

After the reform is before the reform

## **Revision of the Consumer Credit Directive and Mortgage Credit Directive**

XIXth European Congress of the EFBS in Prague  
17 and 18 October 2019



# Outline

1. General political context
2. Revision of the Consumer Credit Directive
3. Revision of the Mortgage Credit Directive
4. Other changes that could affect European credit law
5. Conclusion



# Who am I?

**Christian König, LL.M.**

Managing Director of the European Federation of Building Societies, Brussels  
([www.efbs.org](http://www.efbs.org))

Managing Director of the Association of Private Bausparkassen, Berlin  
([www.bausparkassen.de](http://www.bausparkassen.de))

attorney-at-law

**Studies** in Bonn, Strasbourg, Graz, Stockholm

**Previous activities:** Vinge Stockholm law firm, Leinen & Derichs Cologne law firm, Schollmeyer & Rickert Bonn, German-Thai Chamber of Commerce Bangkok, Head of the European Office of the European Federation of Building Societies in Brussels, General Counsel the Verband der Privaten Bausparkassen, former Member of the Board of Directors of the Berufsbildungswerk der Bausparkassen



# 1. General political context



European Federation  
of Building Societies



Association of Private  
Bausparkassen



HVB Banca pentru Locuințe



# 1. General political context

## European Commission Candidates 2019-2024

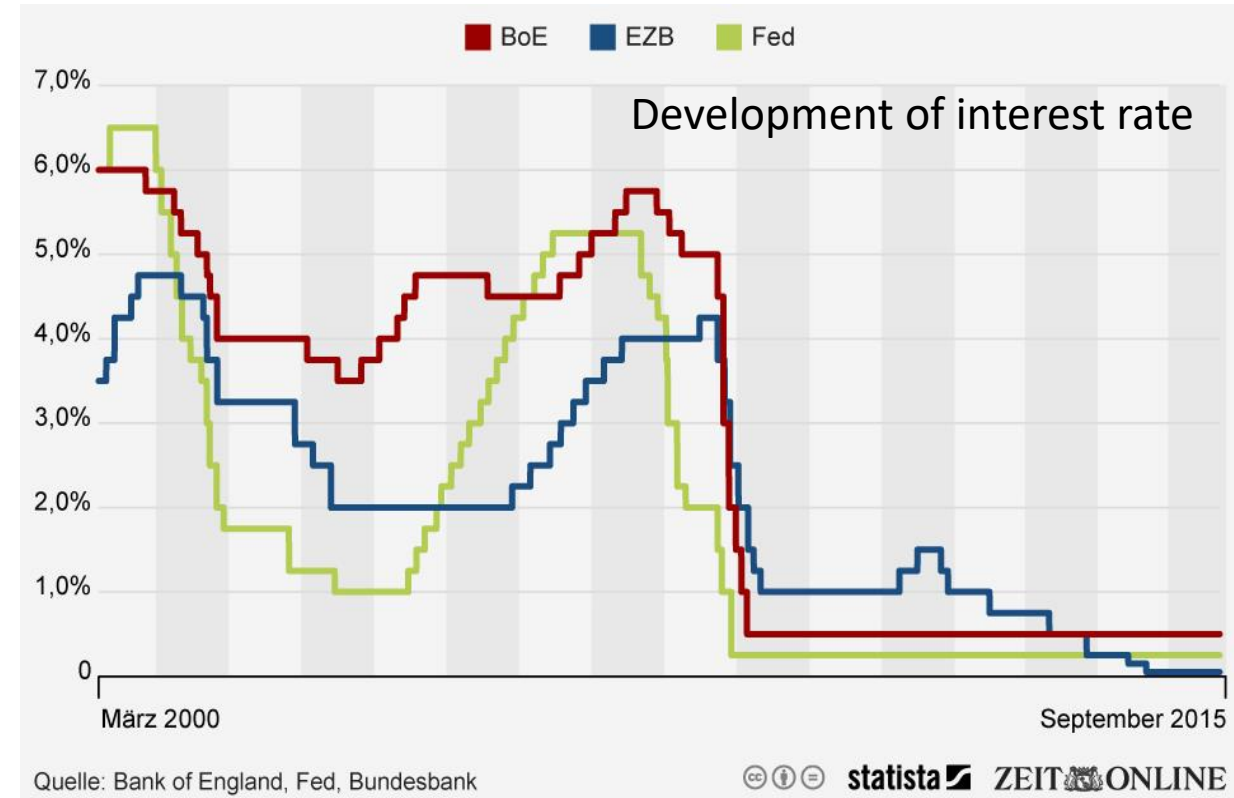
 <p><b>Ursula von der Leyen (DE-EPP)</b> Elected president 2019-2024</p> 	 <p><b>Frans Timmermans (NL-S&amp;D)</b> Vice-president 2019-2024 EU commissioner for fundamental rights 2014-19</p> 	 <p><b>Josep Borrell (SP-S&amp;D)</b> Vice-president 2019-2024 &amp; High representative of the European Union</p> 	 <p><b>Margrethe Vestager (DK-Renew)</b> Vice-president 2019-2024 EU commissioner for Competition 2014-19</p> 
 <p><b>Johannes Hahn (AT-EPP)</b> EU commissioner for neighbourhood policy and enlargement negotiations 2014-19</p> 	 <p><b>Kadri Simson (EE-Renew)</b></p> 	 <p><b>Paolo Gentiloni Silveri (IT-S&amp;D)</b></p> 	 <p><b>Elisa Ferreira (PT-S&amp;D)</b></p> 
 <p><b>Didier Reynders (BE-Renew)</b></p> 	 <p><b>Jutta Urpilainen (FI-S&amp;D)</b></p> 	 <p><b>Valdis Dombrovskis (LV-EPP)</b> EU commissioner for euro and social dialogue 2014-19</p> 	 <p><b>Dan Nica and Rovana Plumb (RO-S&amp;D)</b></p> 
 <p><b>Mariya Gabriel (BG-EPP)</b> EU commissioner for digital economy and society 2014-19</p> 	 <p><b>Sylvie Goulard (FR-Renew)</b></p> 	 <p><b>Virginijus Sinkevičius (LT-Greens/EFA)</b></p> 	 <p><b>Maroš Šefčovič (SK-S&amp;D)</b> Commission's vice-president in charge of the energy union 2014-19</p> 
 <p><b>Stella Kyriakides (CY-EPP)</b></p> 	 <p><b>Margaritis Schinas (GR-EPP)</b> Spokesperson of the EU commission 2014-19</p> 	 <p><b>Nicolas Schmit (LU-S&amp;D)</b></p> 	 <p><b>Janez Lenarčič (SI-Renew)</b></p> 
 <p><b>Dubravka Šuica (HR-EPP)</b></p> 	 <p><b>László Trócsányi (HU-EPP**)</b></p> 	 <p><b>Helena Dalli (MT-S&amp;D)</b></p> 	 <p><b>Ylva Johansson (SE-S&amp;D)</b></p> 
 <p><b>Věra Jourová (CZ-Renew)</b> EU commissioner for justice, consumers and gender equality 2014-19</p> 	 <p><b>Phil Hogan (IE-EPP)</b> EU commissioner for agriculture and rural development 2014-19</p> 	 <p><b>Janusz Wojciechowski (PL-ERC)</b></p> 	 <p>The UK has officially confirmed that it will not nominate a European Commissioner candidate.</p> 

\*\* The European People's Party (EPP) membership of Hungarian party Fidesz was suspended on March 2019.

