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Rapporteur: Ms MADER

On 18 April 2011 and 10 May 2011 respectively, the Council and the European Parliament decided to consult the European Economic and Social Committee, under Article 114 of the Treaty on the Functioning of the European Union, on the


The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 23 June 2011.

At its 473rd plenary session, held on 13 and 14 July 2011 (meeting of 14 July), the European Economic and Social Committee adopted the following opinion by 113 votes to 4 with 7 abstentions.

1. Conclusions and recommendations

1.1 The European Economic and Social Committee is interested to see the Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property, but would express a number of reservations in this connection. The financial crisis, which has led to the insolvency of many home-buyers, forced to sell on their properties at rock-bottom prices, has highlighted the need for adequate European legislation in this field.

1.2 The Committee supports the Commission's objective of creating the necessary conditions for the development of an efficient and competitive single market in order to restore consumer confidence and bolster financial stability. It nevertheless fears that what is contained in the proposal is not enough to achieve this objective.

1.3 The Committee stresses the need to ensure coherence amongst the existing texts, in particular Directive 2008/48/EC (1) on credit agreements for consumers.

1.4 The Committee feels that, by its very nature, the proposal should have Article 169 of the Treaty as its legal basis and not Article 114.

1.5 The EESC would point out that, when rules are harmonised at EU level, a high level of consumer protection should be maintained, and hence consumer rights protected by national laws must not be jeopardised. With this objective in mind, therefore, the Committee believes that harmonisation should be suitably targeted.

1.6 The Committee welcomes the provisions enhancing comparability, particularly those aimed at harmonising definitions and the calculation of the annual percentage rate of charge.

1.7 The EESC considers that the measures aimed at ensuring responsible lending are not enough in themselves to improve market conditions and help to prevent over-indebtedness.

1.8 The Committee considers the regulation of credit intermediaries, for which it had called in its opinion on the proposal for a directive on credit to consumers, to be crucial given the many difficulties faced in relation to these professions. This regulation should be dealt with in general rules and should not be confined to the limited objective of this proposal.

1.9 It also feels that the proposal does not contribute to the achievement of the single market in mortgages in general and regrets that, in this area, use of an optional instrument has not been considered.

1.10 The EESC suggests that certain provisions be clarified or enlarged upon in order to enhance consumer information on variable rates. Consumers have little awareness of reference indices and of the impact variations in rates can have on repayment amounts. It believes that usurious interest rates should be banned, that lending rates for the main residence should be capped, and that changes in interest rates should be based only on objective, reliable and public indices that are external to the lender.

1.11 The Committee recommends that borrowers be able to choose the insurance cover for their loan in order to increase competition amongst insurers.

2. Background and general comments

2.1 On 18 December 2007, the Commission adopted a White Paper on the integration of EU mortgage markets. The related consultation of a large section of the public indicated to the Commission that the discrepancies between existing legislation on mortgages hindered the proper functioning of the single market, increased costs and was detrimental to consumers.

2.2 On 9 July 2008, the European Economic and Social Committee adopted an opinion on the White Paper on the integration of EU mortgage credit markets (1). The Committee, albeit unsure about the real possibility of integrating and harmonising the credit market, given the individual cultural, legal and socio-ethical characteristics of the different Member States, welcomed the fact that a link had been established between the existing mortgage credit rules and the need to protect consumers. It emphasised the responsibility of lenders and borrowers, who must be mindful of the extent of their commitments.

2.3 The current financial crisis has brought to light the weaknesses linked to market and regulatory failures but also to the general economic climate, the practices of credit intermediaries and lenders and low levels of financial literacy amongst borrowers. All of these problems should be avoided in the future since they could lead to a considerable loss of confidence.

2.4 The proposal for a directive takes account of the results of consultations and the work of the OECD and the World Bank.

2.5 Its objective is to ensure a high level of consumer protection within a harmonised EU framework, approximating the laws of the Member States. For this reason, and given its content, the Committee feels that the proposal should have Article 169 of the Treaty as its legal basis and not exclusively Article 114.

2.6 It is aimed at creating an efficient and competitive single market while respecting the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, restoring consumer confidence and increasing financial stability.

2.7 The directive is intended to guarantee consumers’ rights within the meaning of Directive 2008/48/EC on credit agreements for consumers, while allowing Member States the possibility of extending its benefits to certain professional categories, in particular micro-enterprises.

