EACB comments on the European Commission proposal for Directive on credit agreements relating to residential property (CARRP)

Brussels, 20 June 2011

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KEY MESSAGES

- **The EACB is concerned and opposed to the extensive powers vested in the Commission to adopt delegated acts, and in particular with regard to the fundamental provisions of the proposed Directive on credit agreements relating to residential property (the Directive), which in our view would create a risk of legal uncertainty**

- **It is necessary that the future Directive diverges from the Directive 2008/48/EC on credit agreements for consumers (Consumer Credit Directive, CCD) only where modifications are really necessary**

- **The EACB considers that the approach of targeted maximum harmonisation should be employed in the proposed Directive, in order to guarantee a level playing field for all market participants and to prevent national legislators from gold-plating.**

- **The scope of the proposed Directive should be clearly limited to consumer agreements only**

- **The pre-contractual information sheet for mortgage credit should be modelled as much as possible on the forms currently in use in the different Member States, which consumers are already familiar with. Any departures from the forms currently in use should be limited to where absolutely necessary**

- **Concerning adequate explanations, the EACB opposes the obligation for creditors to assess the level of knowledge and experience of a consumer with credit, and proposes to align this requirement with the provision on adequate explanations envisaged in the Consumer Credit Directive**

- **The EACB supports a high-level approach to the regulation of creditworthiness assessment and opposes detailed prescription, at EU level, of factors on which creditworthiness assessment should be based. In particular, the EACB is opposed to the introduction of the lender's obligation to deny credit in case of negative creditworthiness, and the obligation to inform the consumer of the reasons of rejection**

- **The EACB is opposed to shifting of the responsibility for taking out a loan from the borrower onto the lender, and to the requirement for the creditor to identify products which are 'not unsuitable' for the individual needs of the consumer**

- **The EACB calls for a clearer distinction of lender's obligations in case of 'advised' and 'non-advised' loan granting process**

- **Should the right for consumers for early repayment be introduced at EU level, the lender's right to fair and adequate compensation should also be secured**

GENERAL COMMENTS

- The nature of co-operative banking is defined by the principle that members are also clients and that clients can also become members. Known as stakeholder value banks[1] as opposed to shareholder value banks, their objectives are to pursue stakeholder value. As such, co-operative banks have no incentive to engage in irresponsible lending, rather the opposite. While the EACB supports the objectives of consumer protection and promoting a level-playing field for all actors in the mortgage market, we consider that the Commission's proposal Directive on credit agreements relating to residential property (the Directive) presents a series of measures which overshoot the target from our perspective, and attempt to introduce an EU solution to a US problem. The proposal Directive provides for extensive tightening, which we believe would lead to significant costs and administrative burden, without clear evidence of expected benefit for consumers. The EACB rejects the Commission's statement that *'the problem* [is not] *limited to one or two Member States but can be found throughout the EU',* and we are of the view that mismanagements by single Member States should not lead to imposing new, stricter legislation in the whole of the EU.

- The EACB considers that the approach of targeted maximum harmonisation should be employed in the proposed Directive, as it is necessary to prevent national legislators from gold-plating and to guarantee a level playing field for all market participants. In our view, targets of maximum harmonisation should be chosen according to the analysis of whether the non-application of the maximum harmonisation principle to a given provision would lead to diverging interpretations resulting in market distortions.

- The EACB is concerned about and does not agree with the extent of the powers vested in the Commission to adopt delegated acts. Such an extensive use of delegated acts, and in particular with regards to some of the more fundamental provisions of the proposed Directive, poses in our view a risk of legal instability and serious transposition difficulties (see also comments on Art 26 and 27)

- It is stated in the Explanatory Memorandum (p. 4) that *'A number of Member States apply selected provisions of Directive 2008/48/EC (…) on credit agreements for consumers (the Consumer Credit Directive) to mortgage credit'.* The EACB would like to emphasize that this is an understatement, as in some Member States (e.g. Austria) it would be more correct to say that the CCD was applied to mortgage credit with very few exceptions. Further, it must be stressed that requiring banks in those Member States to readjust, for the second time in such a short period of time, to the new requirements of the proposal Directive would mean tremendous costs. It is therefore necessary that the future directive on mortgage credit diverges from the CCD only where modifications are really necessary. For example, in case of early repayment, a cap of 1% of the amount of credit repaid early, as envisaged in Art 16 of the CCD, is not adequate for mortgage credit, as it does not provide lenders with fair and objectively justified compensation and an adjustment to mortgage credit would be necessary. The EACB is not satisfied with a statement of the Explanatory Memorandum (page 3) that the rules set out in the Directive 93/13/EC on unfair terms in consumer contracts do not *'take into account the specificities of mortgage credit'.* Indeed, the issue of unfair contract terms is currently reviewed in the context

