



5th of July 2012

Summary of the EMF Position Paper to the EP on the CARRP ahead of the Trialogue

- 1. Delegated Acts:** The EMF supports the decision of the Council in particular to limit the delegated acts to non-essential elements of the Proposal, as intended by the Lisbon Treaty.
- 2. Article 2(1a) (EP) – Scope:** The EMF is opposed to the EP's proposal that MS which have already applied the CCD in full to credit agreements for renovation purposes may continue to apply the CCD for a period of 5 years where these agreements are not secured by a mortgage or another comparable security.
- 3. Art. 3(k) - Definition of Total Cost of Credit:** The EMF believes that "notarial costs" should be defined in the final Directive, and on a broad basis. Furthermore, it is vital that costs relating to ancillary products are also only included in the TCC where they are known to the lender.
- 4. Art. 9a(2) (EP Text) - Pre-contractual Information:** The EMF is opposed to the fixing of a 14 day reflection period, a possibility provided for by the EP. If this were maintained, it would be vital to maintain the waiver and also introduce an exemption for those MS where the interest rate is fixed on the date of the signature of the credit agreement.
- 5. Art. 11 – Adequate Explanations:** The EMF welcomes the changes made by both the EP and Council to Article 11 which makes clear what explanations should be given by lenders to consumers.
- 6. Art. 14 – Creditworthiness Assessment:**
 - **Art. 14(2)(a):** The EMF welcomes the drafting proposal put forward by the Council and taken on board by the EP in respect of the 'duty to deny'.
 - **Art. 14(2)(b):** The EMF strongly supports the decision of both the EP and Council to delete the duty on lenders to provide the consumer with the reasons for rejection.
 - **Art. 14(4):** The EMF strongly supports the decision of both the EP and Council to delete the duty on lenders to identify products that are 'not unsuitable' for the consumer.
- 7. Art. 18(4) (Council text) – Duty to Advise:** The EMF is opposed to the introduction by the Council of Member State discretion in respect of the introduction of a duty to advise.
- 8. Art. 18 (EP text) – Early Repayment:**
 - **Art. 18(2):** The EMF welcomes the EP's decision to introduce a right for lenders to claim indemnity and to delete the reference to "excessively difficult and onerous".
 - **Art. 18(3a):** The EMF is strongly opposed to the introduction of caps on lenders' indemnity.



9. **Art. 14a (EP Text), Arts. -18a & -18b (EP Text) and Arts. 18a & 18b (EP Text): Property Valuation, Variable Rate Loans & Underlying indexes and reference rates, Flexible & Reliable Markets and Arrears & Foreclosure:** These provisions have not been subject to an impact assessment and should be deleted.
 10. **Art. -19a (EP Text) – General Requirements:** The EMF is concerned about the breadth of the general requirements and the possibility provided to Member States to 'gold-plate'. This Article should be deleted.
 11. **Art. 30 (COM Text) & Art. 34(1) (Council text) – Transposition:** An additional, separate two year transition period should be introduced for lenders.
 12. **Art. 33 (Council Text) & Art. 1(2) (EP Text) – Level of Harmonisation:** The Council and EP Articles should be replaced by a similar Article to the CCD Article on the level of harmonisation.
 13. **Annex IIa (EP Text) & Annex III (Council Text) – Minimum knowledge & competence requirements:** The EMF supports the appropriate flexibility provided for in point 3 of the Council's Annex III in relation to Member States ability to determine the appropriate level of knowledge and competence on the basis of professional qualifications or professional experience.
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EMF Position Paper to the European Parliament on CARRP File ahead of Trialogue Negotiations

The European Mortgage Federation (EMF) has closely followed the passage of the Commission's Proposal for a Directive on Credit Agreements relating to Residential Property (CARRP) through the European Parliament (EP) and Council, and has actively contributed to this process, both pre- and post publication of the Proposal.

The EMF welcomes the progress made by the EP and the significant improvements that have been made to the Commission's original text. Ahead of the trialogue negotiations, the EMF would however like to provide herewith its views on those provisions which have the potential to jeopardise the viability of the mortgage business, significantly limit access to credit for consumers and undermine overall economic recovery:

1. Delegated Acts

The EMF supports the decision by both the EP and Council to restrict the delegated acts to non-essential elements of the Proposal. In particular, the EMF supports the decision of the Council to limit the use of delegated acts to assumptions on the APRC and indemnity insurance of credit intermediaries. The EMF cannot however support the EP's proposal that the content or presentation of ESIS may be subject to amendment in this way. The review clause (Art. 31 (COM & EP text) & Art. 35 (Council text) already provides for a more appropriate method of assessing the ESIS and making adjustments if necessary.

