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WP 2019-02

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The European Mortgage Credit Directive (MCD) aims to create a Union-wide mortgage credit market with a high level of consumer protection. While focussing on the primary policy objective, i.e. facilitating the emergence of an internal market for mortgage credit, this paper analyses the MCD's regulation of the activities of credit intermediaries, and the rules on establishment and supervision of credit intermediaries in particular. As professional middlemen, credit intermediaries could reduce information asymmetries between on the one hand creditors and on the other hand consumers. Against the background of Fintech intermediary disruption and the increasing importance of digital distribution channels for financial services, our paper analyses whether and/or to what extent the MCD's prudential rules for credit intermediation qualify as true "enablers" for an Internal market for mortgage credit.

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The final and revised version of this paper will be published in *Law and Financial Markets Review*.

The entire working paper series can be consulted at <http://www.law.ugent.be/fli/>.

DOES CREDIT INTERMEDIATION FACILITATE THE EUROPEAN INTERNAL MARKET FOR MORTGAGE CREDIT?

INTRODUCTION

1. The European Mortgage Credit Directive (MCD)¹ aims to create a Union-wide mortgage credit market with a high level of consumer protection. While focussing on the primary policy objective, *i.e.* facilitating the emergence of an internal market for mortgage credit, this paper analyses the MCD's regulation of the activities of credit intermediaries, and the rules on establishment and supervision of credit intermediaries in particular. As professional middlemen, credit intermediaries could reduce information asymmetries between on the one hand creditors and on the other hand consumers. Against the background of Fintech intermediary disruption and the increasing importance of digital distribution channels for financial services, our paper analyses whether and/or to what extent the MCD's prudential rules for credit intermediation qualify as true "enablers" for an Internal market for mortgage credit.

2. After a brief sketch of the state of the Internal Market for mortgage credit, we outline the theoretical role of credit intermediaries, as drivers of market discipline and supply-side competition, in such market (*Section 1*). *Section 2* subsequently outlines the essentials of credit intermediation under the MCD, before assessing respectively the MCD's passport and supervisory regime for credit intermediaries (*section 3*) and the harmonisation of the main concepts of mortgage credit law throughout the European Union (*section 4*). *Section 5* considers the potential importance of the MCD's rules on credit intermediaries in light of its stated purpose to facilitate the emergence of an internal market for mortgage credit. Hereto we assess the MCD's internal market objective in particular by answering three questions:

- 1) the likelihood of the MCD's potential to move consumers to actively seek credit intermediary services offered by a credit intermediary established in other EU Member States,
- 2) the MCD's potential to incite credit intermediaries to offer intermediary services in other EU Member States, either through a branch or under the freedom to provide services (*e.g.* by means of a website), and
- 3) whether the MCD could bolster the intermediation, by credit intermediaries in their local markets, of credit offered by creditors based in another EU Member State (*i.e.* cross-border provision of credit through local credit intermediaries).

1 CREDIT INTERMEDIARIES AND THE EUROPEAN MARKET FOR MORTGAGE CREDIT

1.1 The current absence of an integrated European market for mortgage credit

3. Today, there is no integrated European market for mortgage credit, *i.e.* a market where a similar range of mortgage credit products is available in all European Member States at the same prices². Even mere cross-border mortgage credit activity is almost non-existing in the EU³. Strikingly, only 56 from the 24,714 respondents to the 2016 Eurobarometer⁴ (or merely 0.23 percent of the research population), declared to have ever purchased a cross-border mortgage credit.⁵ This percentage of cross-border mortgage credit purchases does, moreover, not appear to increase over time.⁶ Often cited concerns with

¹ Directive 2008/48/EC of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, *OJ L* 60/34, 28 February 2014.

² Definition integrated market for mortgage credit cf. the famous 1987 CECCHINI Report. See on this definition ZSOLT PATAKI, "The Cost of Non-Europe in Financial Services", European Parliamentary Research Service, September 2014.