[1] CPES study: Investigating Diversity in the Banking Sector in Europe: Key Developments, Performance and Role of Cooperative Banks

of Chapter V of the Proposal for a Directive on Consumer Rights (2008/0196 (COD)) which will apply to financial services, including mortgage credit, and there is no need for duplication of this effort in the proposal Directive on mortgage credit.

DETAILED COMMENTS

CHAPTER 1

Art 1

The EACB believes that as the objective and most of the provisions of the proposed Directive relate to consumer protection, the scope of the Directive should be confined to credit agreements relating to residential property '*concluded with consumers'*. The proposed Directive does not make this sufficiently clear, and in fact, in some of the language versions of the proposal (e.g. German language version) Art 1 makes no reference to consumers at all. The EACB therefore urges to implement clarification that the proposed Directive applies only to mortgage credit granted to consumers.

Art 2(1)(a)

Concerning the scope of the Directive, the EACB wishes to stress that in some Member States (e.g. Finland) it is usual that even smaller consumer credits might be secured by residential property. This means that even those smaller, consumption loans (e.g. for buying a car) would be, under Art 2(1)(a) of the proposed Directive, treated as credit agreements related to residential property and fall within the scope of the Directive. In order to avoid this situation, the scope of the Directive should be defined by reference to the purpose of the loan, or the amount of the loan (e.g. '*loans for the purpose related to residential property'*, i.e. buying, renovating etc., or '*loans for amounts above certain minimum threshold'*.

In addition, the definition of a 'consumer' used in the proposed Directive can lead to significant practical application difficulties. For example, it seems that large-scale investors investing major amounts would also be covered by the Directive. Yet unlike consumers, investors of this kind do not need special protection. For this reason, the EACB believes that fixing a maximum threshold over which the requirements of a future Directive would not apply should be considered.

Art 3(f)

Art 3(f) describes a tied credit intermediary as a credit intermediary acting on behalf of and under the full responsibility of only one creditor or one group. However, it is frequently the case in practice for co-operative banks in some Member States that a credit intermediary may be tied to one bank (Bank A; e.g. a special product provider within the co-operative banking group) and act under full responsibility of that bank, and yet, offer credit provided by a different bank (a local co-operative bank, Bank B, acting as a creditor). This could be possible because Bank A and Bank B (the creditor) belong to the same co-operative banking group which, however, does not constitute a 'group' in the meaning of Art 3(g) of the proposed Directive, as such a group is not required to produce 'consolidated accounts'. Although such intermediaries are indeed tied to one bank (Bank A), they would not be covered by the definition of 'tied credit intermediary' in its present form, as in cases such as the one explained above, they would act on behalf of a creditor (Bank B) which is not the bank to which they are tied. The creditor would

not (in the meaning of the proposed Directive) belong to the same group as the bank to which the intermediary is tied. Art 3(f) should therefore be reworded as follows:
*(f) 'Tied credit intermediary' means any credit intermediary who acts on behalf of and under the full responsibility of only one creditor, **financial institution** or one group.*

Art 3(o)

The definition of 'creditworthiness assessment' in the proposed Directive is general and does not prescribe factors which should be taken into account by the lender when assessing the consumer's ability to meet his debt obligations. This is welcome by the EACB, as a high-level principle would allow for a flexible and individualised approach to assessing creditworthiness, which is at the core of the co-operative banks' business model. In this context, the EACB opposes any more detailed prescription of creditworthiness assessment methodology, as described in Rec. 24 and Art 14 of the proposal Directive, which list criteria for creditworthiness assessment, envisage a possibility for Member States to issue guidance on the methods and criteria to assess a consumer's creditworthiness, and envisage a possibility for the Commission to issue delegated acts (see comments on Rec. 24 and Art 14 for further details).

Art 3 – additional definitions

Need for a definition of a '*bridging loan'*

The term bridging loan is used in Annex I of the proposal Directive, but is not explicitly defined anywhere in the Directive. A definition of a 'bridging loan' should therefore be developed.

