eurofinas

SPECIALISED CONSUMER CREDIT PROVIDERS IN EUROPE

Eurofinas Response to the European Banking Authority's Draft Guidelines on Creditworthiness Assessment

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 seven Guidelines.

Introductory observations

Eurofinas, the voice of consumer credit providers at European level welcomes the opportunity to respond to the Consultation Paper on Draft Guidelines on Creditworthiness Assessment.

Eurofinas supports the work of the European Banking Authority (EBA) in enhancing consumer protection in the mortgage credit sector.

Who we are and why we are concerned

Depending on market characteristics and structure of Member Associations, Eurofinas represents first and second charge mortgage lenders.

From experience, we have seen that a high number of local authorities have applied either fully or partially, the Consumer Credit Directive (CCD) to the mortgage credit sector. Such authorities are therefore likely to consider, when transposing the Mortgage Credit Directive (MCD), to apply this Directive to consumer credit as well. This is almost certain, where permitted by EU law, in countries which do not have civil law distinctions between mortgage and consumer credit lending.

The CCD is the golden standard for regulation of consumer credit in the European Union. This legislation already includes an obligation to assess the creditworthiness of applicant borrowers (article 8). Eurofinas fully supports such obligation because we perceive it as a precondition for successful and sustainable lending. In this regard, we draw your attention to the potential interactions between the creditworthiness assessment in the mortgage credit and consumer credit sectors.

General remarks

Eurofinas shares the view with the EBA that creditors must carry out creditworthiness assessments. Indeed, all steps should be taken to ensure that such assessments are carried out in a professional and adequate way. In this respect, we would also like to emphasise the importance of the use of data. Lenders must be encouraged to base their assessments on the widest range of sources available. Against this backdrop, lenders should however remain free to decide upon suitable systems and relevance of factors.

Importantly, one must appreciate that such assessments are carried out at one particular moment in time. It is essential to take this aspect into consideration when scrutinising the execution of creditworthiness assessments.

We draw your attention to the recent Judgment of the Court of Justice of the European Union in Case C-449/13. This case concerns the application of the CCD's obligation to assess borrowers' creditworthiness[1]. The Court recognised that the CCD "affords the creditor a margin of discretion for the purposes of determining whether or not the information at its disposal is sufficient to demonstrate the consumer's creditworthiness and whether it is necessary to check that information against other evidence".

Eurofinas fully agrees with the EBA that over indebtedness of European households is a serious phenomenon which must be treated as such. However, over-indebtedness can be caused by multiple factors, primarily by certain macro-economic factors and personal circumstances. This has been recognised in a recent study on household over-indebtedness conducted by Civic Consulting on behalf of the European Commission.[2] Nevertheless, several aspects of the Guidelines seem to imply that over-indebtedness or payment difficulties are necessarily the result of inappropriate creditworthiness assessments.

Given that lending practices vary per EU Member State, we believe that the obligations laid down in the Guidelines should be phrased in an appropriately broad manner. Whilst the Guidelines provide sufficient flexibility to encompass the different characteristics of the lending and mortgage systems, some will prove difficult to implement in practice and may even raise issues with regard to legal certainty. Also, it is important to ensure consistency of the guidelines with "Level 1" regulation. In this respect, we are concerned by an increasing liability and litigation risk stemming from the proposed Guidelines.

Specific remarks

Guideline 1: Verification of the consumer's income

(1.1) Eurofinas is of the opinion that an obligation to verify the consumer's income history and any variability over time can be problematic and rather burdensome on creditors. In this respect, we emphasise the importance of the proportionality principle. Yet, proportionality is currently only mentioned in guideline 1.2. In addition, the income history seems to be relevant only with regard to consumers with irregular income (e.g. freelancers). In our view, relevant information relates to the income the consumer receives at the time of applying for the credit and a general estimation of the income to be received in the future.

Eurofinas would therefore like to suggest to EBA to use, instead of "the consumer's income history and any variability over time", the following wording: "including the

[1] See CA Consumer Finance SA v. Ingrid Bakkaus and others, Case C-449/13, 18 December 2014. More information at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140184en.pdf

[2] Civic Consulting of the Consumer Policy Evaluation Consortium, 'The over-indebtedness of European households: updated mapping of the situation, nature and causes, effects and initiatives for alleviating its impact – Part 1 and 2', 4 December 2013, Berlin.

consumer’s underlying income capacity, and the consumer’s income history, if relevant, and any variability over a sufficiently long period of time”.