³ One exception is that of financial institutions - encouraged by the European rules on mutual recognition - operating through the internal market by way of subsidiaries or mergers and acquisitions. This is however no cross-border credit in a strict sense. See in this respect P. ROTT, "Consumer Credit", in *Understanding EU Consumer Law*, H.-W. MICKLITZ, N. REICH and P. ROTT (eds.), Antwerp-Cambridge, Intersentia, 2009, 181.

⁴ See European Commission, "Special Eurobarometer 446: Financial Products and Services", July 2016, available at <http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2108>.

⁵ See the dataset "SP446 - Volume AP_xls" underlying the Eurobarometer 2016, available at http://ec.europa.eu/COMMFrontOffice/downloadODP/?2403592EFB15E27E0D865576D45C73B6F_QC2.1.

⁶ Variations chiefly find their origin in minor fluctuations of the total loan value. Whereas the 2016 Eurobarometer report provides the reader solely with a robust idea of the evolution of cross-border mortgage purchases in comparison with (the Eurobarometer of) 2011, the underlying

regard to cross-border purchases in general apply, such as ‘not having enough information’, ‘not knowing your rights’, ‘the language barrier’, ‘complexity’, ‘preference to buy face-to-face’, ‘the fear that there is less consumer protection in other Member States’, etc.⁷. Several of these causes for consumers’ reluctance towards the cross-border purchase of credit cannot be (easily) resolved through harmonisation of the legal framework applicable to household credit⁸. Consumers’ reluctance towards cross-border purchase of credit explains why, besides mitigation of some of the existing demand-side hurdles with regard to cross-border credit (*e.g.* consumers’ fear that ‘there is less legal protection in other Member States’), European lawmakers perceived the stimulation of cross-border activity by creditors (*i.e.* the supply-side) of particular importance to establish an integrated European mortgage credit market.

4. With the introduction of the MCD in 2014, European lawmakers wanted to take an ambitious step towards the integration of the national markets for mortgage credit within the EU. Accordingly, the MCD aims to create a Union-wide mortgage credit market with a high level of consumer protection⁹.

1.2 The potential role of credit intermediaries

5. In general, credit intermediaries engage essentially in market-matching between the supply- and demand-side of the credit market: they link borrowers’ credit needs with matching credit offers.

The added value of the intermediary activity seems obvious. Research indeed affirms consumers’ failure to shop around:¹⁰ no less than two out of ten consumers contends themselves with the first mortgage they encounter. Considering many consumers’ omission to (adequately) shop around for (mortgage) credit, it is plausible that most of them may be happy to outsource this job to a professional intermediary. By commissioning a credit intermediary to match a particular credit need to one or more suitable credit solutions, households may - among others - benefit from the intermediary’s specific expertise, economies of scale and stronger position to negotiate at arm’s length with a creditor.¹¹ Credit intermediation could also tackle detrimental consequences of financial conservatism.¹² Credit intermediaries’ ability to adequately scan the market for suitable credit products may accordingly enhance competition. As credit intermediaries typically select different credit terms and offers for consumers the latter may become a driver of market discipline and increased supply-side competition.¹³

Furthermore, credit intermediaries could mitigate information asymmetries between creditors and consumers.¹⁴ By alleviating information disequilibria in the pre-contractual stage (amongst others

dataset allows for more nuanced reflections in that respect. When examining the underlying dataset, it seems that the fluctuations shown in the report (an increase of cross-border purchases of mortgage credit by respondents from Belgium, Ireland, Cyprus, and Luxemburg versus a decrease of cross-border purchases of mortgage credit by respondents from Denmark, Italy, Romania, and the UK) chiefly find their origin in minor alterations of the absolute values. These changes per country do not appear to be statistically significant. In 2011 for instance 4 (out of 552) respondents from Romania said they had previously bought a cross-border mortgage credit, whereas in 2016 only 1 (out of 595) respondents claimed to have done so. See the dataset “SP446 - Volume AP.xls” underlying the Eurobarometer 2016, available at http://ec.europa.eu/COMMFrontOffice/downloadODP/?403592EFB15E27E0D865576D45C73B6F_QC2.1.