CHAPTER 2

Art 5(1)

The EACB considers that a requirement for creditors to act *'in accordance with the best interest of the consumer'* is impractical and ill-judged. In particular it seems disempowering and patronising towards consumers, and potentially leading to unjustified litigation. This requirement should be therefore in our view deleted from the proposal (see also comments on Art 17).

Art 6(4)

The EACB opposes the delegation of powers to the European Commission to specify the requirements for assessing the level of competence of the staff of the creditors and credit intermediaries. Education remains in the Member States' domain, and they are best suited to assess the type of qualifications which would comfortably fit within the existing national education/training system. The EACB therefore calls for deletion of Art 6(4) from the proposed Directive.

CHAPTER 3

Art 8(2) & Rec. 17

The EACB would like to stress that a clear distinction must be made between the information lenders are obliged to provide to the general public at the stage of advertising, and the information lenders must provide to an individual consumer at the

stage just before signing the contract. It should be realised that it is the information included in the pre-contractual stage, rather than in the advertising, that is the basis for the consumer's decision to sign the credit agreement. Advertising is normally intended merely to establish a first contact with the potential creditor. The list of information elements to be included in the advertisement is in our view too long, rendering advertisement on radio and TV very difficult, if not impossible. A particular EACB's concern relates to point (i), which refers to the warning about the risk of losing the property. The EACB is opposed to such an excessive warning at as an early stage as advertising which – considering the real default and foreclosure rates – is unjustified. In fact, the EACB opposes such warnings also at the pre-contractual stage (Art 9 & Annex II) as the low number of non-performing consumer mortgage loans does not make strong enough case for such a warning.

In addition, it is not realistic, or even justified, to expect consumers to compare advertisements, as envisaged in Rec. 17. They should be able to compare offers, and they can do so thanks to the use of the ESIS form at the pre-contractual stage. The EACB would propose therefore to delete the phrase *'and should be able to compare advertisements'* from Rec. 17.

Art 8(4)

The EACB is opposed to the possibility given to the European Commission to adopt at the later stage delegated acts amending the list of the standard information items to be included in the advertising, as this would lead to a great deal of uncertainty for lenders, who could be exposed to burdensome administrative work and costs related to readjusting their marketing materials following such amendments.

Art 9(1) & Annex II

In addition to the usual three stages of providing information to consumers: specific, individualized pre-contractual information, additional pre-contractual explanations and contractual information (as outlined in the CCD), the proposed Directive also requires the provision of general information about mortgage credit (Art 9(1)). This is information duplication and Article 9(1) should be deleted. It should be stressed that this deletion would not result in any loss of information on the part of the consumer, as the borrower will still receive tailored information about the items listed in Article 9(1) as part of the pre-contractual information and additional explanations.

The choice of the ESIS form[2], as a basis for the pre-contractual information sheet enclosed in Annex II of the proposed Directive seems a logical choice, considering that it has already been extensively tested with consumers and assessed positively. However, it should be born in mind that the situation in different Member States is very different, and that the differences result mostly from the CCD implementation. A number of Member States apply the ESIS to all mortgage credit agreements. In other Member States special information sheets (linked to the CCD implementation) are used. Finally, there are Member States where the information sheet envisaged in the CCD (i.e. SECCI), has been applied to mortgages. It should be born in mind that in this last group of countries in particular, ESIS-based pre-contractual information would mean big changes -

[2] Created by the industry in 2001 in its '*Code of Conduct on Home Loans*' agreed between the banking industry, the European Commission and consumer groups and endorsed by the Commission in its Recommendation C(2001)477 of 1 March 2001

reorganising IT systems and the necessary consulting. Doing all this for the second time in a very short space of time (i.e. shortly after the implementation of the CCD) would be burdensome and costly, and could lead to considerable confusion on the side of both banks and consumers. In order to avoid excessive administrative burden of re-adjusting the forms currently in use as well as consumer confusion, the information sheet for mortgage credit should be modelled on the forms currently in use in the different Member States, which consumers are already familiar with.