# 1. General political context

## Political environment for regulation

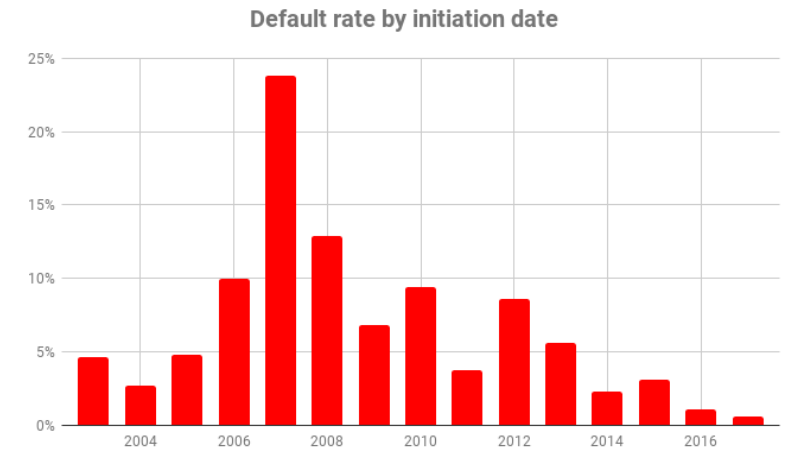
- From 1 November 2019 von der Leyen Commission
- Didier Reynders Commissioner for Justice
- Valdis Dombrovskis, Commissioner for financial services
- Historically low interest rates, ECB
- Low number of foreclosures in the EU



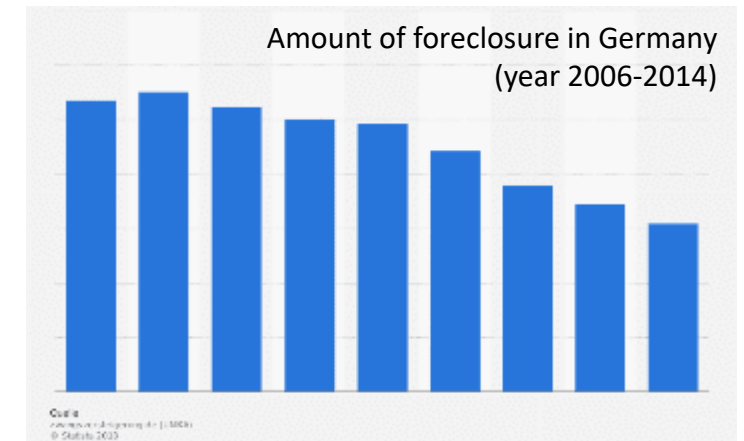
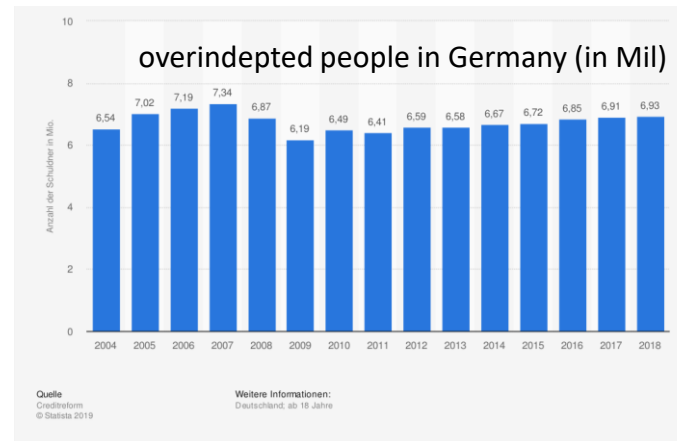
# 1. General political context

## Political environment for regulation

- From 1 November 2019 von der Leyen Commission
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## Housing foreclosures Spain





# 1. General political context

## Political environment for regulation

- From 1 November 2019 von der Leyen Commission
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- Valdis Dombrovskis, Commissioner for financial services
- Historically low interest rates, ECB
- Low number of foreclosures in the EU
- But miss-selling cases



**£20,400**  
compared with a  
national average  
of **£26,370**



**76%** of borrowers  
had no savings, the  
rest have an  
average of **£177**



### Bills

**68%**  
struggle to pay  
their bills



### Debts

Average of  
**£4,700** in  
non-mortgage  
debts



Source: Financial Conduct Authority, 2017

BBC





## 2. Revision of the Consumer Credit Directive

- First Consumer Credit Directive (87/102/EEC)
- Current Consumer Credit Directive (2008/48/EU) (in the following called CCD)
- Usual revision clause, i. e. automatism of reform

Finance Watch full response to the European Commission Open Public Consultation on the Evaluation of Directive 2008/48/EC (Consumer Credit Directive - CCD) – 8<sup>th</sup> April 2019

Part 9: Questionnaire for other stakeholders

### Questions on relevance

Relevance looks at the relationship between the needs and problems in society and the objectives of the Directive. It also requires a consideration of how the objectives of Directive correspond to wider EU policy goals and priorities.

Note that some Member States have adopted more regulation on consumer credit than only CCD. Harmonization towards a minimum consumer protection is not desirable.

Same for Belgium (see note 5.1 et 2)

**Question 1. Do you consider that the following developments have changed the provision of consumer credit since 2008?**

Finance Watch agrees with the identified elements that have impacted consumer credit provision.