⁷ See European Commission, “Special Eurobarometer 446: Financial Products and Services”, July 2016, available at <http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2108>, 22.

⁸ This is for instance the case for consumers’ general subjective preference for local credit providers, language barriers, differing debt cultures, different levels of home ownership and a lack of a full monetary harmonisation within the EU. See on this biases White Paper on the Integration of EU Mortgage Credit Markets, Brussels 18 December 2007, COM (2007) 807 final, 3: “*The Commission recognizes that consumers predominantly shop locally for mortgage credit and that the majority will probably continue to do so for the foreseeable future. The integration of EU mortgage markets will therefore be essentially supply-driven, in particular through various forms of establishment in the Member State of the consumer.*” and N. JENTZSCH, “The Implications of the New Consumer Credit Directive for EU Credit Market Integration”, position paper, April 22 2003, 9 ff.; European Mortgage Federation, *Hypostat 2008: A review of Europe’s Mortgage and Housing Markets*, November 2009.

⁹ See consideration 5 MCD. For an analysis of the second policy objective, namely the achievement of a high level of consumer protection, we refer to M. DE MUYNCK and D. BRULOOT, “Credit intermediation under the 2014 European Mortgage Credit Directive: a Call for Targeted Rules on Intermediary Remuneration”, ERCL 2017, 13(1), 1-37.

¹⁰ Special Eurobarometer 373: Retail Financial Services (*supra* footnote 4).

¹¹ On the added value of credit intermediaries in the search process, see for example S. Grundmann, ‘Information, Party autonomy and economic agents in European Contract Law’ *Common Market Law Review* 2002, 269.

¹² Or ‘loyalty to one’s own bank’ see in this respect OPTEM, ‘Pre-Contractual Information for Financial Services. Qualitative study in the 27 Member States Summary Report’ January 2008, 69.

¹³ See Office of Fair Trading, ‘Report on Consumer contracts’, OFT1312, February 2011, 10.

¹⁴ See in this respect ao R. Hynes and E. Posner, ‘The Law and Economics of Consumer Finance’ *American Law and Economics Review* 4 (2002) 168-207; O. Bar-Gill and E. Warren, ‘Making Credit Safer’ 157 *University of Pennsylvania Law Review* (2008-2009) 1-102; O. Bar-Gill, ‘The Law, Economics and Psychology of Subprime Mortgage Contracts’ *American Law & Economics Association Annual Meetings Working Paper* Nr 47; S. Block-Lieb and A.J. Langer, ‘The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided

by translating the ‘legalese’ language used by creditors¹⁵), credit intermediaries could level the playing field between consumers and sophisticated lenders, and accordingly enhance freedom of contract as well as product choice.¹⁶ By clarifying (using plain and intelligible language)¹⁷ potential credit solutions, associated costs,¹⁸ as well as their impact on a household’s financial situation¹⁹ and the risks attached, credit intermediaries may help to overcome consumers’ widespread distrust while negotiating credit agreements. The alleviation of information disequilibria is obviously more significant in case of non-standardized and complex products²⁰ than in case of plain-vanilla types of mortgage credit.²¹

6. The positive effects of credit intermediaries on the functioning of (mortgage) credit markets are amplified when perceived in a cross border context. Credit intermediaries could indeed serve as professional match-makers between the supply-side and the demand-side of a Single Market for (mortgage) credit. A harmonised legal framework for credit intermediaries, including rules on establishment, registration and supervision (passport regime) and a harmonised mortgage credit law, could hence foster future (cross-border) mortgage credit intermediation activity within the EU.