Art 9 (2)

It is questionable how to interpret the requirement to allow the consumer *'sufficient time'* between receiving ESIS form and concluding the contract. It seems that the provision in question is a remnant of the original concept of the Commission to introduce an obligatory 'reflexion period' between the provision of ESIS and signing the contract, which in our view would have been useless and even detrimental for consumers, and which the EACB strongly opposed to in the past. It must be born in mind that taking out a mortgage credit is a long-term commitment and it is not a result of snap decision on the side of consumers. Once the decision to take out mortgage credit has been taken, consumers may need quick access to funds in order to secure the purchase of a chosen property at an agreed price, without incurring any losses related to late payment or a higher interest rate on the loan. In addition, in some Member States, particularly where the application of the provisions of the CCD was extended to mortgage credit, consumers are granted a right of withdrawal from the mortgage agreement. To combine the 'sufficient time' as proposed by the Commission before the conclusion of the contract, with the right of withdrawal after the conclusion of the contract would be highly impractical. The EACB therefore calls for deletion from the proposed Directive of the provision requiring a legally binding 'sufficient time', as it is ambiguous and not beneficial for consumers.

Art 11

The EACB would like to stress that the provision of additional 'adequate explanations' in writing would result in producing excessive and fruitless paperwork, and should not be required.

The obligation of the lenders to *'assess the level of knowledge and experience with credit of the consumer by any means necessary (...) to determine the level of explanations to be given to the consumer and adjust such explanations accordingly'* is clearly driven by the requirement of Art 19 of Directive 2004/39/EC on markets in financial instruments (MiFID) to assess client's knowledge and experience in investment field when providing investment advice. The EACB is strongly opposed to making such a parallel between investments and lending. While in the investment field it is indeed the client (investor) who bares the risk and it is in his own interest to provide all the relevant information, this is not the case with regards to borrowers. In addition, the requirement to use 'any means necessary' would be completely out of proportion and is totally open-ended as to the responsibility of the lender; it also remains unclear how such an assessment could be performed by lenders (it would not be reasonable to expect that banks organise testing for their clients). The EACB would therefore propose to align the wording of Art 11 of the proposed Directive with the wording of Art 5(6)CCD.

CHAPTER 4

Art 12(5)

It is alarming that the formula and the assumptions used to calculate the APRC as set out in Annex I of the proposed Directive could be subject to delegated acts. In addition, a point requiring clarification is related to the fact that although Art 12(5) makes reference to delegated powers vested in the Commission under Art 26-27, Art 26-27do not in fact list Art 12(5).

CHAPTER 5

Art 14 (1) & Rec. 24

While the EACB agrees with the requirement of a thorough assessment of the borrower's ability to repay his/her credit, it favours an approach which would allow for an individualised lending decision-making process. The EACB supports a high-level approach to the regulation of creditworthiness assessment at EU level, as expressed in the general definition in Art 3(o) of the proposal Directive (*"evaluation of consumer's ability to meet his debt obligations"*). However, while the definition in Art 3(o) is general, Art 14 goes on to list the criteria on which creditworthiness assessment should be based (consumer's income, savings, debts and other financial commitments). At the same time, Rec. 24 lists another set of criteria (consumer's income, regular expenditures, credit score, past credit history, ability to handle interest rate adjustments, and other existing credit commitments). It is the view of the EACB that the specific criteria of creditworthiness assessment should not be imposed at EU level, and that a more general regulation, similar to Art 8 CCD, coupled with the general definition of creditworthiness in Art 3(o) of the proposed Directive, would be a more appropriate approach. Finally, it is important to bear in mind that a legal obligation to assess borrowers' creditworthiness already exists at banking supervisory level. This supervisory level is fully adequate and any attempt to tackle creditworthiness within the categories of civil law would lead to an extensive, and in large part unjustified, litigation.

Following the same logic, the EACB opposes the option envisaged in Rec. 24 for Member States to issue guidance on the method and criteria to assess a consumer's creditworthiness, e.g. setting limits on loan-to-value or loan-to-income ratios, as this stands against the concept of an individualised approach to creditworthiness, which is at the very core of the co-operative banks' business model. The procedures developed and used by the co-operative banks have already proved themselves to be sound and proper. In addition, it would seem that financial stability/solvency issues would be better addressed in the context of Basel II and Basel III, and not in a directive focused on consumer protection. Finally, there is a question of the loans already granted but still outstanding. Indeed, if consumers with such credits wanted to switch their loans granted under conditions different from those stipulated in the guidance (e.g. with a higher LTV ratio) such consumers would not be able to switch and would be locked in current loans. The EACB calls therefore for removing any reference to the LTV and LTI ratios from the proposed Directive. On a related point, the EACB calls for replacing the phrase *'regular expenditures'* with simply *'expenses'*.