Other important aspects to consider are:

- Change in the market share of the banking and non-banking credit market (for example P2P, crowd-funding, FinTech, Fintech, etc.)
- Increased role of credit intermediaries and impact on responsible lending practices
- Complex and unclear lending products (insurance + credit) to avoid proper use of APR as comparison tool for consumer choice
- The financial crisis, the corresponding repayment problems of households and the reaction of governments, Central Bank and the law

Automated decision-making based on the use of big data and algorithms for consumer credit risk assessment P2P lending platforms are a very different business model compared to traditional bank lending business as they are spreading all risks to platform users and take themselves no credit risk. There are no disclosure standards concerning APR rates, no standards for calculation of APRs, both the platforms and the borrower have some incentive not to be too critical concerning the risks. The platform generates its income through a fee which usually corresponds to a certain percentage of the transaction volume. This payment model provides a steady incentive to stimulate the platform's transaction volume by exaggerating the investment opportunities and profit chances while the risks of investment projects are rather played down or concealed.

**Exemption from national level, Bulgaria.** This focuses only on the main changes to the Civil Procedure Code (CPC) of Bulgaria, which have fully affected and delivered additional rights, in the first place, from the CPC was changed, the various Article 417 of CPC. Only the rights of commercial banks, according to this article were protected. The banks had the right to correct insolvent debtors, who couldn't defend themselves. At least for 5 years a number of public organisations express their opinion that this article must be removed from the CPC. Finally it was removed from the CPC in 2017. As a result of the application of this Article 417 from the Civil Procedure Code, many citizens lost their real estate and very often it was their unique home.

Guarantees were introduced to the consumers to actually seek out the debtors. When the defendant cannot



Freie Universität Berlin  
John F. Kennedy Institute, Lankstr. 7 - 5 14195 Berlin - Germany  
Phone: Jankstr. Tel. ++49-30-4305 5 20 77, Fax ++49-30-4305 5 20 85, Mail: jankstr@fdk.uni-berlin.de

### The Implications of the New Consumer Credit Directive for EU Credit Market Integration\*

#### POSITION PAPER

Nicola Jentzsch\*\*

Freie Universität Berlin  
John F. Kennedy Institute  
Section of Economics  
Lankstr. 7 - 9  
14195 Berlin

April 22, 2003

#### Abstract

European consumer credit markets are still highly segmented: they differ in credit culture, composition and regulation. The new Consumer Credit Directive is intended to establish a maximal harmonization within member states to further increase integration. But is the Directive in its proposed version an adequate instrument to achieve this goal? To approach this question, the present position paper provides an overview of consumer credit in European economies and the United States. It discusses research on integration in the U.S. and Europe and highlights characteristic aspects of consumer credit markets. It further proceeds in listing market barriers and reviewing the proposed Consumer Credit Directive according to these insights.

\*The views expressed in this paper are those of the author and do not reflect the view of the institution the author is affiliated with. This paper has not been commissioned by any non-profit or for-profit organization.

\*\*The author is lecturer and research fellow at the John F. Kennedy Institute of the Free University of Berlin.

Rotterdam Institute of Private Law

Working Paper

### Information disclosure in the EU Consumer Credit Directive: Opportunities and limitations

Catherine I. Garcia Porras &

Willem H. van Boom



Electronic copy available at: <http://ssrn.com/abstract=1538111>



### Consumer Credit Directive Consultation

Department of Finance

By Paul Joyce,

Senior Policy Researcher

HAC

April 2009



### Consumer Credit, Digitalisation and Behavioural Economics

Are new protection rules needed?



## 2. Revision of the Consumer Credit Directive

### **Art. 27 Para. 2 CCD, obligation to review by Commission every 5 years**

- Fixed threshold fees and percentages with regard to calculation of the early repayment compensation (Art. 16 para. 1 CCD: early repayment compensation max 1% or 0.5% of the loan amount earlier repaid and valuation in the light of economic trends and the situation)
- Examination of the exceptions of the CCD for organizations granting loans to their members (Art. 2 para. 5 CCD) and exceptions to deferral or repayment modalities to avoid legal proceedings (Art. 2 para. 6 CCD)
- Content of standard information in advertising (Art. 4 para. 1, 2 c) CCD Reference here to reduced requirements for overdrafts Art. 2 para. 3 CCD)
- Not necessary indication of the APRC for overdraft loans in Art. 6 para. 2 CCD
- Mandatory information in the credit agreement pursuant to Art. 10 paras. 1 and 2, in particular g) APRC and total cost of the credit
- Special provision for a shorter withdrawal period for linked credit agreements that already exist under national law (Art. 14 para. 2 CCD)
- Special provision for national threshold values for early repayment compensation, higher early repayment compensation if higher losses can be proven, etc. (Art. 16 para. 3 CCD)



## 2. Revision of the Consumer Credit Directive

### Previous work of the COM

- Roadmap with the possibility to consult till July 2018
- Consultation 14.01.-8.04.2019
- Study by CIVIC Consulting
- The results of the consultation can be found below:
- ([https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3472049/public-consultation\\_de#consultation-outcome](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3472049/public-consultation_de#consultation-outcome))

STAFF WORKING DOCUMENT

### Evaluation of the Consumer Credit Directive

**Roadmap**  
Feedback period  
29.06.2018 - 27.07.2018  
FEEDBACK: CLOSED

**Public consultation**  
Consultation period  
14.01.2019 - 08.04.2019  
FEEDBACK: CLOSED

**UPCOMING**

**Commission adoption**  
Planned for  
Fourth quarter 2019

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Fee  
29 Jul

EVALUATION ROADMAP	
Roadmaps aim to inform citizens and stakeholders about the Commission's work to allow them to provide feedback and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to share any relevant information that they may have.	
TITLE OF THE EVALUATION	Evaluation of the consumer credit directive
LEAD DG – RESPONSIBLE UNIT	JUST.E1
INDICATIVE PLANNING (PLANNED START DATE AND COMPLETION DATE)	Planned start date Q3 2018 Planned completion date Q4 2019
The Roadmap is provided for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the document, including its timing, are subject to change.	