2 CREDIT INTERMEDIATION UNDER THE MCD

2.1 MCD scope and contents

7. The MCD lays down a common framework for a large number of aspects of the laws, regulations and administrative provisions of the Member States concerning agreements concluded by a professional creditor covering credit for consumers secured by a mortgage or otherwise relating to residential immovable property. Hence, the MCD applies to two main types of credit agreements, *i.e.*:²²

- (1) credit agreements, whatever their purpose is, which are secured either by a mortgage or by another comparable security on residential immovable property or secured by a right related to residential immovable property; and
- (2) credit agreements the purpose of which specifically is to acquire or retain property rights in land or in an existing or projected building.²³

8. As to its contents, the MCD first comprises a set of consumer information requirements (information in advertising, general information and the provision of personalised pre-contractual information through the ESIS²⁴). The directive further contains several principle based rules and standards for the performance of credit services, in particular conduct of business obligations and competence and knowledge requirements for staff of credit providers. The MCD also addresses the creditworthiness

“Reform” of Bankruptcy Law’ *Texas Law Review* (84) 1481-1565; L.E. Willis, ‘Decision-making and the Limits of Disclosure: The Problem of Predatory Lending: Price’ *Maryland Law Review* (65) 707-735; A. Schwartz, ‘Personal Bankruptcy Law: A Behavioural Perspective’, in J. Niemi-Kiesilainen, I. Ramsay and W.C. Whitford (eds), *Consumer Bankruptcy in a Global Perspective* (London: Hart, 2004) Chapter 3 and I. Ramsay, ‘From Truth in Lending to Responsible Lending’, in G. Howells, A. Janssen and R. Schulze (eds), *Information Rights and Obligations. A Challenge for Party Autonomy and Transactional Fairness* (Aldershot Hants: Ashgate, 2005) 52-57.

¹⁵ See in this respect for instance EUROPEAN COMMISSION, *Special Eurobarometer: public opinion in Europe on Financial services*, May 2005, http://ec.europa.eu/public_opinion/archives/ebs/ebs_230_en.pdf, 64.

¹⁶ D. Pogrud Stark, ‘Unmasking the Predatory Loan in Sheep’s Clothing: A Legislative Proposal’ 21 *Harvard Blackletter Law Journal* 2005, 138.

¹⁷ On these concepts, see P.N. Stoop, ‘Plain Language and Assessment of Plain Language’ *International Journal of Private Law* 4 (2011) 329 and the following.

¹⁸ Credit intermediaries could for example point a consumer’s attention to several ‘hidden costs’ (eg a compulsory credit insurance) in order to promote creditor competition on the true costs of credit.

¹⁹ For instance by making simulations on the basis of the consumer’s income and repayment rhythm, by emphasizing that a credit insurance is not compulsory, etc. K.C. Engel and P.A. McCoy, ‘A Tale of Three Markets: The Law And Economics of Predatory Lending’ 80 *Texas Law Review* (2002) 1255, 1267.

²⁰ E.g. an adjustable rate mortgage (with index trackers), a hybrid product that combines both a fixed and a variable interest rate, foreign currency credit, open-end mortgage agreements or investment mortgages.

²¹ See Internal Market Study, 27. Given the growing importance of intermediary platforms on the internet, the added value of intermediary advice is especially oriented towards complex financial consumer goods (to the detriment of the ‘commodity consumer finance products’ e.g. a travel insurance, a current account, etc). See G. Biglaiser, ‘Middlemen as experts’ *Journal of Economics* (24) 223 and F. De Jong, *Marktfalen bij tussenpersonen. Onderzoek naar marktfalen in de intermediaire bedrijfstak voor financiële dienstverlening* (Uitgeverij Paris: Zutphen, 2010) 33.

²² See art 3, §1 MCD.

²³ In addition to a limited list of mandatory exceptions to the scope of application, the MCD provides Member States the option to adopt additional exceptions. See for instance article 7:119, §2, g) and h) of the Dutch Civil Code.

²⁴ European Standardised Information Sheet.

assessment of consumers to be performed before the conclusion of a mortgage credit agreement. Of great practical importance are further the provisions on early repayment and so-called tying practices²⁵. Finally, the directive establishes a European passport regime for credit intermediaries who meet certain admission requirements in their home Member State. In this paper we limit ourselves, with the scope of our research in mind, to an assessment of the establishment and supervisory regime and an exemplary assessment of the harmonised substantial rules on mortgage credit.

