

Respuesta del sector a las Consultas de la EBA en materia de Directrices sobre el análisis de la capacidad de pago y sobre las demoras y ejecuciones

Febrero 2015

El pasado 12 de diciembre la Autoridad Bancaria Europea (EBA) publicó dos documentos de consulta: un **Borrador sobre la valoración o análisis de la capacidad de pago** ([Ver aquí](#)) y otro **Borrador de Directrices sobre retrasos y ejecuciones** ([Ver aquí](#)).

Como recordareis, la nueva directiva sobre crédito hipotecario ([ver aquí](#)) establecía en sus artículos 18 y 28 diferentes provisiones sobre ambos asuntos en cuestión.

En particular, el artículo 18 requería que los Estados miembros debían velar por que, antes de celebrar un contrato de crédito, el prestamista evaluase en profundidad la solvencia del consumidor, teniendo en cuenta los factores pertinentes para verificar las perspectivas de cumplimiento por el consumidor de sus obligaciones en virtud del contrato de crédito. Además, el artículo 20 añadía que dicha evolución debería realizarse *“basándose en la necesaria información, que deberá ser suficiente y proporcionada, relativa a los ingresos y gastos y a otras circunstancias financieras y económicas del consumidor”*.

Por otro lado, el artículo 28 requería que *“Los Estados miembros adoptaran medidas para alentar a los prestamistas a mostrarse razonablemente tolerantes antes de iniciar un procedimiento de ejecución”*.

Para asegurar que estas provisiones se implementan y se supervisan de forma consistente entre los Estados Miembros, así como para apoyar el proceso de trasposición de la propia directiva, la EBA ha decidido diseñar unas directrices (*guidelines*) sobre ambos asuntos, que ha sometido a consulta (hasta el 12 de marzo de 2015), y cuyo destinatario son las Autoridades nacionales supervisoras competentes en la materia, de las que se espera que cumplan y las apliquen en sus respectivos mercados.

Así pues, ambos documentos de Directrices, cuando se publiquen en su versión final, serán **“vinculantes” para los mercados**. Es por ello que desde la Federación Hipotecaria hemos respondido a la Consulta de ambos documentos, alertando sobre algunas de las directrices que se incluyen.

A continuación se resumen, brevemente, los mensajes principales de ambas respuestas (adjuntas al final del documento)

Borrador de Directrices sobre el análisis de la solvencia.

- En primer lugar, se aclara que cualquier análisis de solvencia se realiza sobre la información que se tiene del prestatario en ese momento, y no sobre la base de la evolución futura de las circunstancias financieras del prestatario, por la imposibilidad de estimarlas. El documento prevé que se analice la variabilidad de los ingresos, su evolución futura en caso de jubilación, estimación de los costes de vida y otros factores que pueden crear sobreendeudamiento.
- En segundo lugar, se destaca que en el borrador de directrices no existe ningún principio de “endeudamiento responsable” para el prestatario, que le obligue a proporcionar una información sobre su situación financiera correcta y completa. El tratamiento no es equitativo.
- Además, se alerta sobre la posibilidad de que estas Directrices impongan requerimientos de información adicionales a los que se incluyen la Directiva de crédito hipotecario. Esto se menciona claramente en la Directriz 3.1 en la que solicita que se diseñe la *“documentación del préstamo de tal forma que ayude a identificar y no mal interpretar la información al consumidor”*.

Borrador de Directrices sobre retrasos y ejecuciones

- En primer lugar, se solicita que se suavice la redacción de alguna directriz, que parece estar **obligando** a los bancos a renegociar o hacer concesiones con los clientes con retrasos, sin que se justifique por parte de estos una situación de insolvencia o dificultad temporal (efecto llamada).
- Por otro lado, se imponen necesidades de información adicionales a las de la Directiva de crédito hipotecario, así como el requerimiento de **justificar** las razones de las opciones que se ofrecen al prestatario que tiene retrasos.
- Por último, desde el sector se echa en falta una directriz sobre **la obligación o deber del prestatario a cooperar con el prestamista**. Cuando un prestatario no coopera, por ejemplo, haciendo caso omiso de la correspondencia y no atendiendo a los encuentros con su entidad, entonces las protecciones que prevé la Directiva no deberían aplicarse y al prestamista se les permitiría pasar a la siguiente etapa del proceso.