(1.2) Eurofinas would like to point out that the requirement that creditors should use information provided by sources that are independent of the consumer’ seems inconsistent with article 20 of the Mortgage Credit Directive. Pursuant to this provision, information used for creditworthiness assessments shall be obtained by the creditor from relevant internal or external sources, including the consumer. We strongly believe that this guideline should not be more restrictive than “level 1” regulation.

Indeed, while the use of external sources can be encouraged, one cannot rule out that in certain circumstances this is simply not relevant (e.g. in case of limited debt history, or when an applicant borrower is self employed). Furthermore, it may not be compatible with the existing available sources for lenders. In this regard, we recall that a very diverse landscape exist across Europe for credit bureaus. The latter may be private or public and collect negative or positive data. It is our view that the use of external sources may simply be more relevant for Member States with more detailed registers.

(1.3) Eurofinas is concerned about the introduction of notions aimed at guaranteeing the quality of the information provided by the consumer, specifically third party verification. For example, would the receipt of a pay slip or tax declaration from the consumer fulfill the third party verification requirement? Or is the intention that a creditor consults a borrower’s employer or the tax authority? We are of the opinion that these notions are too vague and would be difficult to apply and justify operationally.

Guideline 2: Documentation and retention of information

(2.1) We propose that, instead of “the creditor should maintain complete documentation of the information that leads to mortgage approval”, the EBA should consider using the following “the creditor should maintain records of the relevant information that leads to mortgage approval”. Such wording would minimize the documentation which the creditors are obliged to maintain and therefore be in line with the principle of proportionality.

Guideline 3: Identification and prevention of misrepresented information

(3.1) We agree that information provided to consumers should not be misleading. Nevertheless, we find this guideline rather unclear. In addition, the text seems to introduce a subjective standard for creditors to comply with. In our opinion, the Guideline would read better as follows: “the creditor should design loan documentation in a way that avoids the risk that the consumer may misunderstand the information provided by the creditor or credit intermediary”

In addition, it must be clear that the assessment is carried out at the time that the credit agreement is concluded.

Guideline 4: Assessment of the consumer's ability to meet his/her obligations under the credit agreement

(4.1) This guideline is not entirely clear to Eurofinas. We would like to ask the EBA to clarify, or define, the term 'undue hardship'. In addition, the reference to over-indebtedness or payment difficulties implies that such matters are necessarily the result of inappropriate creditworthiness assessments, while household' over-indebtedness can have multiple causes, such as unemployment, relationship breakdown, or illness As a matter of fact, these events may occur after a loan has been granted or possibly not have been reasonably foreseen at the time when it was granted. In addition, Eurofinas would like to recall that "responsible borrowing" is an important way to prevent or minimize "undue hardship".

Moreover, we draw attention to the fact that the MCD provides that the lender should only assess the "probability" for the customer to fulfill its obligations. There should be consistency with "level 1" regulation

(4.3) We believe it is good practice to take as many relevant factors as possible when assessing an applicant borrower's creditworthiness. We therefore support, for example, including obligations to service other loans and regular payments. However, we would like to draw the EBA's attention to the fact that not all information may be available at the time of assessment. In addition, depending on the Member State, the existing infrastructure may not have sufficient details about borrowers.

Here again, the reference to over-indebtedness or payment difficulties implies that such matters are necessarily the result of inappropriate creditworthiness assessments. We disagree with this.

Guideline 6: Allowance for potential future negative scenarios

(6.1) This Guideline would be problematic in terms of implementation. For this reason, we propose to change the term "potential negative scenarios in the future" to "scenarios which are foreseeable".

Guideline 7: Identification of groups of loans with higher risk profiles

(7.1) We think this guideline is a prudential requirement which may not be best placed in this guidance document.

Contact persons

Alexandre Giraud	Nadia Hazeveld
Senior Legal Adviser	Junior Adviser
+32 2 778 05 64	+32 2 778 05 72
a.giraud@eurofinas.org	n.hazeveld@eurofinas.org

Eurofinas is entered into the European Transparency Register of Interest Representatives with ID n° 83211441580-56