

The European Banking Federation is the voice of the European banking sector, uniting 32 national banking associations in Europe that together represent some 4,500 banks - large and small, wholesale and retail, local and international - employing about 2.5 million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that securely handle more than 300 million payment transactions per day. Launched in 1960, the EBF is committed to creating a single market for financial services in the European Union and to supporting policies that foster economic growth. Website: www.ebf-fbe.eu

12 February 2015

EUROPEAN BANKING FEDERATION'S RESPONSE TO EUROPEAN BANKING AUTHORITY'S CONSULTATION PAPER ON DRAFT GUIDELINES ON ARREARS AND FORECLOSURE - EBA/CP/2014/43

GENERAL COMMENTS

The European Banking Federation (EBF) welcomes the opportunity to respond to the European Banking Authority (EBA)'s consultation on draft Guidelines on arrears and foreclosure.

The EBF supports the introduction of guidelines to ensure consistency in the implementation of the Mortgage Credit Directive¹ across the EU Member States.

The EBF welcomes the EU Institutions' decision in the context of the Mortgage Credit Directive (MCD) **to adopt a high-level principles-based approach to allow the National Competent Authorities to implement the Guidelines according to their national specificities.**

However, the EBF considers that the following key points should be particularly underlined:

- The EBF considers that the EBA Guidelines relate to payment difficulties on an agreement regulated by the Mortgage Credit Directive, and not to payment difficulties in general. The reference to payment difficulties should be therefore further clarified because payment difficulties could be interpreted as referring to payment difficulties in general.
- The need for adequate linkage among different directives exists in relation to the Consultation Paper on Arrears and Foreclosure procedures: point 4 on the resolution process could lengthen the time required to complete the procedures, with an adverse impact on Risk-Weighted Assets as governed by Regulation (EU) no. 575/2013.
- **The suitability assessment issue was analysed in depth by the European Parliament, the Council and the Commission when adopting the Mortgage Credit Directive (MCD). The "suitability assessment" was considered not appropriate for products such as mortgage and consumer credit and was rejected. It is therefore vital to clarify that the Guidelines do not**

¹ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 Text with EEA relevance, 28.2.2014, OJEU L 60/34-85.

refer/request any “suitability assessment” to avoid provisions being mis-interpreted extensively and introducing “de facto” a suitability assessment (for example in 1.1 (establishment of policies and procedures), 3.1 (provision of information and assistance to the consumer) and 4.1 (resolution process)).

The text of the MCD was finalised in a way that avoids increased litigation between banks and borrowers (in the event of consumer default, the creditworthiness assessment will not be automatically considered wrong based on an ex-post evaluation). The Directive notably obliges intermediaries to assess creditworthiness and inform the consumers concerned (adequate explanations) while – at the same time – making consumers responsible for choosing the product, meaning that suitability assessment was not included in the MCD.

Given this, the European Banking Industry considers it extremely important to constrain the Guidelines to the decisions that were taken when approving the Directive, without broadening the provisions on creditworthiness or on arrears and foreclosures. Reopening issues already solved at a political level would not contribute to the stability of the legal framework in terms of certainty about the compliance obligations.

- The European Banking Authority’s draft Guidelines on arrears and foreclosure (based on the EBA Opinion on Good Practices for the Treatment of Borrowers in Mortgage Payment Difficulties) goes much further than the requirements imposed by the Mortgage Credit Directive notably as regards 1.1 (procedures for early detection), 1.2 (policies and procedures for effective handling of), 2.1 (training of staff) or 3.4 (information about available government/public schemes). It is also imperative to preserve a right balance between gathering relevant information on the financial situation of the customer and the respect of data protection requirements.
- It is also important to insist on the fact that it should not be imposed to lenders to predict the financial situation of their customers. Indeed primarily failures concern the accidents of life (illness, divorce, job loss ...) generating an abrupt change in the financial situation of the customer.
- The MCD was approved less than one year ago and must be implemented by March 2016, meaning that all national-level procedures will have to be modified to comply with the new Directive. The implications of the transposition of the Directive and the implementation of the Guidelines could be significant for firms’ MCD implementation programmes, and delivery timescales may be challenging.



RESPONSES TO QUESTIONS

Question 1: Do you agree with the proposed Guidelines? If not, outline why you disagree and how the Guidelines could be improved. Please respond separately for each of the five Guidelines.