Finally, we do not consider it necessary to extend Member States powers to interfere with the creditor's established creditworthiness assessment processes (Art. 14 (1) sentence 4), as no evidence has been provided to justify such an intervention. In addition, we consider the bank/group-specific requirements regarding this assessment process to be

an integral part of the competition between the various credit providers on the market, which - in respect of its form and computer-based support mechanisms possibly taking place in the background - should at all costs be left in the sphere of the individual market participants and not be subject to any standardisation. We also consider the regular updating of the records of these processes to be counter-productive in view of the reduction of the red-tape also envisaged at the European level.

Art 14 (2)(a) & Rec. 25

It must be born in mind that assessing creditworthiness is not an automated process but is carried out by co-operative banks on an individualised basis. The EACB wishes to stress that in some circumstances a responsible lending decision can be made despite the creditworthiness assessment which at face value is negative. For example, there are factors which can be taken into account by the lender which are not strictly speaking elements of creditworthiness assessment. Examples of such relevant and legitimate factors are third party surety or collateral. In fact, such factors may constitute, in some circumstances, sufficient safeguards to allow responsible lending decision in the presence of a negative creditworthiness assessment. Another example of a situation where the granting of the loan could be looked favourably upon despite negative creditworthiness assessment could be granting a loan for the purpose of finishing the property which is used as collateral, in order to be able to sell that property. The Commission proposes that in every case where the outcome of the creditworthiness assessment is negative, the lender is under the obligation to refuse credit. The EACB objects to such a standardised, strict approach, and calls for a more individualised, case-by-case approach to the lending decisions. It should not be forgotten that should the borrower turn out to be unable to repay the loan, the lender bares significant costs, and it is in his own interest not to lend where there is no conviction that the borrower will be able to meet his obligations. The EACB considers the provision of Art 14(2)(a) as an unjustified and unnecessary intervention into the private autonomy of the contracting parties, and requests deletion of this provision. If anything, an alternative solution could be a requirement for the lender to provide the borrower with an adequate warning about the negative outcome of the creditworthiness assessment and its possible implications for him/her in the future.

Another concern of the EACB relates to the fact that the creditor's obligation to refuse credit in case of a negative creditworthiness assessment could be interpreted *a contrario* as a right to credit in case of a positive creditworthiness assessment. We recognise the Commission's attempt to address this issue in Rec. 25, 3rd sentence of the proposed Directive, which states that 'a *positive creditworthiness assessment should not constitute an obligation for the creditor to provide credit'.* However, it does not provide a sufficient solution, particularly considering that Art 14(2)(f) envisages the obligation to review the decision manually on the consumer's request, which again reinforces our concerns, as it implies that the consumer may dispute the lender's decision to refuse credit. This is one more argument for the deletion of Art 14(2)(a).

Art 14(2)(b)

The EACB is opposed to the obligation for the creditor to inform the consumer of the reasons for rejection in case the loan is not granted. This creates a potential risk of consumers exploiting such information and tailor-making their consequent applications (i.e. adjusting their following loan applications in accordance with the received reasons for rejection presented by the previous lender). This could lead to an irresponsible borrowing behaviour where consumers receive loans under false pretences. In addition, such a requirement would remain in conflict with the freedom to contract and suggest *a*

contrario a right to credit. It should also be born in mind that, in most cases, the rejection would be based on a combination of factors, including employment situation, level of indebtedness, etc., rather than for one, particular reason. Finally, rejection may be based on elements other than those related to creditworthiness assessment, such as e.g. Anti Money Laundering provisions, which banks are prohibited from communicating to consumers. The EACB would therefore call for deletion of Art 14(2)(b).