A. Context, purpose and scope of the evaluation
<p><b>Context</b></p> <p>The Consumer Credit Directive<sup>1</sup> (Directive 2008/48/EC) aims to create a single market for consumer credit and to achieve a level playing field for consumer credit across the EU. It introduces important rights for consumers, as the lender must, before signing a contract for a credit product, perform a creditworthiness assessment and help the borrower to identify the total cost of the credit by providing standardised information and the annual percentage rate of charge (APR). The Directive also gives consumers the right to withdraw from the agreement within 14 days of signing and to repay the loan or credit at any time.</p> <p>A first report on the implementation of the Directive<sup>2</sup> was adopted in May 2014. It concluded that several provisions of the Directive were often not being respected by creditors, namely those on advertisements and pre-contractual information, and those on duty to inform consumers about their rights. The report also concluded that consumers often encounter problems when exercising rights granted by the Directive. Following-up on the report, the Commission emphasised the need to continue monitoring the enforcement of the Consumer Credit Directive.</p> <p>In 2017, a <a href="#">REFIT Platform opinion</a> on the Consumer Credit Directive was adopted. The REFIT Platform recommended that the Commission assess the relevance, effectiveness and efficiency of the standard information requirements triggered by Article 4 of the Directive, regarding the standard information to be included in advertising. Such an assessment could also examine the coherence with other Directives such as the Mortgage Credit Directive (2014/17/EU) and the Directive on unfair commercial practices (2005/29/EC).</p> <p>In the <a href="#">EC Consumer Finance Action Plan</a><sup>3</sup>, the Commission undertakes to explore ways of facilitating cross-border access to consumer credit, while ensuring a high level of consumer protection, including with a focus on creditworthiness assessment standards and credit registers.</p> <p>Against this background, the Commission has decided to carry out a full-fledged evaluation of the Consumer Credit Directive, in line with Better Regulation principles. The evaluation is planned to be concluded in 2019.</p>
<p><b>Purpose and scope</b></p> <p>In recent years, the consumer credit market has developed quickly. In particular, an increasingly digitalised market undergoing continuous innovation creates both opportunities and risks for lenders and consumers. In this context, it is necessary to evaluate the functioning of the Directive in the EU, including whether the rules of the</p>

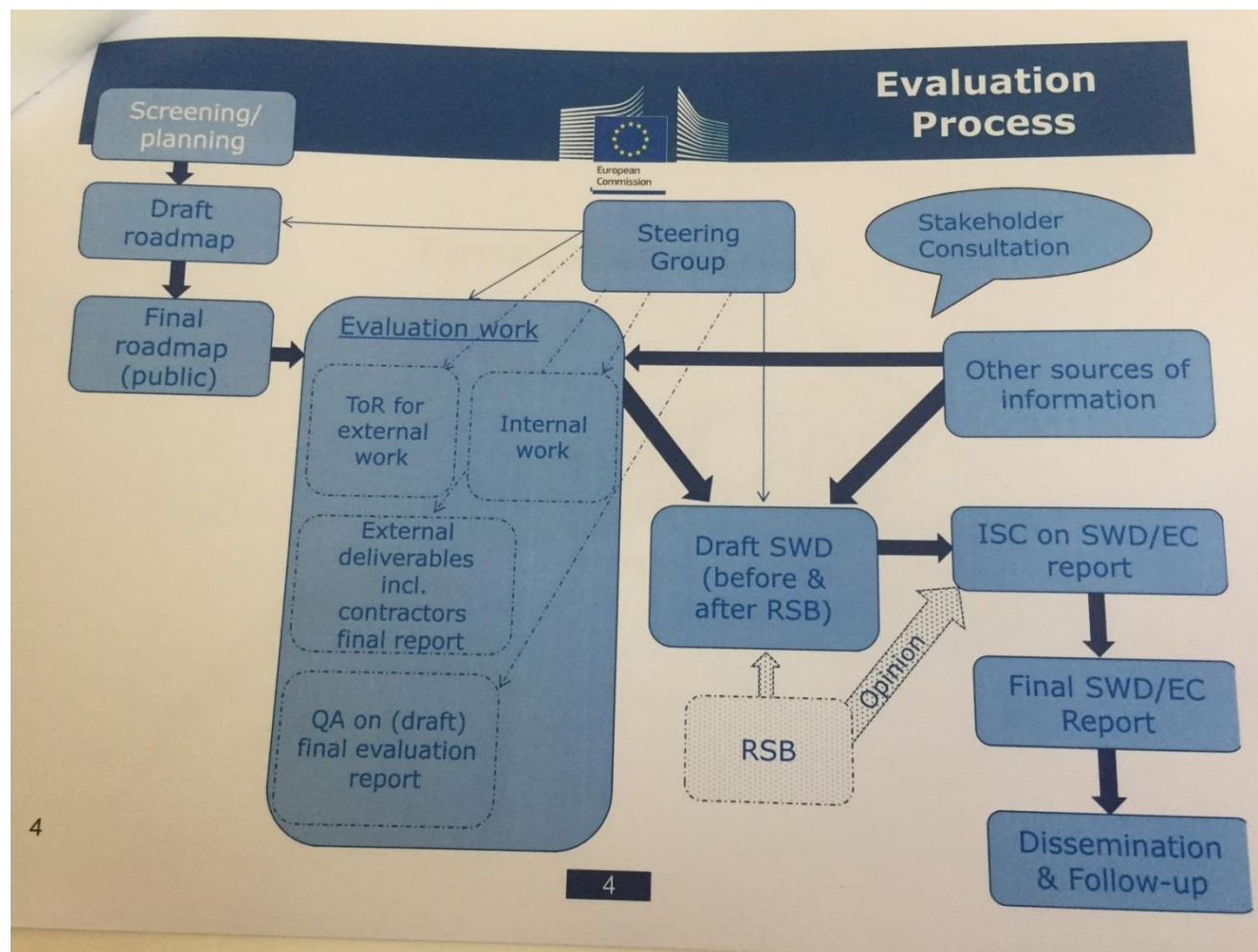
<sup>1</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC

<sup>2</sup> COM(2014) 259 final, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2008/48 on credit agreements for consumers

<sup>3</sup> COM(2017) 139 final, Communication from the Commission – Consumer Financial Services Action Plan: Better Products, More Choice



