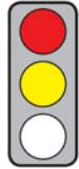


MAIN ISSUES

Objective of the Directive: The Commission wishes to establish a “smoothly functioning internal market with a high level of consumer protection” for mortgage lending.

Parties affected: Consumers, banks, credit intermediaries.



Pros: The EU passport for mortgage loan intermediaries helps remove barriers to the cross-border intermediation of mortgage loans.

Cons: (1) The Directive neglects the removal of practical obstacles to the internal market.
(2) The credit refusal obligation in the case of negative creditworthiness assessments leads to considerable legal uncertainty.
(3) The proposed rules regarding early repayment can raise the costs of fixed-interest loans.
(4) EBA’s arbitration powers are not covered by the EBA-Regulation.

CONTENT**Title**

Proposal COM(2011) 142 of 31 March 2011 for a **Directive** of the European Parliament and of the Council on **credit agreements relating to residential property**

Brief Summary► **Background and objectives**

- The Commission wishes to establish a “smoothly functioning internal market with a high level of consumer protection” for mortgage loans.
- The Commission criticizes “irresponsible lending and borrowing” as one of the factors that caused the financial crisis. The Directive is to strengthen the stability of the financial markets by “ensuring that mortgage credit markets operate in a responsible manner” and by setting “a reliable framework on credit intermediation”.
- In its proposal the Commission orientates itself towards the Consumer Credit Directive (2008/48/EC); mortgage loans are excluded from its scope.

► **Scope**

- The Directive applies to all credits commercially granted or intermediated to private persons which (Art. 2 (1) in conjunction with Art.1)
 - are secured either by a mortgage, a comparable security or a right related to residential immovable property,
 - serve the purpose to acquire or retain property rights in land or residential building or
 - serve the renovation of the residential immovable property and are not covered by the Consumer Credit Directive’s scope.

► **Requirements for creditors and credit intermediaries**

- Creditors and credit intermediaries must act “honestly, fairly and professionally in accordance with the best interests” of consumers. Remuneration systems must not impede compliance with said obligation. (Art. 5 (1), (2))
- Creditors and credit intermediaries must possess “an appropriate level of knowledge and competence” in relation to their activities. Member States have the “primary” right to define what this means exactly. (Art. 6 (1) lit. a, (2))

► **Special requirements for credit intermediaries**

- Credit intermediaries must apply for an authorization from the competent authority in their home Member State (Art. 19 (1)).
- Therefore, they must “as a minimum” (Art. 21 Abs. 1):
 - hold a professional indemnity insurance or some other comparable guarantee against liability and
 - “be of good repute”; should they have a criminal record, authorisation must be refused.
- Each national supervisory authority monitors the credit intermediaries they have authorised and lists all authorised credit intermediaries in a register open to public access (Art. 19 (4) in conjunction with Art. 20).
- The national authorisation is recognised by all EU Member States (“EU Passport”; Art. 19).
- Credit intermediaries who offer products of only one or a few creditors – so-called tied credit intermediaries – must notify consumers of this. Upon a consumer’s request, they must disclose the names of the creditors. (Art. 10 (1) lit. c)
- Freelance credit intermediaries who are not tied to one or just a few creditors must notify consumers on any existing commission rules. Upon the request of consumers, the amount of the respective commissions must be disclosed. Moreover, they must inform consumers as to their right to demand this. (Art. 10 (1) lit. h and (2))

► **Pre-contractual information**

- Creditors and credit intermediaries are obliged to make “general information about credit agreements” available to consumers at all time. They are to contain in particular: specifications on the type and duration of credits, implications relating to fixed vs. variable rate products, and conditions attached to early repayment. (Art. 9 Abs. 1)
- Thereupon, consumers are obliged to provide creditors with “correct information” as to their “financial situation and personal circumstances”, as well as on the purpose of the credit application (Art. 15).
- Finally, creditors and credit intermediaries are to provide consumers with “personalized information” in the form of the European Standardised Information Sheet (ESIS). Moreover, it is to be attached when submitting a “binding offer”. This serves to make it easier for consumers to compare different offers. (Art.9 (2), Annex II and Art. 14 (4))

► **Advertising requirements and annual percentage rate of charge**

- Any advertisements of credit contracts must include a series of standard information “by means of a representative example”, in particular on the annual percentage rate of charge, the total amount and duration of the credit, the amount of instalments, the total amount payable and whether the interest rates are fixed or variable (Art. 8 (2)).
- The annual percentage rate of charge is calculated in accordance with a uniform mathematical formula. The total amount payable by consumers forms the basis for calculation. (Art. 12 (1), Annex I)

