credit agreement. This generates a certain form of joint and several liability between the supplier of goods/services and the lender.

<sup>49</sup> Article 11 states that the consumer may seek redress against the grantor of credit when the following conditions are fulfilled:

- The consumer has entered into a credit agreement with a person other than the supplier of the goods or services purchased;
- The grantor of the credit and the supplier of the goods or services have a pre-existing agreement whereunder credit is made available exclusively by the former;
- The consumer obtains his or her credit pursuant to that pre-existing agreement;

Whilst the Belgian response has been widely regarded as ineffective, the legislation in France,<sup>50</sup> Germany<sup>51</sup> and the UK<sup>52</sup> has gone far beyond the principle set out in Article 11.<sup>53</sup>

The Commission's discussion paper goes on to note that if it is 'deemed appropriate to harmonise, it would be necessary to opt for a clearly defined system' as opposed to the approach set out in the current Directive that simply lays down only the foundations of regulation<sup>54</sup> and leaves considerable scope for Member States to go further.<sup>55</sup> 'The combined effect was a segmentation of the Internal Market into separate national markets and discrepancies in consumer protection.'<sup>56</sup> In other words, 'it has resulted in 15 different sets of rules' which affects the provision of cross border credit.<sup>57</sup> Equally, it is noted that the Directive needs to be updated so as to 'ensure that the very specific consumer protection rules

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- The goods or services covered by the credit agreement are not supplied or are not in conformity with the contract;
  - The consumer has sought redress against the supplier but has failed to obtain satisfaction.

<sup>50</sup> France introduced the concept of '**linked credit**' which provides for the situation in which the conclusion of the sale is subordinated to the party concerned obtaining a loan and vice versa. Under French law there is an obligation on the professional, seller of goods or provider of services, to specify in the contract of sale or supply that the payment of the price will be made by means of a credit even if the purchaser refuses the loan proposed to him by the seller and uses a credit from a body of his choice. There is also an obligation for the credit organisation to mention the commodity or service financed by the credit. The inter-dependence between these two agreements is fixed at two key moments – (i) when they are signed and (ii) when they are performed.

<sup>51</sup> Germany introduced the notion of '**wirtschaftliche Einheit**' (economic unit). A purchase agreement is a transaction linked to the credit agreement when the credit is used to finance the purchasing price and when the two agreements have to be considered as an economic unit. It may be assumed that there is an economic unit when the lender involves the seller in preparing or concluding a credit agreement. The purchase agreement can go ahead only if the consumer has not used the right to withdraw from his credit agreement. The contractual clause on withdrawal must refer to this right. Withdrawal remains valid even if the sum lent has not yet been paid back. The consumer can refuse repayment if he can invoke litigation which releases him from his obligations in relation to the seller.

<sup>52</sup> The UK maintained the formula set down in the Consumer Credit Act 1974 – that of '**joint and several liability**'. Section 75 states:

- (1) 'If the **debtor** under a **debtor-creditor-supplier agreement** falling within **section 12(b) or (c)** has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a **misrepresentation or breach of contract**, he shall have a **like claim** against the **creditor**, who, with the supplier shall accordingly be jointly and severally liable to the debtor.
- (2) Subject to any agreement between them, the creditor shall be entitled to be indemnified by the supplier for loss suffered by the creditor in satisfying his liability under section (1), including costs reasonably incurred by him in defending proceedings instituted by the debtor.
- (3) Subsection (1) does not apply to a claim
  - (a) under a non-commercial agreement, or
  - (b) so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000
- (4) This section applies notwithstanding that the debtor, in entering into the transaction, exceeded the credit limit or otherwise contravened any term of the agreement.
- (5) In an action brought against the creditor under subsection (1) 'he shall be entitled, in accordance with rules of court, to have the supplier made a party to the proceedings.'

Consequently, it may be noted that where the lender is closely associated with the supplier of the goods/services in question, the damage must be borne by the lender and the supplier. The consumer must have the right to take action against one or the other or both in order to recover the amount of the damage suffered. However, this only applies to credit agreements mentioned in Section 12(b), (c) of the CCA 1974, which state:

'A debtor-creditor-supplier agreement is a regulated consumer credit agreement being:

- (a) ...
- (b) a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier, or
- (c) an unrestricted-use credit agreement which is made by the creditor under pre-existing arrangements between himself and a person ("the supplier") other than the debtor in the knowledge that the credit is to be used to finance a transaction between the debtor and the supplier.'

<sup>53</sup> The proposal does not permit Member States to go beyond the directive and to keep or introduce a higher level of consumer protection.

<sup>54</sup> It contained a 'minimal clause' allowing Member States to go further than the rules of the directive.

<sup>55</sup> As per France, Germany and the UK.

<sup>56</sup> See: Op cit, n32

<sup>57</sup> Questions and Answers on Consumer Credit, Memo/02/252

it lays down interface smoothly<sup>58</sup> with the more widely applicable rules laid down by the directives on E-commerce<sup>59</sup> and distance selling of financial services. Finally, a number of Member States, including the UK, wish to modernise their consumer credit laws. (In this regard, the DTI published the 3<sup>rd</sup> in its series of consultation documents<sup>60</sup> in December 2002 aimed at reforming the Consumer Credit Act 1974.)<sup>61</sup> It is felt that a new Commission proposal may anticipate and guide this process of modernisation.<sup>62</sup>

One area of potential concern to consumers based in the UK is that the new proposal will not permit Member States to go beyond the formula set down in the directive. If this proves to be the case then section 75 of the Consumer Credit Act 1974 (CCA) may very well be affected by such a requirement.<sup>63</sup> At present, under the CCA retailers and card issuers are jointly liable in the event of anything going wrong with transactions between £100 and £30,000. Under the Commission's proposal, the lender's liability would be restricted to apply only if the retailer is also acting as a credit intermediary. The obvious concern is that this will result in a weakening of the rights of UK-based consumers. However, if one takes a broader view of this proposed reform, then the approach of maximum harmonisation of consumer credit will ensure that a 'level playing field will be created within the EU'.<sup>64</sup> This can only be of benefit to consumers located in Member States and would appear to be an approach which they would welcome given the fact that Eurobarometer<sup>65</sup> revealed that 53% of consumers consider consumer protection as a proper matter for full harmonisation throughout the EU.<sup>66</sup>

The Commission's proposal also introduces the notion of joint and several liability, though this is limited to instances where the retailer acts as a credit intermediary.<sup>67</sup> Whilst this

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<sup>58</sup> Ibid.