Art 14(2)(d)

The EACB would propose to change the wording of Art 14(2)(d) of the proposal Directive in line with the formulation of Art 9(2)CCD. Art 14(2)(d) should therefore read as follows: '*Where the credit application is rejected on the basis of ~~the data contained, or lack thereof, in~~ **consultation of** a database ~~that has been consulted~~, the creditor ~~informs~~ **shall inform** the consumer immediately and without charge of the ~~name of the database that was consulted as well as of its controller and of his right to access and, where necessary, his right to rectify his data in that database~~ **result of such consultation and of the particulars of the database consulted'**.*

Art 14(2)(e)

This provision is based on an incorrect assumption that a loan application could be rejected based purely on an automated decision. This in fact is not the practice of the co-operative banks, which take a more individualized approach to the lending decision, and would not refuse a loan based purely on an automated decision. In addition, parameters involved in an automated decision are considered to be business secretes, and such internal decision processes should not have to be disclosed for competition reasons. The EACB is therefore strongly opposed to this provision and calls for deleting it. In addition, Article 15 of the Data Protection Directive (95/46/EC) already contains detailed requirements on the general admissibility of automated decisions and on informing data subjects of the results. These requirements are not confined to automated lending decisions. Regardless of whether a credit agreement or some other type of contract is involved, this data protection regime establishes an EU-wide basis for handling automated decision processes. A future Directive on credit related to residential property should not encroach on areas already covered by this regime.

Art 14(2)(f)

In addition to the concerns related to the issue of the implied right to credit (see comments on Art 14(2)(a)), manual review of the decision means additional red tape, and should be further looked into.

Art 14(4)

Firstly, it should be stressed that the ability of a loan to match a borrowers' personal circumstances depends on an individual judgement that only the borrower himself can make. The responsibility for making such an assessment cannot and should not be shifted onto the creditor. This is why the EACB has opposed the introduction of an obligation of the lender to assess suitability of a given product for consumer's individual needs. The EACB is likewise opposed to the requirement for the lender to identify products which are 'not unsuitable'. In addition, it should be stressed that this is a highly ambiguous term which may lead to difficulties in the context of legal interpretation, and lead extensive litigation.

The EACB is also concerned about the requirement for the lenders to *'consider a sufficiently large number of credit agreements'.* Not only is the formulation '*sufficiently large'* ambiguous and as such exposed to diverse interpretation, but also it raises concerns in a situation where the lender's product range is limited to only one product, which could easily be the case for a small co-operative bank. It remains unclear how this requirement could be fulfilled by the lender in such circumstances.

The EACB is also apprehensive about the requirement for the lender to base his considerations not only on the information that is up to date at the particular moment in time (i.e. when the lending decision is being made), but also to consider *"reasonable assumptions as to the consumer's situation over the term of the proposed credit agreement".* While lenders would make every effort to consider various future possibilities, it would not be reasonable, in our opinion, to expect the lender to predict certain types of unpredictable future events, such as, for example, divorce or unemployment (which are also very personal and as such difficult to discuss with a consumer). The EACB would therefore call for allowing lenders to carry out all the relevant assessments based on the circumstances existing in a certain point in time only.

Art 14(5)

As previously stated, regulation of creditworthiness – if necessary - should be based on high-level principles. Standardizing the criteria to be used to perform such an assessment is against the concept of flexible, individualized approach. The EACB is therefore strongly opposed to the power vested in the Commission under Art 14(5) to adopt delegated acts specifying the criteria to be considered in the conduct of creditworthiness assessment. In particular, such technical details should not be regulated at EU level without participation of the relevant stakeholders. Likewise, the EACB is against specifying criteria for ensuring that products are not unsuitable. The EACB has been for a long time arguing that there are no products which would be unsuitable for consumers *per se*, and therefore the development of such criteria is not possible without product standardisation, which should be by all means avoided.

CHAPTER 6

Art 16(2) & Rec. 27

The EACB considers that defining issues such as uniform registration criteria and data processing conditions to be applied to the databases, as well as the registration thresholds and definitions of key terms, should not be carried out via Commission's delegated acts, as such issues would require further consultation with the relevant stakeholders. The EACB therefore calls for deletion of Art 16(2).

It is unclear if the provision of Rec. 27 aims at introducing an actual obligation for all lenders to *'consult the credit database over the lifetime of the loan in order to identify and assess the potential for default'.* Should this be the intention, the EACB considers that such an obligation would be overly burdensome for banks. In any case, this provision needs to be clarified.