The EMF would therefore urge the EP to align itself with the Council in respect of delegated acts.

2. Article 2(1a) (EP): Scope

The EMF is opposed to the EP's proposal that MS which have already applied the CCD in full to credit agreements the purposes of which is the renovation of a residential immovable property may continue to apply the CCD for a period of 5 years where these agreements are not secured by a mortgage or another comparable security.

The EMF is of the view that this is not an adequate response to the concerns of many lenders in those Member States where the CCD has been applied to mortgage credit, and it should be accepted that through the implementation of the CCD, the requirements of CARRP are broadly covered. What is more, the EMF believes that the EP's drafting lacks clarity and could result in all unsecured loans for renovation purposes be captured by the CARRP across the EU after 5 years. This would not be consistent with the objectives of the work conducted at EU level so far and would also expose lending institutions to major unnecessary costs and legal uncertainty as they would have to adjust all business processes, IT systems and staff training to the CARRP just after having implemented the new CCD requirements.



In this respect, the EMF would urge the EP to reconsider its position in this respect and align itself with the Commission's text which provides that loans for renovation purposes will only be included in the scope of the CARRP Directive where they are not covered by the CCD.

3. Art. 3(k): Definition of total cost of credit

The EMF cannot support the EP's suggestion that property valuation fees be included in the scope of the Total Cost of Credit (TCC). This would be unworkable in those Member States which have already applied the CCD, and therefore its definition of the TCC to mortgage credit.

In relation to the exclusion of mortgage registration fees, the EMF would like to draw the EP's attention to DG SANCO's recently adopted Guidelines on the Application of the CCD in relation to the APRC. Specifically, **the EMF is extremely concerned about the narrow interpretation of "notarial costs"¹ in this context**, and the potential for read-across in the future between these Guidelines and any future Guidelines for implementation in the context of the CARRP, not least because the definition of the TCC is the same as that in the CCD.

This narrow interpretation of "notarial costs" would effectively mean that mortgage registration fees and mortgage inscription taxes, and a range of other specific charges including fees to establish a third party guarantee, would be included in the TCC. However, these taxes and charges cannot be considered as part of the "Total Cost **OF THE CREDIT**" to the consumer. Furthermore, the exact notarial costs are only fixed and known at the moment at which the notary is able to pass the deed and has been provided with a survey of the cost elements.

With these concerns in mind, the EMF would urge the EP to: (i) reconsider its proposal to include property valuation fees in the scope of the TCC, and (ii) ensure that notary fees are understood in the broadest sense. This could be achieved by defining "notarial costs" as outlined in Annex II of this Paper, in the context of recital 34 of the Council text.

Furthermore, in respect of the inclusion of costs relating to ancillary services and to property valuation in the definition, it is vital that the second condition for their inclusion should be that they are known to the lender. In this respect, the corresponding recital in the final text should be brought more in line with recital 34 of the Council Compromise Text.

The EMF would encourage the EP to endorse the Council's position in this area, subject to a further clarification regarding the broad definition of notarial costs.

4. Art. 9a(2): Pre-contractual Information (reflection period)

¹ APRC Guidelines, Page. 15: "Notarial costs: The exclusion of notarial costs refers only to those costs of a notarial nature e.g. the fees a notary receives for the establishment of a legal act such as the notarial act."



The EMF is strongly opposed to the fixing of a 14-day reflection period, a possibility provided for by the EP, on the grounds that this would prove extremely difficult – if not impossible - to implement in practice across the different loan-granting procedures in the EU. **For this reason, the EMF continues to firmly believe that the decision taken by both the Commission and the Council not to fix a specific time period is the most appropriate approach.**

If, however, during the trialogue negotiations, the 14 day period were to be maintained and it were not possible to render this provision an option for Member States, **it would be vital to ensure that there was an exemption in place for those Member States, where the interest rate is fixed on the date on which the credit agreement is signed and the funds are released.** Equally, **it would be vital to maintain the ‘waiver’ for consumers** who, having found a property, need to rapidly conclude the contract in order to secure its purchase.

The EMF would like to take this opportunity to insist that under no circumstances should there be a combined reflection and withdrawal right, as had previously been proposed by the EP. The interest rate risk which would already exist for lenders because of the 14-day withdrawal right would be increased further if there was a previous, additional “reflection period” and would have to be priced into the borrowing rate from the outset.