## 2. Revision of the Consumer Credit Directive



**Internal process of the preparation of the European Commission:**

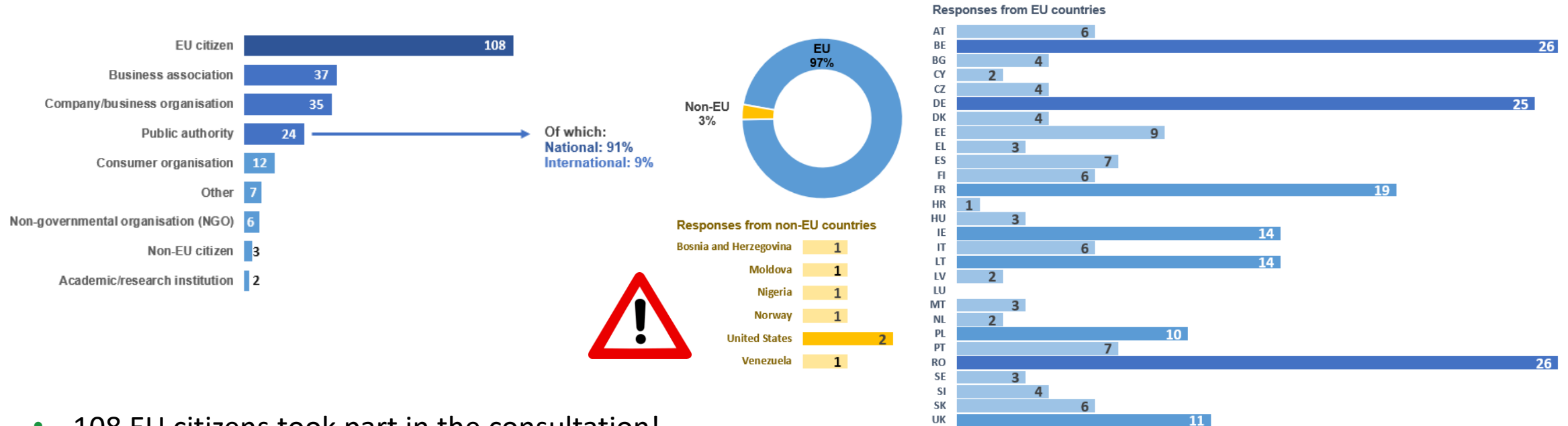
**Timetable and objective:**

To submit to the new Commissioner, from 1 November 2019, a legally sound proposal for a Directive, which has been legally examined as necessary and for which there is a proven and widely supported need for regulation!



## 2. Revision of the Consumer Credit Directive

### Insights into the results of the COM consultation



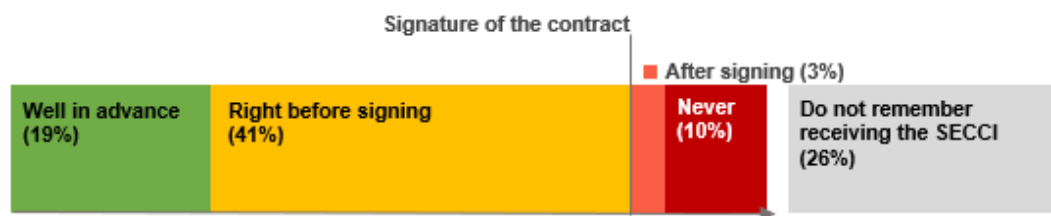
- 108 EU citizens took part in the consultation!
- Only 12 consumer organisations!
- 27 respectively 35 business organisations!
- 26 replies from Belgium and Romania and 25 from Germany!



## 2. Revision of the Consumer Credit Directive

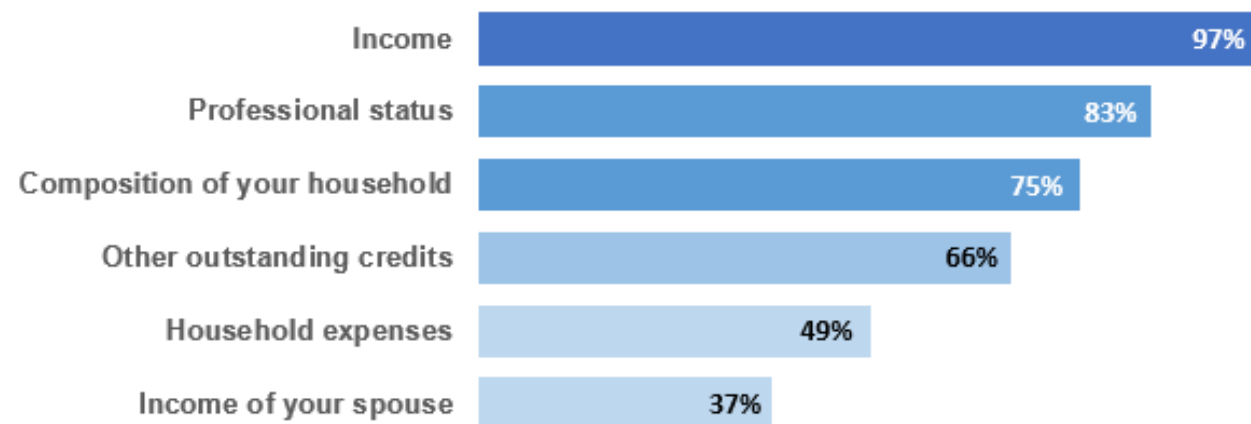
### Insights into the results of the COM consultation