19th of January 2015

Draft EMF Comments on EBA Consultation Papers on Draft Guidelines on Creditworthiness Assessment and on Arrears & Foreclosure

The European Mortgage Federation (EMF) welcomes the opportunity to comment on the EBA's draft Guidelines on creditworthiness assessment and on arrears and foreclosure:

I. 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.

▪ *General remarks*

As a general remark, the EMF would like to reiterate that systematic and thorough creditworthiness assessments are at the very core of the mortgage lending business and are carried out as a matter of course throughout the Industry. It is also worth recalling here that a legal obligation to assess candidate borrowers' creditworthiness has also long existed at banking supervisory level. The EMF therefore welcomed the decision by the EU Institutions in the context of the Mortgage Credit Directive (MCD) to adopt a high-level, principles-based approach to the assessment of creditworthiness. This approach provides the necessary flexibility to Member States to take account of the specificities of their national markets, whereas prescriptive legal obligations would not only constrain existing national practices, but also result in legal uncertainty and potentially in increased litigation. It is vital that this flexibility is maintained and respected during the transposition and implementation process.

As a further general remark, the EMF would like to underline the importance of striking the right balance between gathering relevant information on the financial situation of the candidate borrower without violating data protection legislation and ensuring that the candidate borrower is responsible and accountable for the information he/she provides, and, ultimately, for the final decision regarding which credit best suits his/her needs.

▪ *Specific remarks*

Draft Guideline 1.1: The assessment of the candidate borrower's creditworthiness is carried out at the moment of the granting of the credit based on his/her circumstances at that time and not on the basis of the evolution of the borrower's financial circumstances throughout the lifetime of the loan, which are very difficult for the creditor to predict. Unless the borrower provides information about variability of his/her income, a creditor cannot feasibly verify this over the lifetime of the loan.

Draft Guidelines 1.2 & 1.3:

- As a general remark, the EMF believes that provided the lender complies with the requirements of draft guideline 1.1, there is no reason why there should be additional, specific requirements for self-employed individuals or those with a seasonal income.
- As specific comments on the contents of 1.2 and 1.3, the EMF is concerned about the introduction of notions aimed at guaranteeing the quality of the information provided by the consumer, specifically the independence of sources (1.2) and third party verification (1.3). For example, would the receipt of a pay slip or a tax declaration from the consumer fulfil the third party verification requirement? Or is the intention that a creditor consults a candidate borrower's

employer or the tax authority? These notions are vague and would be difficult to apply and justify operationally.

Draft Guideline 2.1: The more precise term “conclusion of the credit agreement” should replace “mortgage approval”.

Draft Guideline 3.1:

- This requirement does not reflect the information requirements in the MCD and would appear to impose additional disclosure requirements outside of the ESIS, the added value of which is not clear. It should also be noted that the assessment of whether documentation is well presented or not is very subjective.
- Furthermore, the EMF is concerned that this draft guideline appears to shift the responsibility for misrepresentation of information by the candidate borrower from the borrower to the creditor. In fact, unfortunately, the draft guidelines contain no ‘responsible borrowing’ principles at all (see our response to question 2 below).

Draft Guideline 4.1:

- The drafting of this guideline is vague, for example, what is meant by “undue hardship”?
- The drafting furthermore implies that in the event of payment difficulties or over-indebtedness of the borrower it would be concluded that the creditworthiness assessment had not been appropriately carried out by the creditor and that this was therefore the cause of the hardship.

Draft Guideline 4.3: It is not possible to take into account all directly relevant taxes and insurances, since not all of this information is necessarily known to the creditor at the moment of the creditworthiness assessment.