2.8 It applies to loans intended to fund the purchase or renovation of a real estate property which are not covered by Directive 2008/48/EC and whether or not they are provided by means of a mortgage or similar guarantee.

2.9 The proposal for a directive applies the principle of targeted harmonisation, placing particular emphasis on it in order to take account of the differences between existing legislation and the diversity of mortgage markets in the EU.

2.10 However, although the Committee is aware of the importance to the economy of the construction sector, it does not believe that the directive has learnt fully from the experience of the financial crisis, the origins of which can be found in the US mortgage market. The unhealthy practice of granting credits for 100 % or more of a property’s value has encouraged consumers to buy, including those with low incomes. During a period of growth, it is possible to meet substantial commitments, but it has only taken the start of a period of economic stagnation, or recession, for unemployment to have caused widespread defaulting on payments. Large numbers of properties coming onto the market have led to falling prices and immense losses for financial institutions. The root of the crisis, therefore, is over-indebtedness amongst borrowers, a phenomenon which must be prevented at all costs. The Committee’s proposals are set out below.

3. The directive’s proposals

3.1 Chapter 1: Subject matter, scope, definitions and competent authorities

3.1.1 Article 3 of the proposal for a directive, in line with the procedure employed for the directive on consumer credit, provides a definition of the most important terms. In this connection, the Committee would like the term ‘residential’ to be clarified in such a way as to indicate whether it targets only the main residence.

3.1.2 The EESC supports this provision, which is intended to ensure that consumers understand and are able to compare different offers.

3.1.3 The Committee believes that the establishment and organisation of supervisory authorities and cooperation between them are necessary and all the more important in view of the failings which have come to light during the crisis.

3.2 Chapter 2: conditions applicable to creditors and credit intermediaries

3.2.1 Articles 5 and 6 establish requirements in terms of the honesty, fairness and competence of creditors and credit intermediaries serving consumers. They make the Member States partly responsible for ensuring compliance with these requirements, while the Commission reserves the right to specify the requirements for knowledge and competence.

3.2.2 The proposal for a directive also calls upon the Member States to ensure that the remuneration of sellers does not discriminate according to the product sold.

3.2.3 The EESC supports these measures, since high-quality information is crucial when taking on a mortgage. It believes that the remuneration of the staff of lending bodies and credit intermediaries should not encourage them to promote loans which are not suited to consumers’ needs. The EESC would nevertheless draw attention to the use of vague, undefined and subjective concepts likely to give rise to diverging interpretations of a legal text delineating strict requirements.

3.2.4 These two articles do not stress the fundamental distinction between creditors and intermediaries: the staff of creditors are essentially paid a salary, while intermediaries receive a commission. Behaviour based on professional ethics can be expected when remuneration remains ‘neutral’, but this is unlikely always to be the case when the staff of the seller’s income depends on selling the most profitable solution, particularly in the case of intermediaries. All persons in contact with sellers, whatever their role, must therefore receive appropriate training, and the staff of intermediaries must have official authorisation that not only attests to their competences, but which, above all, dictates their behaviour.

3.2.5 There is another fundamental difference: in the event of disputes, the consumer can deal with the creditor, a financial institution which in principle is solid and solvent. In the case of an intermediary, liability is often personal and an intermediary is much less certain to be solvent. This is a further reason for adopting legislation which is much stricter than that currently in force.

3.3 Chapter 3: Information and practices preliminary to the conclusion of the credit agreement

3.3.1 In accordance with Directive 2005/29/EC on unfair business-to-consumer commercial practices (1), advertising must be fair, clear and not misleading.

3.3.2 All advertising containing figures must include a number of indications providing crucial information for consumers wishing to sign up to a mortgage contract. This information must be clear, concise and legible, regardless of the medium by which it is provided.

3.3.3 Article 9 lays down the requirements for pre-contractual information at two levels. It stipulates the general information to be made available and included on the European Standardised Information Sheet (ESIS) for the provision of information to be made available and included on the European contractual information at two levels. It stipulates the general information note should be provided.

3.3.4 Article 10 complements the information to be provided to consumers on the qualifications and operating conditions of the credit intermediary in question.