CHAPTER 7

Art 17 & Rec. 31

The draft Directive rightly classifies 'advice' as a separate service, different from the services provided by the lender or a tied credit intermediary to the borrower in the course of 'regular', non-advised process of granting a loan. However, the distinction between those two types of services is not made clear in the proposed Directive. While it is logical that a *'recommendation of the most suitable agreements for the consumer's needs, financial situation and personal circumstances'* is a part of the 'advice' (service as defined in Art 17), it is not logical to include a requirement for the lender/tied credit intermediary to *'act (…) in accordance with the best interest of the consumer'* (Art 5(1)), and to *'identify products that are not unsuitable for the consumer given his needs, financial situation and personal circumstances'* (Art 14(4)) within the regular, non-advised loan granting process, as those belong to the separate service of 'advice'. Particularly, considering the potential liability aspects, the requirements of Art 5(1) and 14(4) should not be part of the 'regular' loan granting process where no 'advice' is given, and therefore they cannot stand in the Directive as currently proposed by the Commission.

Another point of concern for the EACB is the requirement for all creditors and credit intermediaries to consider a *'sufficiently large number of credit agreements available on the market'*. It remains unclear whether a creditor providing a service of 'advice' would be obliged to consider, and possibly recommend, to the consumer products of his competitors. Such interpretation could potentially lead to reluctance of creditors to provide the service of 'advice' at all.

Finally, it should not be assumed that 'advice' is a service always provided for a fee. We would therefore propose to add that not only the *'remuneration of the individual providing the service'* must be transparent, but also that it must be transparent for the consumer whether he is advised or not.

CHAPTER 8

Art 18

As a general comment, the EACB does not consider that early repayment should be regulated at EU level. If any, the provisions concerning early repayment should be general, allowing necessary adjustments to the national circumstances.

Art 18(1)

The EACB wishes to emphasize that early repayment should remain a matter of choice and not become a statutory right. Early repayment should be agreed by the contractual parties in a consensual manner. Standardizing this right would interfere with the product design of mortgages and impair their diversity. If early repayment was to become mandatory, the consumer should have the option to waive the right of early repayment under the condition that he is well informed about the effects of that waiver and unconditionally declares in a written form that he accepts the consequences.

Art 18(2)

In terms of compensation, the EACB considers that the right to a compensation for the creditor in case of early repayment must be secured in all circumstances. Such a right can be secured in a contract with the consumer, however, should the right to early

repayment become a statutory right of consumers, a statutory right to compensation for lenders must also be introduced. The EACB does not agree with the option given to the Member States to either grant or not the entitlement for lenders to receive compensation.

The proposal Directive mentions *'potential costs directly linked to early repayment of credit'*. The EACB wishes to emphasize that full compensation for the interest rate loss arising from the funding of mortgage loans that are subject to early repayment needs to be assured. Lenders should be entitled to be fully reimbursed for all the losses and foregone profits. Limited compensation would oblige lenders to mutualise their risk, i.e. to divide potential losses amongst all mortgage borrowers.

The compensation should be calculated on a wide calculation basis (comprising funding costs) without legally enforceable caps on interest rates and on the variation of interest rates. The provisions of the proposed Directive must ensure the right to full compensation for the creditor in case of early repayment in all circumstances and should be subject to maximum harmonisation in order to prevent any competition distortions.

Further, the right of early repayment should be discussed in the context of specific refinancing conditions available for the lender and taking account of the type of interest rate (fixed or variable) of a given product. Prepayment has a direct impact on the long-term funding of mortgages. While financial flexibility is important for consumers, the aspect of economic stability should not be neglected. The fulfilment of the need for lenders to accurately structure their refinancing liquidity and cash flow depends on the borrower's commitment to repay in accordance with the underlying agreement. A sudden termination of a contract by the consumer might jeopardize the management of the interest rate risk for the banks. Experience in some Member States has already demonstrated that restrictions on early repayment have squeezed fixed-rate mortgages out of the market. The risks could arise from a change in current national laws (e.g. German law) on the established culture of fixed interest rates for financing real property. For this reason, we are in favour of retaining the conditions for exercising early repayment already anchored in national laws. In addition, it should be recognised that the legal framework governing the early repayment will have an effect on prices and product diversity, but could also increase systemic risk in the event of mass early repayments in periods of falling interest rates.

Finally, the EACB considers the terms *'excessively difficult'* and *'onerous'* used in Art 18(2) par 2, to be imprecise, and calls for the deletion of the par 2 of Art 18(2). In general, the provisions of the proposed Directive early repayment have been poorly worded, and the EACB calls for a complete rewording of Art 18.