*Do you remember exactly when you received the SECCI related to your last loan?*



### *Credit worthiness assessment*

*What information were you asked for, verbally or in writing?*

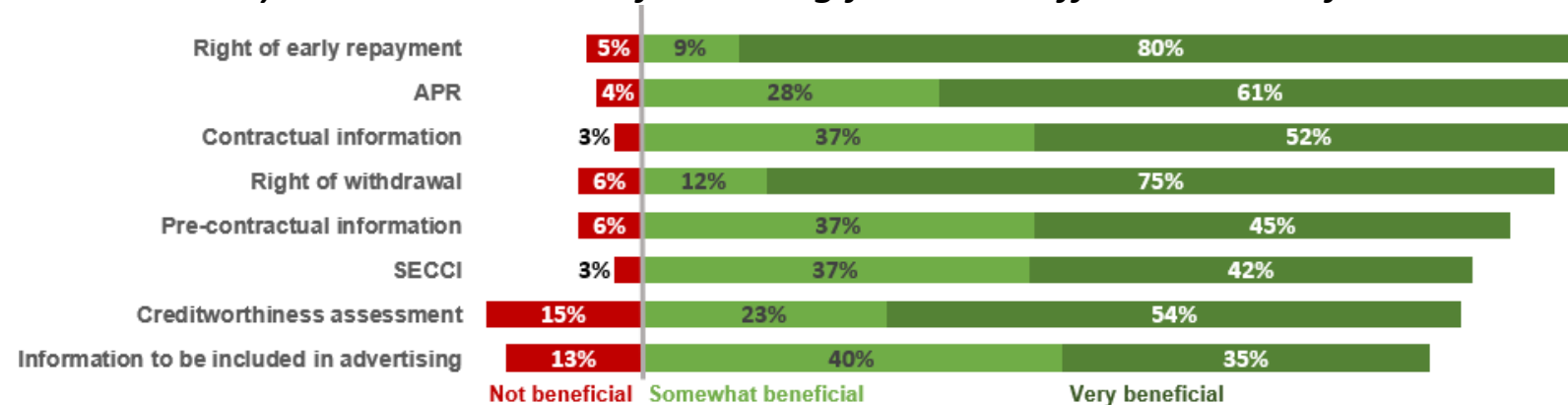




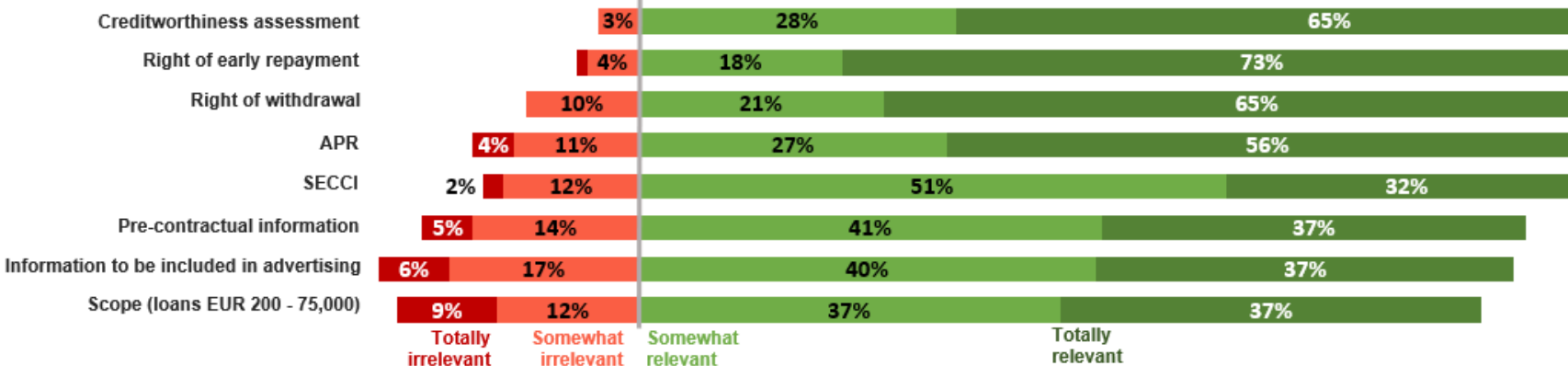
## 2. Revision of the Consumer Credit Directive

### Insights into the results of the COM consultation

*How would you assess the benefits arising from the different rules of the Directive?*



Note: The remaining percentage to 100% corresponds to respondents who answered 'Do not know'



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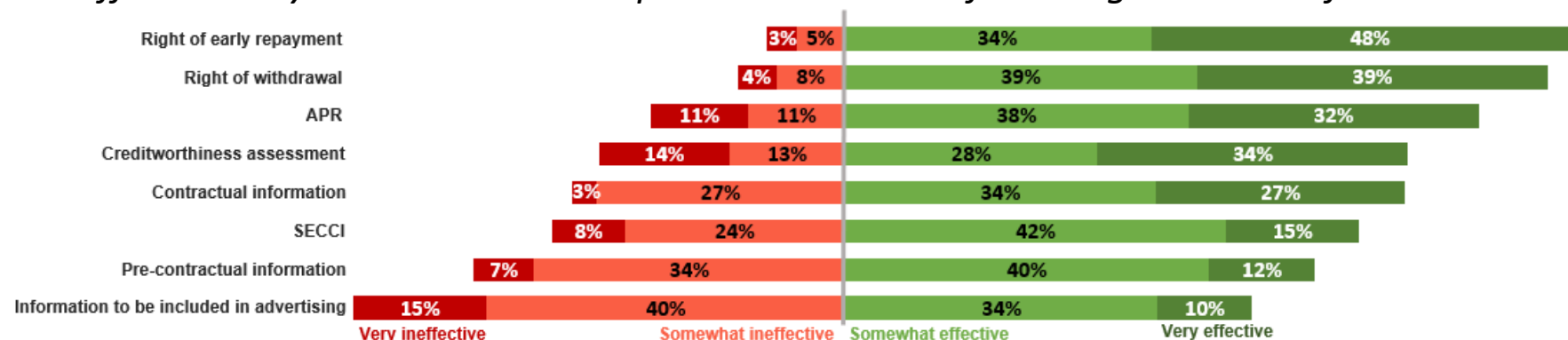
*How relevant do you consider the following provisions of the Directive to be in the light of the objectives of the Directive?*



## 2. Revision of the Consumer Credit Directive

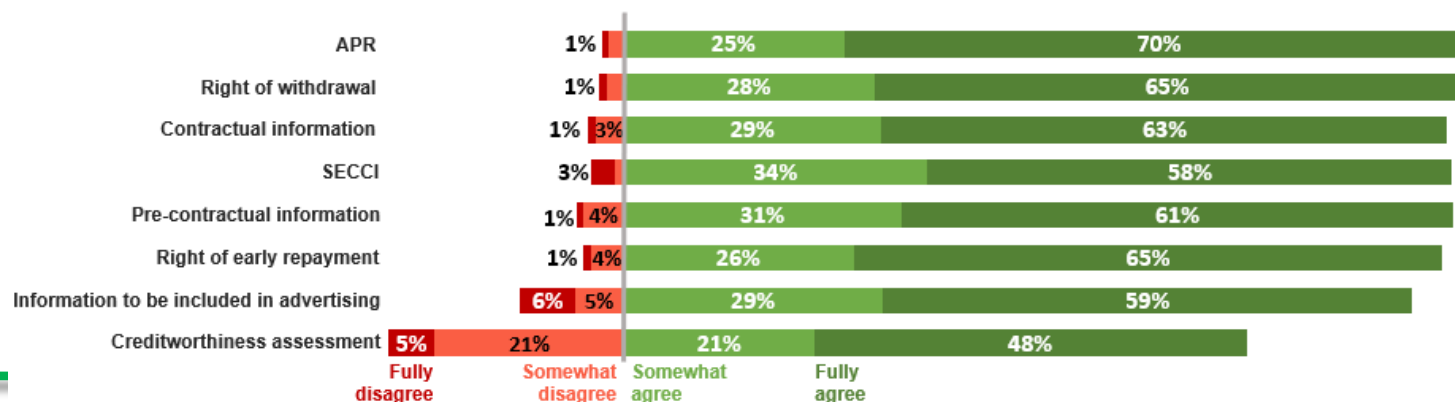
### Insights into the results of the COM consultation

*How effective do you think consumer protection is in the following elements of the Directive?*



Note: The remaining percentage to 100% corresponds to respondents who answered 'Do not know'

*Should the following different aspects be regulated at EU level?*



Note: The remaining percentage to 100% corresponds to respondents who answered 'Do not know'



## 2. Revision of the Consumer Credit Directive

At an event organised by COM and CEPS on 18 June 2019, the following was proposed:

- **ING** called for:
  - further **harmonisation** in the field of **advertising**, as there is hardly any cross-border business,
  - regulation of the use of **digital customer data** as part of the automated credit assessment of other IT service providers
- EBF called for reform of the CCD with regard to **the use of digital customer identification features** and digital "know your customer" processes.
- Representatives of **DG Justice and Consumer Protection** called for:
  - to set limits on so-called **pay day** loans,
  - they claimed that consumer credit was mainly sought by poor and vulnerable groups of the population, thereby increasing the risk of over-indebtedness disproportionately,
  - introduction of a **cooling off period of 24 hours**  
(for so-called **pay day** loans in **Denmark** there is a reflection period of 48 hours)