GUIDELINES 1: ESTABLISHMENT OF POLICIES AND PROCEDURES

Guideline 1.1:

Point 1.1 requires the creditors to establish procedures to detect early indications.

The EBF believes that flexibility should be maintained regarding the early detection of financial difficulties of a borrower. The EBF does not contest the need to establish procedures to identify upstream the financial difficulties of the consumer. However, the EBF considers that such obligation should be an obligation of diligence and not results oriented.

In addition, it is unclear whether it will be possible, taking into account the prospective changes in legislation (Data Protection Regulation and the articles on profiling). If this obligation was to be set, there should be a clear legal basis for the processing of data.

The wording “to detect early indications” is subjects to interpretations. We consider that an example such as “a borrower’s request to reduce/delay a payment” should be included in the Guidelines to avoid misinterpretation by national authorities which may believe that banks should be expected to go even further in the assessment. It would for instance be extremely burdensome and even impossible for banks to follow changing customer patterns of expenditure over time.

Suggestion for amendment

1.1 The creditor should establish procedures to detect early indications of consumers going into payment difficulties, **such as a borrower’s request to reduce/delay a payment.**

Guideline 1.4:

The article 1.4 requires the policies and procedures to be reviewed ‘regularly’. Whilst this is not a defined period, it does allow flexibility for the Member State to interpret the frequency and circumstances when it would expect creditors to undertake the reviews. We support this flexible approach.

GUIDELINE 2: ENGAGEMENT WITH THE CONSUMER

Guideline 2.1:

It is stated that “When a consumer goes into payment difficulties, the creditor should work with the consumer to establish why the difficulties have arisen and for the creditor to take appropriate steps”.

It has to be noticed that in some cases consumers in payment difficulties refuse to cooperate with the bank.



We believe the Guideline should take this into consideration and should be adapted as follows:

Suggestion for amendment:

2.1 When a consumer goes into payment difficulties, the creditor *should take reasonable steps to* work with the consumer to establish why the difficulties have arisen ~~and for the creditor to take appropriate steps.~~

Guideline 2.2:

- Point 2.2 states that the creditors should “conduct meetings with the consumer in relation to their payment difficulties in privacy having regard for data protection legislation and not disclosing personal information to a third party without a consumer’s consent”.

The creditors should not be obliged to conduct meetings with the consumers. Indeed such requirement could create difficulties in practice (e.g consumer simply does not show up). The Guidelines should either be more general or regulate only about the communication between the creditor and the consumer. The consumer often does not want to cooperate with the creditor and a meeting would be very difficult to set up. The reluctance of the consumers should not be neglected.

- It would be more appropriate to draw up general remedy procedures and proposals, function of customer-in-difficulty categories, with solutions specific for each of these categories, step by step, function of the degree of financial difficulty they are in, instead of dealing on a case by case basis.
- In some Member States banks operate on the internet and do not have branches. “Meetings” should be replaced by “dialogue” since those banks cannot meet a physical meeting requirement.

Suggestion for amendment:

The following wording should be proposed: “if ~~the creditor should conduct meetings~~ enter into a dialogue with the consumer in relation to their payment difficulties, the dialogues should be held in privacy having regard to data protection legislation ...”

- The paragraph is not very clear with regard to the data protection regulation. Based on a first reading, it could be misunderstood that consent is always necessary even when the intermediary communicates payment default information to third parties such as credit bureau. It should be clarified that the reference to consent relates to personal information, such as causes of default (loss of job, etc.).
- It is also important to consider that it is obvious that in foreclosure cases, the relationship between the bank and its customer becomes more difficult, so that it is highly unlikely that this customer gives his/her agreement regarding the processing of his/her personal data, a fact that would have as effect blocking the bank’s actions to work out its receivables via receivables work out companies.



GUIDELINE 3: PROVISION OF INFORMATION AND ASSISTANCE TO THE CONSUMER

Guideline 3.1:

The intended purpose of this Guideline and the need for a “consumer engagement policy” is not clear. It must be clarified that creditors are not responsible for debt counselling which is the responsibility of public authorities.

It is important to note that article 1.2 requires a creditor to establish policies and procedures for the effective handling and engagement with consumers in payment difficulties. The creditor policy can include the format and channels in which information is provided to consumers.