<sup>59</sup> For further discussion on the E-Commerce Directive (2000/31/EC) refer to: J.Worthy, N.Graham & R.Finney, 'E-Commerce for financial services: Working with the new UK Rules', p121, Computer Law & Security Report, 19(2), 2003.

<sup>60</sup> For further discussion refer to: K.Sanford & A.Seager, 'Bringing the Consumer Credit Act into the electronic age', p12-13, e-commerce law and policy, January 2003.

<sup>61</sup> It aims to accomplish two things: (i) To remove any remaining obstacles to the recognition of electronically concluded contracts (by adopting a technology neutral approach); and (ii) To bring the CCA 1974 in line with other legislation such as the Electronic Commerce Directive, the draft Consumer Credit Directive (see above) and the Distance Marketing of Consumer Financial Services Directive. The DTI has asked for views on the latest consultation paper to be submitted by 28<sup>th</sup> March 2003.

<sup>62</sup> See: Op cit, n33, p17. A number of key questions are posed in relation to the form that the new Directive should adopt:

- Is there a case for introducing a mechanism that would be based on one of the existing national systems?
- Should there be a pre-existing agreement between the supplier of goods and services and the lender?
- If principles of joint and several liability between the lender and the supplier are selected and if there are pre-existing agreements between them, should provision be made, as in the case in the UK legal system, for limits on the amounts covered by this mechanism or not?
- Is there a case for giving the consumer the right to take action directly against the lender when it is clear that the latter benefits from commercial advantages by operating with certain suppliers and has – commercial – means of action?
- Would it be appropriate or not in this respect for the consumer to first approach the supplier?

<sup>63</sup> This assumes that the Consumer Credit Act 1974 applies to the particular arrangement in question and depends on two factors. (i) The applicable law of a contract entered into by a UK consumer, on the Internet, will not necessarily be that of his own domestic law, (e.g. English law). If the court of a Member State determines this issue, then the 1980 Rome Convention on the Law Applicable to Contractual Obligations will be applied. (For further discussion see: D.Rowland & E.Macdonald, 'Information Technology Law', p170, Cavendish Press, 2000.) (ii) There has also been considerable debate as to whether or not section 75 of the CCA may be extended to the use of credit cards for Internet transactions. (See: Brindle & Cox (eds), 'Law of Bank Payments', p242-246, 1999; P.Robertson, 'Credit cards and Internet payment: Time for another look at s75 of the CCA 1974', p17-19, Credit & Finance Law 11(3), 1999). See: infra, n68 for further discussion.

<sup>64</sup> Op cit, n45

<sup>65</sup> Eurobarometer 56.0, (Question 16), December 2001.

<sup>66</sup> 19% thought that harmonisation should only be partial, whilst 10% felt that standards should not be harmonised at the EU level.

<sup>67</sup> An example of this would be where a car dealer provides finance for the purchase of a car via a brand related finance company.

represents a welcome development in terms of consumer protection across the EU, from the perspective of a UK consumer it may very well be seen as falling short of the protection currently afforded them by the CCA.<sup>68</sup> However, the Commission's proposal should be read in conjunction with its proposal on payment systems, which will include 'refund' mechanisms for non-cash means of payments including credit cards.<sup>69</sup> It is anticipated that the interaction of these two directives will ensure an effective legal framework at the EU level.

If the overall objective of *e*Europe is to be achieved then the European Commission's measures to improve electronic commerce security must be accompanied by reform of consumer protection. As both Eurobarometre 56.0 and the *e*Europe Benchmarking Report highlight, EU consumers do not currently have sufficient confidence in the Internal Market; a key reason being the absence of an appropriate level of common rules. The Commission's proposal appears to acknowledge the need for harmonisation and modernisation of this area, but the question remains as to whether the common rules that are finally introduced are adequate to encourage the greater use of online facilities by consumers.

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<sup>68</sup> This may be linked in with the debate as to whether or not the CCA 1974 may be extended to cover the use of credit cards on the Internet. In the majority of Internet transactions the merchant acquirer (with whom the supplier has an agreement), is a different entity from the card-issuing bank. As such this will usually involve: (a) A supplier who has an agreement with a merchant acquirer in the same jurisdiction; and (b) A card-holder who is signed up with a card-issuer in another jurisdiction. Whilst the CCA 1974 distinguishes between 2-party and 3-party credit agreements, it fails to explicitly address the now common 4-party agreement. Consequently, banks have sought to take advantage of this apparent loophole. However, both the Office of Fair Trading and the DTI have expressed the view that credit card companies market their product specifically on the basis of its suitability for making payment when overseas, (under the VISA and ACCESS schemes). As such these companies cannot subsequently claim to be unconnected when it comes to the application of section 75. (See: Report No. OFT 132 Connected Lender Liability, May 1995; Report No. OFT 097 Connected Lender Liability, March 1994). Also see: *Op cit*, n18, p58-62.

<sup>69</sup> At the time of writing it is anticipated that this proposal will be put forward later in 2003.