The EMF would urge the EP to reconsider its position in respect of the fixing of a 14-day reflection period in light of the concerns raised by the Industry.

5. Art. 11: Adequate Explanations

The EMF welcomes the changes made by both the EP and Council to Article 11 which makes clear what explanations should be given by lenders to consumers. This is an improvement on the requirements provided for in the Commission’s original text which are time-consuming, disproportionate and difficult to assess accurately.

For these reasons, the EMF would encourage the EP to maintain its position this respect.

6. Art. 14: Creditworthiness Assessment

- **Art. 14(2)(a) - Duty to Deny:** The EMF welcomes the fact that the EP has aligned itself with the Council’s drafting proposal in relation to the requirement in the Commission’s Proposal that lenders refuse the credit in the event of a negative creditworthiness assessment, which transforms this obligation on lenders from a strict prohibition into a more workable, qualified test.

The transposition of what is an obvious practice to deny the credit in the event of a negative creditworthiness assessment into a legal obligation would result in increased lender liability and an increased risk of litigation. This would, in turn, lead to consumer exclusion e.g. for



young professionals, first-time buyers and self-employed individuals, based on lenders' unwillingness to bear such disproportionate liability and regulatory risk.

The EMF would therefore urge the EP to maintain its position in this respect during triologue negotiations.

- ***Art. 14(2)(b) - Duty to provide reasons for rejection:*** The EMF strongly supports the EP's decision to delete the requirement on lenders to inform the consumer of the reasons for rejection. Not only could such a requirement incite some consumers to 'game the system' by altering their application, but it could result in consumers contesting the reasons for rejection and taking lenders to court. It would then be the responsibility of a judge to decide whether or not the reasons for rejection were acceptable, despite the lenders' fundamental freedom to contract. This could ultimately result in a 'right to credit' which could not be supported by the Industry.

Against this background, the EMF would, again, urge the EP to maintain this position during triologue negotiations. The EP will have noted that the Council has deleted the requirement on lenders to inform the consumer of the reasons for rejection, limiting the provision to a requirement to inform the consumer that the application has been rejected. The position of the Council could be an appropriate compromise, if necessary, vis-à-vis the Commission during the negotiations.

- ***Art. 14(4): Duty to identify products that are 'not unsuitable':*** The EP's decision to delete in its entirety the provision requiring lenders to identify products that are "not unsuitable" for a borrower is strongly welcomed by the EMF. Such a requirement on lenders would result in increased lender liability and a greater risk of litigation from borrowers in default claiming that they had been sold an "unsuitable" product. If this were the case, it would be the responsibility of judges to rule on what is meant by "suitability" which could subsequently result in different interpretations in different Member States. There would also be a strong risk of overlap between the suitability assessment and the advisory standards provisions in Art. 17.

For these reasons, the EMF would, here also, urge the EP to stand firm on its proposal to delete this provision, which is also in line with the Council's position in its final opinion on the Commission's Proposal.

7. Art. 18(4) Council text: Duty to advise

The EMF is strongly opposed to the Council's proposal to introduce Member State discretion in relation to the introduction of a duty to advise, as proposed in the Council's Article 18(4). Advice is a separate service from the granting of the credit, to be requested and paid for by the consumer. Significantly for the Industry, **the EP recognises this in its final Proposal and, like the Commission, does not place a duty on lenders to provide advice** but rather determines the standards advice should meet where it is provided.



The discretionary introduction of a duty to advise raises a number of complex issues that would be detrimental to EU mortgage markets, including: (i) increased lender liability and mutualisation of costs between borrowers, (ii) restriction of consumer choice and product diversity, (iii) contravention of the legal obligation of "non-intrusion" imposed on lenders, (iv) restriction of distribution channels and distortion of competition, and (v) limitation of the principle of freedom to contract. More details can be found in Annex I to this Paper.

Against this background, the EMF would ask the EP to stand firm on its position in this respect together with the Commission. The duty to warn, actually introduced by the Council and later taken on board by the EP, is the appropriate tool to highlight the existence of a specific risk to the consumer. This duty would however be more appropriate in Art. 11 on adequate explanations in order to reduce the risk of confusion during the transposition phase.

8. Art. 18 (2): Early Repayment

The EMF strongly welcomes the EP's positioning on Art. 18(2) in respect of lender indemnity and the nature of other conditions linked to the right of early repayment:

- **Lender Indemnity:** The EMF strongly welcomes the EP's decision to provide for a balanced set of rights in respect of early repayment. In this respect, the EP couples the right for borrowers to repay early with a right for lenders to claim fair and objective compensation where justified, rather than leaving this to the discretion of Member States. Lenders' ability to be fully compensated for all costs in the event of early repayment is fundamental to the viability of the mortgage lending business.