► **Creditworthiness assessment – credit refusal obligation**

- Before concluding a credit agreement, creditors must on the basis of “appropriate processes” conduct a “thorough assessment” of the consumers’ creditworthiness (Art. 14 Abs. 1).
- Hereby, they rely on information on consumers’ income, savings, debts and other financial commitments as well as on “relevant internal or external sources” (Art. 14 (1)).
- Based on “information that is up to date at that moment in time and on reasonable assumptions” as to the consumers’ situation, creditors must exclude products that are unsuitable for consumers (Art. 14 (4)).
- Consumers must provide creditors with “complete and correct information” regarding their financial and personal situation (Art. 15). Where consumers “knowingly provide incomplete or incorrect information”, they can be sanctioned (Art. 24 (1) sub-par. 2).
- In order to assess the creditworthiness of a consumer, all creditors must be provided with non-discriminatory access to private databases and public credit registers (Art. 16 (1)).
- Should an assessment of the consumer’s creditworthiness produce a negative result, credit must not be granted (Art. 14 (2) lit. a).

► **Early repayment**

- Consumers have a “statutory or contractual” right to discharge their obligations under a credit agreement prior to the expiry of that agreement. The costs for the remaining duration of the contract must then be reduced. (Art. 18 (1))
- Member States may provide that the repayment right is subject to certain conditions (Art. 18 (2)). This includes (Art. 18 (2) sub-par. 1)
 - a time limit as to the exercise of that right;
 - a distinction between fixed and variable interest rates of credits; in the case of fixed-interest rates, the repayment right may be made subject to the existence of a “special interest”;
 - providing a “fair and objectively justified” compensation of the creditor’s costs in the case of early repayment.
 However, the exercise of the right of early repayment must not be made “excessively difficult” or “onerous for the consumer” by national measures (Art. 18 (2) sub-par. 2).

► **Delegated legal acts by the Commission**

- Pursuant to Art. 290 TFEU, the Commission wishes to become entitled to adopt delegated acts, in particular regarding:
 - the requirements for the knowledge and competence of creditors and credit intermediaries (Art. 6 (4)),
 - the calculation of the annual percentage rate of charge (Art. 12 (5)),
 - the criteria for the creditworthiness assessment (Art. 14 (5)) and
 - the information to be disclosed by credit intermediaries, incl. commissions (Art. 10 (3)); moreover, the Commission calls for unspecified “powers” in order to standardise the format and presentation of these information (Art. 10 (4)).

► **Powers of the European Banking Authority (EBA)**

- EBA is entitled to settle the following disputes between national supervisory authorities in a legally binding manner:
 - If a supervisory authority refuses to cooperate with another one when supervising a credit intermediary (Art. 22 (3) sub-par. 3).
 - If a credit intermediary infringes obligations from the Directive, despite the supervisory authority’s complaints and follow-up actions taken by the competent authority in the home Member State (Art. 22 (4) b).
- EBA may stipulate the minimum monetary amount of the professional indemnity insurance or comparable guarantee through regulatory technical standards (Art. 21 (3) sub-par. 3).

Changes to the Status Quo

To date, there have been no EU legislative rules on mortgage loans.

Statement on Subsidiarity by the Commission

The Commission argues that only joint EU action leads to an efficient internal market for mortgage loans with high consumer protection. According to the Commission, national measures lead to different rules, which entails obstacles to the functioning of the internal market.

Policy Context

In 2005, the Commission published a Green Paper on mortgage loans in the EU [COM(2005) 327]; in 2007 the White Paper followed on the integration of EU mortgage loans [COM(2007) 807; see [CEP Policy Brief](#), in German]. In 2009, the Commission carried out a consultation on “responsible lending and borrowing”.

Legislative Procedure

31 March 2011 Adoption by the Commission
Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force.

Options for Influencing the Political Process

Leading Directorate General:	DG Internal Market (Commissioner Michel Barnier)
Committees of the European Parliament:	Economic and financial affairs (leading), Rapporteur: Antolín Sánchez Presedo (S&D Group, SP)
Committees of the German Bundestag:	still open
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 114 TFEU (Internal Market; ex-Art. 95 TEC)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure; ex-Art. 251 TEC)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The EU internal market for mortgage loans is underdeveloped. As well as the inevitable language barriers, this is due to a lack of consumer confidence in foreign creditors and to practical obstacles to the cross-border granting of mortgage loans. However, **the Directive will hardly strengthen the internal market for mortgage loans because**, unlike as it was announced in the White Paper in 2007, **the Commission** is too one-sidedly focused on consumer protection and **neglects the removal of barriers**.

Such barriers exist in the form of different standards in real estate valuation, in national restrictions on the use of foreign loans and immovable properties serving as coverage for mortgage bonds, in practical difficulties when transferring mortgages, in restrictions on access to foreign registers, and in national differences with regard to foreclosures.

On the one hand, the uniform calculation of the annual percentage rate of charge, pre-contractual information requirements and rules regarding advertising measures can contribute to making it easier for the consumer to compare credit offers in order to make a rational decision regarding the optimal product offer. On the other hand, it must be doubted whether all this will really increase the demand for foreign mortgage loans, as the already mentioned language barriers persist.