## 2. Revision of the Consumer Credit Directive

At an event organised by COM and CEPS on 18 June 2019, the following was proposed:

Consumer organisations demanded:

- that if credit institutions used algorithms to influence consumer behaviour and set individual prices on the basis of those algorithms, the consumer would not be liable for any resulting error or non-payment,
- the mis-selling of **foreign currency loans** in the past, which according to their assertion was mainly made possible by **commission-driven** sales, was also criticised,
- regulations for **monitoring** compliance by public authorities with the requirements of the Consumer Credit Directive,
- for example, as in the case of the reduction of the sugar content in food products, a corresponding **reduction** in the granting of credit by credit institutions, and in some cases also the **allocation** of consumer credit,
- copying regulations on **residual debt insurance from Germany** - see also [www.thepriceofbadadvice.eu](http://www.thepriceofbadadvice.eu)
- or the prohibition of **cross-selling at the point of sale** of the consumer credit with a residual debt insurance,
- that, in the event of early repayment of the credit, the consumer should be ensured that the proportional part of the residual debt insurance premium is repaid,
- the prohibition of commissions on the sale of investment products and complex financial products



## 2. Revision of the Consumer Credit Directive

At an event organised by COM and CEPS on 18 June 2019, the following was proposed:

Consumer protectors called for:

- **socialising** the costs of **unpredictable consumer motives for failure** - in the health insurance sector this is already the case today,
- the inclusion of **overdraft loans in the CCD** as well as **leasing contracts** / since the CCD came into force, an increase in "alternative transactions" has occurred in this respect,
- the inclusion of **0% loans** in the directive - German regulation as a benchmark here,
- the introduction of standards for **responsible lending in the area of consumer credit**,
- increased consumer protection for **revolving credits** (Spain) and **payday loans** (GB) (question of definition),
- CCD should not only regulate the legal relationship between entrepreneurs as lenders and consumers as borrowers, but also **between consumers themselves**; the reason for this expansion is the increasing granting of credits through so-called **crowd funding platforms**.



## 2. Revision of the Consumer Credit Directive

**At an event organised by COM and CEPS on 18 June 2019, the following was proposed:**

- A representative of **ICF International**, the consultant for the COM, called:
  - **gaps** in the CCD should **be filled**, abolition of the lower limit of **€ 200** in the scope (in Eastern Europe this would partly correspond to 50% of one month's salary),
  - it considered the **information requirements** of the Directive to be too extensive and irrelevant,
  - he also spoke out in favour of the reduction of information obligations

Study not yet published.





## 2. Revision of the Consumer Credit Directive

The information duties of the CCD are discussed:

- Reduction and comprehensibility of pre-contractual information (**SECCI**),
- Classification of truly essential information,
- **Summary of a summary**, infobox,
- Information obligations are too extensive and are not read by the consumer,
- Obligations to provide information in advertising are pointless, since the consumer is not aware of them and cannot, as a rule, read them because of the small font size,
- Information should be made simpler and reduced to the core,
- Even less information is not better understood by consumers,
- The issue is whether the legislator wants the customer to understand the information or whether the customer uses this information for comparison purposes



## 2. Revision of the Consumer Credit Directive

### Group of themes creditworthiness assessment

- **Art. 8 para. 1 p. 1 CCD**

“Member States shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database. Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement.”

- **Art. 18 para. 1 MCD**

“Member States shall ensure that, before concluding a credit agreement, the creditor makes a thorough assessment of the consumer's creditworthiness. That assessment shall take appropriate account of factors relevant to verifying the prospect of the consumer to meet his obligations under the credit agreement.”

⇒ **Strong political desire to adapt**

- **Already concretely proposed in EBA Draft Guidelines on loan origination and monitoring**  
EBA/CP/2019/04 of 19 June 2019



## 2. Revision of the Consumer Credit Directive

### Indicative timetable

- November 2019 (still designated) Commissioner Reynders might be convinced by his staff of the need to reform the CCD
- Q1 or Q2 2020 Proposal for an amendment to the Directive
- Q 3 2020 Start of negotiations under German Council Presidency in EP and Council
- earliest agreement in Q 1 2021, usual two-year implementation period, i.e. implementation into national law earliest in Q1 2023



**A glance in the crystal ball**



## 2. Revision of the Mortgage Credit Directive

### Procedure for reviewing the reform

Art. 44 MCD provides for:

- that COM will review the Directive by 19.03.2019,
- due to delayed transposition by many Member States, the review of the Directive will only start in Q3/2019
- first-stage of infringement proceedings initiated against Poland and Hungary for failure to implement Directive sufficiently
- study commissioned by CIVIC Consulting



## 2. Revision of the Mortgage Credit Directive

### Procedure for reviewing the reform

The verification requirement of Art. 44 MCD provides for the analysis of the:

- application of ESIS and its comprehension by consumers and their satisfaction,
- other pre-contractual information,
- cross-border transactions by intermediaries and lenders,
- the development of the market for non-credit institutions offering credit agreements for residential real estate,
- the need for further measures, including the introduction of a kind of "passport" for non-credit institutions offering credit agreements for residential real estate,
- examination of the need to establish additional rights and obligations in relation to the post-contractual phase of credit agreements,
- extension of the scope of the Directive to substitutable forms of credit,
- assessment of the continued appropriateness of the application of the Directive to unsecured loans taken out for the purpose of renovation of a residential property,
- assessment of the proportionality of the warnings (Art. 11 para. 6, Art. 13 para. 2) as well as potential for further standardisation of the warnings, etc.



## 2. Revision of the Mortgage Credit Directive

### Procedure for reviewing the reform

In addition to the specifically provided aspects of Art. 44 MCD, discussions will also take place on:

- green lending standards,
- **summary of the summary** of the ESIS,
- identification of the essential information,
- better definition of FX loans, avoid exclusion of cross-border workers,
- improvement in credit worthiness standards,
- e.g. based on household income, not individual,
- definition of the credit, capital transfer for an certain time in exchange for an interest, and/or fee, if necessary interest does not have to be positive,
- limitation of the eternal right of withdrawal,
- determination of the time at which the ESIS must be handed-over, cooling-off period





### 3. Other changes affecting the credit law

Current European Court of Justice proceedings on the right of withdrawal

Romano (ECJ, judgment of 11.09.2019, case C-143/18)



- Case by the LG Bonn
- Facts of the case: Mr and Mrs Romano withdrawal a credit agreement concluded in distance selling 9 years after conclusion on the ground that the bank's withdrawal information had been incorrect. The withdrawal information contained a reference to the fact that the right of withdrawal expired as soon as the contract was fully fulfilled by both parties at the express request of the consumer.
- German Supreme Court (BGH): A consumer who has not been duly informed of his right of withdrawal when concluding a credit agreement in distance selling may revoke the agreement for "eternity".
- ECJ: Interpretation of the BGH is not compatible with Directive 2002/65 on the distance selling of consumer financial services. A right of withdrawal also lapses in the case of loan agreements concluded in distance if the contract is fully performed at the express request of the consumer. In addition, the ECJ ruling contains statements on the relevant consumer definition: "normally informed and reasonably observant and circumspect average consumer".