The EMF would urge the EP to stand firm on its position in respect of lender indemnity.

- **Nature of Other Conditions:** The EMF also welcomes the EP's approach in respect of the other conditions linked to the exercising of the early repayment right. The EMF is concerned that the requirement in Art. 18(2) of the Commission Proposal that the conditions attached to the early repayment should not make it "excessively difficult or onerous" for the consumer to exercise the right could result in a situation where, depending on interpretation, conditions associated with existing early repayment regimes in Member States could unwittingly be classed as being difficult and onerous and therefore be prohibited. This would have serious structural implications for well-functioning EU mortgage markets, the fundamentals of which have developed and evolved over years as a direct response to national market realities. The EMF therefore strongly supports the decision of the EP to redraft this part of the paragraph as a new provision and delete the reference to "excessively difficult or onerous".

The EMF would, again, urge the EP to maintain its position in this respect during the triologue negotiations.



- **Caps:** The EMF would like to stress that in the EP's text there is already a requirement that lender compensation be **fair** and **objective** and only be claimed **where justified**. With this in mind, it would be entirely unnecessary and excessive to impose legal caps, an option which is provided to Member States in Art. 18(3a) of the EP text. Not only would the introduction of legally enforced caps on an indemnity necessarily result in increased costs for consumers, as lenders are once again forced to mutualise their costs, it would also have fundamental implications for product diversity, where prospective borrowers are potentially deprived of the choice of the most appropriate product depending on the economic conditions at the time, and for the economy as a whole².

The EMF believes that caps cannot be viewed as the 'trade-off' for lender indemnity and that this provision should be deleted.

9. Arts. -18a(new) & -18b(new) (EP text): Variable Rate Loans and Underlying Indexes and Reference Rates

These Articles were introduced by the EP at a very late stage, shortly before the vote took place in ECON, and therefore have neither benefited from an impact assessment, nor appropriate, in-depth discussion during the EP Committee stage of the legislative procedure.

The EMF is extremely concerned about the extensive information disclosure requirements contained in these Articles in relation to variable rate loans, which would make the ESIS extremely long and confusing for consumers. In particular, it would make no sense to publish or provide a prospective borrower with several years' worth of historical data relating to fluctuations in interest rates and minimum and maximum borrowing rates. Such historical data cannot determine how rates will evolve in the future and could actually mislead the consumer.

With these concerns in mind, the EMF would encourage the EP to reconsider its position in respect of the inclusion of these Articles in the Directive.

10. Art. 18a(new) (EP text): Flexible & Reliable Markets

The provisions in this Article have not been subject to an impact assessment and are therefore 'unknown quantities' which should be deleted from the scope of the Directive.

The EMF would again encourage the EP to reconsider its position in respect of the inclusion of this Article in scope of the Directive.

² This is best evidenced by the example of Spain where the introduction of legislation providing an unconditional right to early repayment and a very restrictive cap on compensation (1%) resulted in an almost overnight switch from a market dominated by fixed rate loans to a market consisting almost exclusively of short-term variable rate loans with an initial fixation period of less than a year.



11. Arts. 14a(new) (EP text): Property Valuation & 18b(new) (EP text): Arrears & Foreclosure

The Commission carried out extensive research over a number of years into property valuation and arrears and foreclosure in the context of its assessment if the Integration of European Mortgage Markets and concluded that it would be inappropriate to legislate at EU level in these areas.

For this reason, and also in light of the fact that no impact assessment has been carried out on the measures proposed by the EP, the EMF would, also here, urge the EP to reconsider its position in respect of the inclusion of these Articles in the Directive.

12. Article -19a(new) (EP text): General Requirements

The EMF has serious concerns about the breadth of the general requirements and the references to the FSB Principles for Sound Underwriting which are meant primarily as a prudential tool rather than a consumer protection measure. The EMF is concerned about the use of LTV ratios in this Article as an example of tools to prevent over-indebtedness. Research and experience carried out by the UK FSA, for example, concluded that limits on LTV ratios are blunt tools that will unnecessarily restrict access for borrowers. The EMF therefore opposes any suggestion in the Directive that LTVs should be specified by Member States. Furthermore, Art. - 19(a)(2)(new) could provide Member States with the opportunity to "gold-plate", which would undermine the Directive's primary goals and could have serious consequences for the competitiveness of national Mortgage markets.