The EU passport for credit intermediaries simplifies their EU-wide activities and removes barriers to cross-border demand and offers in the mortgage loan market. However, it **makes a certain degree of harmonisation necessary**, for example authorization requirements or professional requirements **for credit intermediaries**, in order to avoid distortions of competition. Intermediating, however, is just the first step towards a loan. **Since the creditors decide on the financial viability of a credit, the professional requirements as to the credit intermediaries should not be too high**. Otherwise this would make intermediation, and therefore credits, more expensive. **The Commission’s right to set additional professional requirements for mortgage loan credit intermediaries by delegated acts is therefore critical**. **The disclosure of possible commissions** can strengthen customer confidence and thus **be in the interest of credit intermediaries**. The explanatory power of such commissions, however, is low: the amount of a commission does not indicate whether or not a certain product suits a consumer.

In fact, the proposed credit refusal obligation in the event of a negative creditworthiness assessment is not necessary. Firstly, a creditworthiness assessment is already in the entrepreneurial interest of a bank.

A weakening of this interest through the re-sale of these credits (“securitisations”) was counteracted through the amendment of the Capital Directive (2010/76/EU, see [CEP Policy Brief](#)): emitters of securitisations must retain a minimum of 5% of the underlying credits. Secondly, existing supervisory rules already serve to prevent a too lax granting of credits. They include the obligation to cover credits with own capital and to identify and steer credit risks appropriately (Art. 22 and 123 of the Capital Directive, substantiated in Germany through the “MaRisk”). Therefore, supervisory authorities can already sanction excessively lax credit granting.

Moreover, **the proposed credit refusal obligation leads to considerable legal uncertainty**. The Directive does not provide any clear specifications for the creditworthiness assessment, although this is to be decisive for the refusal to grant a credit. Hence, the substantiation of this assessment through the Commission by delegated acts remains completely unclear. Whether or not banks will be held liable for consequences of a “faulty” creditworthiness assessment remains open.

Impact on Efficiency and Individual Freedom of Choice

An early termination and repayment of a credit can be favourable to consumers. However, it can also lead to increased costs, since normally creditors cannot terminate their refinancing contracts early. Creditors and consumers should therefore have the right to determine whether or not an early termination right is given and how the costs are shared when entering into a contract. A statutory provision should not undermine this type of freedom of contract. **Lax termination conditions and low compensation amounts can help facilitate terminations in Germany and make them cheaper. However, it makes the banks’ refinancing through mortgage bonds and thereby fixed-interest rate credits more expensive.**

Impact on Growth and Employment

Provided the Directive strengthens cross-border competition in the mortgage loan market, thereby leading to further integration of the EU internal market, it can contribute to more growth.

Impact on Europe as a Business Location

Insignificant.

Legal Assessment

Legislative Competence

The Directive is correctly based on Art. 114 TFEU (Internal Market). However, the “sanctions” for consumers who knowingly provide incomplete information must not be of a penal nature (Art. 24 (1) sub-par. 2). EU competence in criminal law pursuant to Art. 83 (1) TFEU is limited to acts of particularly serious crime with a “cross-border dimension”.

Subsidiarity

Standardised European rules regarding the early repayment of mortgage loans affect the costs of long-term loans. As preferences for long-term fixed-interest rates differ from one Member State to the other, different national rules on early repayment should remain in effect.

Proportionality

The evaluation depends on the content of the Commission’s delegated acts, in particular on the professional requirements for credit intermediaries and on the content of the creditworthiness assessment.

Compatibility with EU Law

The Commission’s call for “powers” to harmonise the information requirements for credit intermediaries must be substantiated. It should be made clear that such powers would be implementing acts (Art. 291 TFEU). The supervision to be applied by Member States should be conducted through the examination procedure (Art. 2 (1) of the Regulation (EU) No. 182/2011, see [CEP Policy Brief](#)).

The proposed arbitration powers for EBA in cases where a credit intermediary infringes obligations from the Directive are not covered by the EBA-Regulation. The Commission proposes arbitration powers for the EBA even given the national supervisory authority taking action. However, EBA may arbitrate only in the event of disputes between national supervisory authorities [Art. 19 of the EBA Regulation (No. 1093/2010); see [CEP Policy Brief](#)]. These do not exist here.

Conclusion

The Directive neglects the removal of practical obstacles to the cross-border granting of mortgage loans. The EU passport for mortgage credit intermediaries removes barriers to the cross-border intermediation of mortgage loans. The professional requirements for credit intermediaries should not be too high. A credit refusal obligation in the case of a negative creditworthiness assessment is not necessary and leads to considerable legal uncertainty. Simplified conditions for early repayment can make fixed-interest credits more expensive. EBA’s arbitration powers are not covered by the EBA-Regulation.