Articles 3.1-3.4 appear to impose new obligations at both a procedural and information level that are not contained within the MCD and do not appear to reflect the aim of Article 28 of the Directive. As an example of this, 3.4(b) imposes a new information disclosure requirement on creditors which comes in addition to the already extensive information requirements under the MCD.

Article 3.1 refers to consumers who ‘*are concerned about payment difficulties*’. MCD Article 28 refers to arrears and foreclosure.

- Therefore we feel that any general requirement around signposting consumers to financial advice or support when they are not in payment difficulty should not be included in the Guidelines. The requirement to provide general information, support and advice on financial planning should be for the Member State to define as appropriate.
- We consider that the requirement to establish policies and procedures for the engagement of consumers is covered under Guideline 1.2, and that Guideline 3.1 should therefore be removed.
- Otherwise, as this provision concerns only one category of customer, the title should be redrafted: “*Provision of information and assistance to the consumer in, or concerned about, payment difficulty*”.

Guideline 3.3:

The provision mentioned in paragraph c) should be completed as follows: “*c) the charges incurred as a result of the payment shortfall **known by the creditor***”

Guideline 3.4:

- The Guidelines impose to the creditor to provide information regarding consequences of missing payment in the mortgage credit agreement. It is important to recall that such obligation is already included in most of national legislations.
- Further clarification should be provided about the meaning of “*government/public scheme or support*”. Is the Guideline referring to the Alternative Dispute Resolution scheme, free legal support or maybe social assistance?
It is also important to clarify that banks should not be liable for the information provided as the creditor cannot act as a legal advisor.



In the EBF's views it would be enough to draw up remedy procedures and proposals per categories of customers in difficulty, with solutions specific for each of these categories, without making it compulsory to negotiate with each individual customer.

GUIDELINE 4: RESOLUTION PROCESS

Guideline 4.1:

Point 4.1 regulates the resolution process and includes a list of the concessions to the consumer.

- The Guidelines should clearly state that the concessions mentioned are only examples and that the creditors always have the right to refuse to make any concessions in each individual case. Changing the type of mortgage is not a viable action for banks in their efforts to work out their receivables, taking into account the fact that the types of mortgages grant different levels of loan securing. Thus, changing a real estate mortgage into a mortgage on some movables would reduce the level of loan securing and therefore, the chances for banks to work out their receivables decrease significantly. From the creditor's point of view, a concession towards the consumer should not be an obligation.
- The Guideline should not lead to a situation where borrowers are purposely not paying their instalments in the knowledge that they will receive concessions.
- In addition, the Guideline should not prevent the creditors from requiring negotiations on the terms and conditions of the credit agreement as a counterbalance to the concessions made. If it was considered an obligation, then it could have an important impact on risk-weighted assets, thus raising the cost of mortgage loans (e.g. higher interest rates) and the risk of credit crunch phenomena.

- The following wording should be considered in paragraph 1: (...) "*when deciding **whether, and if so** ~~on~~ which steps/forbearance measures to take, **if any.***"
- (...) "*Concessions to the consumer **may include:***"

- In addition, the limitation period should be considered.

The wording in the second sentence should be therefore adapted as follows:

*"Forbearance measures consist of concessions towards a consumer facing, or about to face, difficulties in meeting his/her financial commitments, **in accordance with national time limit on the validity of claims on outstanding payments**".*

GUIDELINE 5: DOCUMENTATION OF DEALINGS WITH THE CONSUMER AND RETENTION OF RECORDS

- The requirement for justification is administratively heavy and presents a subjective character in the explanation for risk and could be challenged before a judge. The interest of the lender and the borrower are not always aligned. This provision could therefore increase litigation.



- We consider that following some remedy procedures and proposals per categories of customers in difficulty with specific solutions for each of these categories would be more appropriate to meet the aim of the proposed measures, as they are at the same time much more transparent; and moreover, to the extent to which the requirement would be implemented in this format, we are of the opinion that it should set forth clearly the terms and conditions to archive such documentation.
- It is important to clarify that the information should only be available for competent authorities.

Question 2: Are there any additional requirements that you would suggest adding to the Guidelines? If so, outline the reason(s) for each proposed additional requirement.

No additional requirements are considered necessary

Noémie PAPP
Legal Adviser Consumer Affairs
n.papp@ebf-fbe.eu