3.3.5 The EESC takes note of these information obligations. It believes that they should be strengthened with regard to the implications of loans granted at a variable rate. A specific information note should be provided.

3.3.6 The EESC would question the current wording regarding the obligation to obtain insurance covering the loan, which may give the impression that it must be obtained from the creditor. The Committee suggests that consumers be allowed to choose their insurer in order to promote competition amongst insurance companies.

3.3.7 The Committee believes that the regulation of intermediaries’ activities is essential. It considers that it would be useful to include the principle that the charging of any sum (such as a deposit, search costs, loan origination fee, etc.), in any form whatsoever, before the loaned funds are actually handed over, is prohibited.

3.3.8 A final consideration which the Committee believes to be of crucial importance is that consumers should be provided with information encouraging them to consider closely their future repayment prospects. Consumers clearly do not always do so. Creditors must therefore act responsibly, returning systematically to what was once a practice laid down by law in several Member States to the effect that the credit granted should not exceed 70-80% of the property’s value. This rule was of high prudential value and was intended to prevent imprudent behaviour on the part of financial institutions. The sub-prime mortgage crisis has shown how appropriate this rule was. Its reintroduction should be considered, while allowing a degree of flexibility for social housing, for which financial facilities exist in most Member States.

3.3.9 The practice of restricting the capital financed would have a two-fold advantage. On the one hand, it would discourage people who are not solvent, who buy and then suffer over-indebtedness. On the other, it would offer the creditor a guarantee that borrowers are responsible, since they have demonstrated their ability to save. In conclusion, the measure which the EESC would like to see is based on the fundamental principle of responsible lending for responsible borrowers.

3.4 Chapter 4: Annual percentage rate of charge

3.4.1 The EESC welcomes the harmonisation of the method for calculating the annual percentage rate of charge. The method using the total cost of the credit, excluding any charges payable by the consumer for non-compliance with any of his/her commitments, will make offers comparable amongst the different Member States.

3.4.2 The information for borrowers regarding variations, provided for in Article 13, is very important, since borrowers are rarely aware of changes to reference rates.

3.5 Chapter 5: Creditworthiness assessment

3.5.1 It is essential that consumers’ creditworthiness be assessed when they sign up to loans and in the event of increases in the total amount of the loan. Consumers must be aware that, in the event of non-payment, they will lose their property, which will then be disposed of by public sale under market conditions which may be very poor.

3.5.2 However, this obligation must not cause certain categories of consumer to be rejected, or cause them to be led dishonestly towards certain types of loan. The obligation to provide reasons for rejections is essential, as well as the opportunity to demand that the application be re-examined when the rejection is the result of an automated process. The

objective pursued by the borrower’s creditworthiness assessment shall be prevention of over-indebtedness. In case of payment default, the lender shall take the responsibility if its decision is based on a poor quality assessment of the borrower’s creditworthiness. The costs of irresponsible lending shall be borne by the lender.

3.5.3 The EESC would point out that it is particularly keen to see responsible lending, which requires compliance with detailed rules by the creditor and the borrower, and for borrowers to provide accurate information regarding their situation.

3.6 Chapter 6: Database access

3.6.1 The proposal for a directive requires the Member States to ensure access for all creditors to databases used to assess the creditworthiness of consumers and for monitoring consumers’ compliance with their obligations.

3.6.2 These public or private registers will conform to uniform criteria to be defined by the Commission and will be in accordance with the provisions of Directive 95/46/EC (*) of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

3.6.3 The EESC would reiterate its view that data collected should be restricted solely to financial commitments, that consumer rights must be respected and that the information contained in these databases must not be used for commercial purposes.

3.7 Chapter 7: Advice

3.7.1 The EESC believes that the rules on advice should not undermine the obligation to provide advice mentioned in Chapter 5, aimed at ensuring that appropriate credit products are proposed to consumers.

3.7.2 Furthermore, the development of services which may be considered to be related must not increase the cost of the loan.

3.8 Chapter 8: Early repayment

3.8.1 The proposal for a directive allows for the right to early repayment to be subject to certain conditions. In particular, it provides for the possibility of fair compensation.

3.8.2 This provision is unfavourable to consumers when compared to the rules in force in certain Member States, where early repayment is always possible with limited or no compensation payable in the event of death or forced redundancy.