CHAPTER 9

Art 19-22

In view of the structures within the co-operative banks' groups in some Member States, with independent co-operative banks in the regions and central co-operative members as providers of group-wide special products (for example the co-operative mortgage banks), the local co-operative banks are deemed to be 'credit intermediaries' in their relations with customers when they grant credits for which for example a co-operative mortgage bank acts as a 'creditor'. This would mean that the co-operative banks that are already subject to the comprehensive supervisory criteria applicable to credit institutions would also be subject to the provisions of Chapter 9 of the proposed Directive. In particular,

Art. 19-22 would lead to additional administrative costs for the co-operative banks, something which, in our view, is not intended by the European legislator. Rec. 14 of the proposal states that *'(...) it is important to take into consideration the specificities of credit agreements relating to residential immovable property (...) and all actors involved in the origination of credit agreements relating to residential immovable property should be adequately authorised, registered and supervised'.* As credit institutions, the co-operative banks are already subject to extensive legislation. It is to be assumed and, in our opinion, the text of Recital 14 permits this conclusion, that the European legislator did not intend duplication in the area of registration, authorisation, supervision, professional requirements, etc. The EACB advocates for an explicit exception that exempts banks – even if they are deemed to be 'credit intermediaries' pursuant to the proposed Directive – from the obligations envisaged in Art 19-22.

CHAPTER 10

Art 25

The EACB is in favour of out-of-court settlements and agrees that consumers should have access to remedies that do not impose costs, delay or burden disproportionate to the economic value at stake. It should be noted that already in practice most consumers of the co-operative banks in Europe can bring their case to the relevant FIN-NET member, or other relevant ADR body competent to deal with cases related to retail banking services, with the exception of course of complaints that have already been brought to court. However, it must be emphasised that the very nature of ADR schemes is that they are voluntary and alternative to traditional judiciary venues. The EACB is therefore opposed to the introduction of an obligation for the industry to adhere to such schemes. It should not be forgotten that banks which already do adhere to an ADR scheme are obliged by extensive body of legislation[3] to inform consumers of such a body and the relevant procedures. Obligatory adherence, however, has not been envisaged in those acts, and it is not clear why this should be different in case of loans related to residential property.

Art 26 and 27

The EACB is concerned about and does not agree with the extent of the powers to adopt delegated acts envisaged for the Commission in the proposal Directive. It is particularly worrying that the Commission would be able to adjust the provisions of the proposal without any consultation with the relevant stakeholders. It should also be born in mind that Art 290 TFEU provides that *'a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power'.* However, the issues listed in Art 26 and 27 of the proposed Directive include such key elements as pre-contractual information, APRC or creditworthiness assessment. It is therefore difficult to see how those elements, which are the very fundaments of the proposed Directive, could be considered as non-essential. Further, while Art 12(5) of the proposal makes specific reference to Art 26-28, the latter do not list provisions of Art 12(5).

[3] Directive 2002/65/EC on distance marketing of consumer financial services (DMFSD), Directive 2004/39/EC on markets in financial instruments (MiFID), Directive 2007/64/EC on payment services (PSD), or Directive 2008/48/EC on consumer credit (CCD)

Art 30

The EACB would like to emphasise that it is impossible for the banks to start to make any modifications before the final national laws are adopted and published. In order to make the necessary modifications to the IT-systems and to the terms and conditions, a 1-year transition period would seem necessary after the 2-year transposition time.

ANNEX II

As mentioned above in the comments on Art 9 (2), there are Member States where the information sheet of CCD (SECCI) has been applied also to mortgages. In order to avoid excessive administrative burden of re-adjusting the forms currently is use as well as consumer confusion, ESIS for mortgage credit should be modelled as much as possible on the forms currently in use in different Member States.

Point 8 of Annex II

The third sentence of section 8(2) of the Instructions to complete the ESIS (Annex II, Part B of the proposal Directive) requires creditors to provide *at least two illustrative examples* of how the exit charge for early repayment will be calculated under different possible scenarios. The EACB would like to point out that hypothetical scenarios concerning the possible amount of an early repayment charge would not provide consumers with useful information since the exact amount they would have to pay depends on a number of factors which are not known when the ESIS is issued. These factors include the interest rate at the time of the early repayment, the remaining life of the loan, the existence of a fixed interest period and the amount of outstanding principal. This requirement should therefore be deleted.

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