Against this background, the EMF would, again, encourage the EP to reconsider its position in relation to the inclusion of this Article in the final Directive.

13. Art. 30 (Commission text), Art. 34(1) (Council text): Transposition

Implementation of the Directive depends on the one hand on the transposition of the Directive into national law and on the other hand on subsequent application by lenders. Experience from the Consumer Credit Directive, where national regulators took up the entire two year period leaving no time for lenders, has shown that it is necessary to lay down two different terms, one for national regulators and one for the law subjects i.e. lenders, in order to allow lenders the time necessary to implement the national law.

In this respect, the EMF would urge the EP to advocate the replacement of the second section of this Article i.e. "They shall apply those provisions from [2 years after the entry into force]" by "These laws, regulations and administrative provisions will be applicable as of the third year following their publication."

14. Art. 1(2) (EP text) & Article 33 (Council text): Level of Harmonisation



In line with the CCD, the EMF firmly believes that the EP's Article 1(2) and the Council's Article 33 should be replaced by the following: *"In so far as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from or adding to the provisions laid down in this Directive".*

The EMF would urge the EP to reconsider its Article on the level of harmonisation during the triologue negotiations.

15. Annex IIa (EP Text) & Annex III (Council Text) – Minimum knowledge & competence requirements

The EMF supports the flexibility provided for in point 3 of the Council's Annex III in relation to Member States' ability to determine the appropriate level of knowledge and competence on the basis of professional qualifications or professional experience.

The EMF would urge the EP to align itself with the Council in this respect.



Annex I – EMF Position on a Duty to Advise

EMF Position on the Discretionary Introduction of a Duty to Advise

The discretionary introduction of a duty to advise would not only undermine the objective of the Directive to introduce a coherent set of harmonised rules at European level, as Member States may or may not choose to introduce such a duty further reinforcing fragmentation of markets, but it would also raise a number of complex issues that would be detrimental to EU mortgage markets:

- **Increased liability and ‘mutualisation’ of costs**

In those Member States where a duty to advise were introduced, this would result in additional liability risk for lenders. If, in addition to this, lenders were required to provide the advice free of charge to the consumer, they would be obliged to price the additional risk into their mortgage products, meaning that all borrowers would be required to ‘foot the bill’ for advice, whether they required it or not.

- **Restriction of Consumer Choice**

Further to the latter point, imposing a duty on lenders to provide advice would detract from the consumer’s ability to transact without having to be advised and would ignore the fact that not all consumers require advice, with financial capability and experience differing from one borrower to the next. Similarly, it would also fail to take account of the fact that not all transactions require advice, as some transactions are very low risk and simple.

As an additional point here, a duty to advise could also impact on product diversity. In order to protect themselves from the additional liability risk, lenders could be discouraged from advising consumers to take specific products, even where these might be appropriate for their situation.

- **Contravention of the Obligation of Non-Intrusion**

In several Member States, there is a legal “obligation of non-intrusion” into the affairs of the borrower. The introduction of a duty to advise would directly contradict this legal principle.

- **Restriction of Distribution Channels & Distortion of Competition**

Finally, requiring the provision of advice would also impact on how lenders choose to distribute their products and, given the inevitable impact on lenders’ business models and their ability (or not) to absorb the implications of a – potentially free of charge - duty to advise in terms of resources, would have an impact on market structures and competition and could pose a barrier to new entrants into markets.

- **Limitation of the principle of ‘freedom to contract’**

Linked to the point above is the consideration that requiring a lender to provide advice interferes with the lenders’ freedom to contract, with the decision to do so depending on their business model and their appetite for risk. The EMF does not believe that there is sufficient justification for in-roads into these fundamental principles of civil law.



Annex II – EMF Position in respect of the Definition of “Notarial Costs”

In the context of mortgage credit, the exclusion of notarial costs from the total cost of the credit to the consumer has to be understood broadly and must cover all costs and taxes which are not levied by the lender for his benefit and for which there is no involvement of the lender, but only of the notary. These include: the notary's fee, the mortgage registrar's fee, the mortgage inscription right, the registration right for the notarial deed, pre- and post mortgage research, writing dues, social and tax notifications, town planning extracts, land registry duties, etc..

The notary is entirely free to draw up his cost sheet once he has executed all notary acts and has been provided with a survey of all costs, which means after having passed the notarial deed and after the inscription of the mortgage in the files of the Mortgage Registrar. The lender, even more than the notary, can only guess at what the notary's final costs will be. In order to achieve a uniform expression of the APRC, it is necessary to exclude all notarial costs, whatever their type, from the calculation of the APRC.