**ECJ rebukes „eternal“ right of withdrawal**



### 3. Other changes affecting the credit law

#### Current European Court of Justice proceedings on the right of withdrawal

##### KH versus Sparkasse Südholstein (Case C-639/18)



- Facts of the case: In 2015, the applicant withdrawal follow-up interest agreements concluded in 2008, 2009 and 2010. It is of the opinion that in the case of a loan agreement concluded in the form of non-genuine section financing, a right of withdrawal after distance selling also exists for an interest prolongation agreement concluded in distance selling.
- German Supreme Court (BGH): In the case of a loan agreement in the form of non-genuine section financing, the right of withdrawal exists only with regard to the original conclusion of the agreement, since the consumer is only granted a right to use capital at this point in time. On the other hand no right of withdrawal exists for following interest prolongations (last: BGH, judgement of 15.01.2019, Az. XI ZR 202/18).
- EU Commission statement: Contrary to the case-law of the BGH, there is a right of withdrawal for interest prolongations made in distance, since this is a "contract concerning financial services" within the meaning of Article 2 letter a of Directive 2002/65 on the distance selling of financial services to consumers.
- Opinion expected on 26 October 2019

**„New right of withdrawal with follow-up interest agreement?“**



### 3. Other changes affecting the credit law

Current European Court of Justice proceedings on the right of withdrawal

**SM versus Sparkasse Saarbrücken (Case C-209/19)**



- Procedure at the LG Saarbrücken
- Facts of the case: Plaintiff withdrawal consumer credit agreement on the ground that the so-called cascade reference in the instruction on withdrawal is not correct: 'The period begins after conclusion of the agreement, but only after the borrower has received all the compulsory information pursuant to Paragraph 492(2) of the Bürgerliches Gesetzbuch (BGB - German Civil Code) (e.g. information on the type of loan, information on the net loan amount, information on the term of the agreement)'. This cascade reference is not understandable since § 492 para. 2 BGB refers to Art. 247 §§ 6 to 13 EGBGB, which in turn refers to provisions of the BGB.
- German Supreme Court (BGH): Cascade reference is proper. The requirement of the "clear and concise" naming of the compulsory data according to Art. 10 para. 2p) of the Consumer Credit Directive (Directive 2008/48/EC) does not require the reproduction of all compulsory data in the revocation information.
- ECJ?

**„Groundbreaking order for reference“**

*„1.2-Trillionen-Euro-problem of banks“*



### 3. Other changes affecting the credit law

#### EBA draft guidelines on loan origination and monitoring - Background

- **July 2017:** Council of Ministers **action plan** for NPL reduction
  - October 2018: EBA Guidelines on the Management of Defaulting and Deferred Risk Positions (EBA/GL/2018/06)
  - **19 June 2019: EBA draft guidelines on loan origination and monitoring (EBA/CP/2019/04)**
- **Objectives**
  - strengthening the financial stability and resilience of the financial system by addressing deficiencies in lending policies and practices
  - improving consumer protection in the context of lending



# 3. Other changes affecting the credit law

## EBA draft guidelines on loan origination and monitoring - Background

- Section 1: Compliance and reporting obligations
- Section 2: Subject matter, scope and definitions
- Section 3: Implementation
- Section 4: Governance requirements for credit granting and monitoring
- Section 5: Loan origination procedures
- Section 6: Pricing
- Section 7: Valuation of immovable and movable property
- Section 8: Monitoring framework



### 3. Other changes affecting the credit law

EBA draft guidelines on loan origination and monitoring

Section 2: Subject matter, scope and definitions

- **Loans falling within the scope of application:**
  - **consumer loans according to CCD** - despite ongoing review of CCD and despite lack of competence of EBA until January 2019
  - **residential mortgage loans according to MCD** - despite review of the MCD
  - **commercial loans** - despite EBA's lack of mandate?
- **Restriction of the principle of proportionality**
  - **central principle in EU law** as a barrier to the exercise of competences within the meaning of Art. 5 TEU and to the restriction of fundamental freedoms





### 3. Other changes affecting the credit law

#### EBA draft guidelines on loan origination and monitoring

##### Section 5: Loan origination procedures

- Instead of 6 guidelines for credit assessment of mortgage loans according to MCD so far: now 102 guidelines with high level of detail, for the first time also for credit assessment of consumer loans according to CCD
- Broad equivalence of credit assessment requirements for consumer loans according to CCD with credit assessment requirements for mortgage loan contracts according to MCD
  - despite differences in Art. 8 CCD compared to Art. 18, 20 MCD
  - despite recital 22 MCD ("stricter requirements")
  - in spite of the principle of proportionality



# 3. Other changes affecting the credit law

## EBA draft guidelines on loan origination and monitoring Section 3: Implementation

### Timeline

- **30.9.2019:** End of consultation period
- **approx. end 2019 / beginning 2020:** Final EBA guidelines
- **30.6.2009:** Planned date of application
  - postponement of the commencement of validity, if applicable?
  - differentiation according to different sections, if applicable?

### Retroactive effect

- planned retroactive effect of Section 5 for loans closed before the cut-off date, including "renegotiation of terms and conditions" after the cut-off date
- open questions: Does it also apply to internal debt rescheduling after the reporting date, interest rate prolongations, collateral changes,...?



## 4. Conclusion

- Q3/Q4 2019 CCD reform proposal to be expected
- Possibility and necessity of making real suggestions for improvement
- CCD has always been a role model for the future rules of MCD
- MCD reform is not to be expected until Q3/Q4 2020, but there is still the possibility of presenting changes within the framework of the studies to consultations in advance
- Important: Participation in consultations directly and through associations, early dialogue with COM and EP?



# Thank you for your attention!



Christian König  
Managing Director  
European Federation of Building Societies  
Rue Jacques de Lalaing 28  
1040 Brussels, Belgium  
[info@efbs-bausparkassen.org](mailto:info@efbs-bausparkassen.org)