Draft Guideline 4.4: This draft guideline, like 1.1, refers to the evaluation of a future situation, in this case retirement. It is very difficult for the creditor to assess completely or accurately at the moment of the assessment of the creditworthiness of the candidate borrower the extent of the impact of retirement on the borrower’s income. This is further compounded by the political uncertainty regarding pensions in a number of EU Member States.

Draft Guideline 5.1: Unlike for a candidate borrower’s existing financial obligations, creditors do not have access to information which would enable them to substantiate the “living expenses of the consumer”, making it difficult to fulfil this requirement.

Draft Guideline 6.1: Creditors could only be expected to make prudent allowances for potential negative scenarios in the future which are ‘foreseeable’ and ‘quantifiable’. However, such scenarios are almost non-existent, making this requirement very difficult to fulfil.

Draft Guideline 7.1: The risk profile of a loan typically depends on the individual circumstances of a borrower; a loan that might pose a higher risk for one borrower because of their circumstances may not for another because of a different set of circumstances. What is important is complete and comprehensive information and adequate explanations to the candidate borrower of the features of different loans. It should be recalled that specific loan types with particular features, such as foreign currency loans and variable interest rate loans, are extensively addressed in the MCD and it is our view that no further action is required in this respect.

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.

Following on from points made above, the EMF believes that it is important to include in the draft guidelines requirements relating to 'responsible borrowing', which would oblige borrowers to provide the lender with complete and correct information on their financial situation and personal circumstances in the context of the credit application process.

II. Draft Guidelines on Arrears & Foreclosure

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.

Draft Guideline 2.2:

- The EMF understands that the motivation behind the privacy requirement is to ensure that where meetings are held with borrowers that those meetings are held in private; however, as drafted, the EMF is concerned that this draft guideline could be misinterpreted as a requirement for a lender to conduct meetings with all of its borrowers in relation to their payment difficulties, which is not practicable.
- Furthermore, there is a risk that the reference to data protection legislation could be misconstrued as consent always being necessary, even, for example, in the case of an intermediary communicating payment default information to credit bureaus. The latter is information which is needed to safeguard financial stability and for which consent is not necessary. It should be clarified that the reference to consent relates to personal information such as the causes of default.

Draft Guideline 2.3: The exact aim and meaning of this requirement is not clear.

Draft Guidelines 3.1-3.4: These draft guidelines 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 Art. 28 of the Directive.

Draft Guideline 4.1:

- This draft guideline appears to oblige banks to accord concessions to consumers in arrears/past due. There are a number of concerns in this respect. Firstly, this could result in borrowers purposely not paying their instalments in the knowledge that they will receive concessions. Secondly, this could have a significant impact on risk-weighted assets, thus increasing the costs of mortgage loans and the risk of credit crunch phenomena.
- Furthermore, the requirement on a creditor to offer total or partial refinancing of a credit agreement could present a risk of action being taken against the lender on grounds of a kind of “abusive assistance” (this notion exists in France, for example, in commercial collective actions) in the event that the borrower is still unable to meet his/repayments.

Draft Guideline 5: The requirement on the lender to justify the reasons for the options offered to the borrower would introduce a subjective element to the explanation to be provided and furthermore present a risk that the reasons will be contested in court. It would furthermore place a significant administrative burden on the lender.

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.

A requirement setting out the borrower's obligation to co-operate with the lender should be included. Where a borrower does not co-operate, for example by ignoring correspondence (indicating that he/she might be unwilling rather than unable to meet repayments), then the protections under the Directive would not apply to the non-cooperating borrower and the lender should be permitted to proceed to the next stage in the process.

Also, it is important that any guidelines covering “non-primary dwelling” type residential mortgage borrowers are formulated so that they do not either: (a) give rise to legal uncertainty or (b)

unnecessarily extend mortgage resolution processes beyond the category of family homes due to the ongoing issues in regard to the definition of consumer.