3.8.3 In its opinion on the proposal for a directive on consumer credit, the EESC argued against allowing Member States to lay down the methods for compensation in the event of early repayment in view of the risk of considerable differences in treatment of consumers and of market distortions.

3.9 Chapter 9: Prudential and supervisory requirements

3.9.1 As the EESC stressed in its opinion on the proposal for a directive on consumer credit, regulating the actions of credit intermediaries is a priority. It must result in the harmonisation of consumer protection levels in the European Union.

3.9.2 The provisions of the proposal for a directive therefore move in the Committee’s desired direction.

3.9.3 They provide for:

— an authorisation obligation for credit intermediaries, whether they be natural or legal persons, and conditions for the withdrawal of authorisation;

— a single register of intermediaries which must give the name of the persons responsible and of those acting under the rules on freedom to provide services. This register must be constantly updated. It must be easily accessible;

— professional requirements (good repute, professional indemnity insurance). These criteria must be transparent. The Commission reserves the right to lay down the technical standards stipulating the minimum monetary amount of the professional indemnity insurance.

3.9.4 The proposal for a directive also lays down the principle of mutual recognition of authorisations, which would enable intermediaries to operate in accordance with the principles of freedom of establishment and freedom to provide services, having first informed the competent authorities of the Member State of origin.

3.9.5 It establishes the information process for authorities in relation to both the granting and the withdrawal of the authorisation and the conditions for cooperation between the competent authorities of the home Member State and of the host Member State.

3.9.6 The EESC nevertheless feels that it would be preferable for the Commission, as a rule, to regulate credit mediation in an autonomous legislative instrument such as that used for insurance mediation.

3.10 Chapter 10: Final provisions

3.10.1 The proposal for a directive establishes:

— the principle of the existence of penalties, leaving it to the Member States to ensure, in accordance with their national law, that appropriate measures can be taken against creditors and borrowers. This symmetry is understandable, but it should not be forgotten that borrowers are in the weaker position, since they are reliant upon the information given to them by creditors or intermediaries;

— the obligation to establish or adhere to procedures for the out-of-court settlement of disputes, which will be in the interest of creditors and borrowers provided that they are independent and do not exclude the possibility of judicial proceedings;

— that the power to adopt delegated acts is conferred on the Commission. The Parliament and the Council can object to decisions taken by the Commission. They can revoke a delegated act at any time.

3.10.2 The EESC would question the scope of the delegated powers allocated to the European Commission on essential aspects of the legislative instrument as well as their consequences in terms of the legal security to be set up for the system. Moreover, these delegated powers by far exceed the limits provided for in Article 290 of the Treaty, defined in the Communication entitled Implementation of Article 290 of the Treaty on the Functioning of the European Union. The possibility of delegation should be limited and only used in exceptional circumstances.

3.10.3 The proposal for a directive instructs the Member States to ensure that it is implemented and that their provisions for its implementation cannot be circumvented.

3.10.4 The EESC takes note of the provisions of the proposal for a directive and reiterates that it must not lead to a reduction in the level of protection in Member States with existing legislation on credit agreements relating to residential property.

3.10.5 Lastly, the proposal for a directive provides that it must be transposed within two years and that it will be reviewed five years after its entry into force, which would appear reasonable, and the impact assessment of the directive’s measures will indicate whether it is appropriate.

Brussels, 14 July 2011.

The President
of the European Economic and Social Committee
Staffan NILSSON
APPENDIX

to the Opinion of the European Economic and Social Committee

The following amendments, which received at least a quarter of the votes cast, were rejected during the discussions (Rule 39(2) of the Rules of Procedure):

Point 3.8.2

Amend as follows:

3.8.2 As regards this provision, the right and the possibility of providing for compensation for early repayment should be weighed against the interest of consumers in there being no compensation payable in the event of death or forced redundancy.

Outcome of the vote:

For: 26
Against: 61
Abstentions: 10

Point 3.10.4

Amend as follows:

3.10.4 The EESC takes note of the provisions of the proposal for a directive and reiterates that in this area, in the same way as for ordinary consumer credit, the aim must be to strive for maximum harmonisation, although without the legitimate, existing interests of consumers being put at risk. It must not lead to a reduction in the level of protection in Member States with existing legislation on credit agreements relating to residential property.

Outcome of the vote:

For: 29
Against: 76
Abstentions: 4