9. Contrary to the approach taken with regard to the Consumer Credit Directive,²⁶ the European legislator made the majority of the provisions of the MCD subject to minimum harmonisation.²⁷ Solely the provisions concerning the calculation of the Annual Percentage Rate of Charge (APRC) and the usage of the European Standardised Information Sheet (ESIS) were made subject to full harmonisation.²⁸ The MCD does, consequently, not jeopardise the ability of the Member States to impose more stringent provisions on credit intermediaries than the rules set out in the directive, provided that such provisions are consistent with the Member States' obligations under Union law. The main rationale behind the choice of the European legislator to employ a chiefly minimally harmonised directive is that an entirely maximally harmonised directive could possibly deteriorate the level of consumer protection in certain Member States.²⁹

The deadline for the implementation of the directive by the Member States in national law was March 21st 2016.³⁰ Albeit not all Member States managed to adopt national legislation timely,³¹ certain Member States appear to have made use of the possibility to adopt additional consumer protecting measures. Notwithstanding more detailed or more protective national regulation based on the minimum standards set out in the MCD may lead to more satisfactory results in terms of consumer protection, minimum harmonisation could hamper the market integration objective by allowing for diffuse layers of additional consumer protection in different Member States.

2.2 Credit intermediaries

10. The MCD defines a credit intermediary as: “*a natural or legal person who is not acting as a creditor or a notary and not merely introducing, either directly or indirectly, a consumer to a creditor or credit intermediary, and who, in the course of his trade business or profession, for remuneration which may take a pecuniary form or any other agreed form of financial consideration: (a) presents or offers credit agreements to consumers; (b) assists consumers by undertaking preparatory work and/or pre-contractual administration in respect of credit agreements other than as referred to point (a); or (c) concludes credit agreements with consumers on behalf of the creditor.*”³². This definition is largely inspired by the broad and at some points ambiguous definition of credit intermediaries included in the Consumer Credit Directive (CCD).³³

11. ***Intermediation in the course of a trade business or profession*** – A rare, non-profit seeking mediation by a private individual³⁴ shall give no reason to a designation as a credit intermediary.³⁵ The activity must necessarily take place “in the course of a trade, business or profession”³⁶. Natural or legal

²⁵ This is the offering or the selling of a credit agreement in a package with other distinct financial products or services where the credit agreement is not made available to the consumer separately; see article 4 (26) MCD.

²⁶ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66, 22nd of May 2008.

²⁷ Art. 2 MCD. See in this respect e.g. W. VAN GERVEN, “Harmonisation of private law: do we need it?”, *CMLR* 2004, 508; E. TERRY, *Bedenkrijden in het consumentenrecht*, Antwerp-Cambridge, Intersentia, 2008, 90.

²⁸ Cf. consideration 7 MCD and art. 2, par. 2 MCD.

²⁹ Cf. consideration 7 MCD.

³⁰ Art. 42 MCD.

³¹ Belgium for instance only adopted national legislation on the 22nd of April 2016, which entered into force on the 1st of April 2017.

³² See article 4 (5) MCD. For an atomization of this definition we refer to M. DE MUYNCK and D. BRULOOT, “Credit intermediation under the 2014 European Mortgage Credit Directive: a Call for Targeted Rules on Intermediary Remuneration”, *ERCL* 2017, 13(1), 10-12.

³³ See article 3 (f) CCD.

³⁴ Like a secured loan transaction between family or friends.

³⁵ Contrary to what was for example the case according to Belgian law prior to the implementation of the MCD. See R. STEENNOT, “Nieuwe regelen inzake hypotheecair krediet: een verruimd toepassingsgebied en de introductie van gedetailleerde precontractuele informatieverplichtingen”, *In het vennootschapsbelang - Liber amicorum Herman Braeckmans*, Antwerpen, Intersentia, 427-449.

³⁶ See article 2, §3 *in fine* for a similar requirement in the Insurance Mediation Directive.

persons that originate loans themselves (*i.e.* engage themselves in the activity of “granting or promising credit” to consumers) obviously do not qualify as an intermediary. The MCD further explicitly excludes public notaries.

It is not required that credit intermediation constitutes the natural or legal person’s chief activity: the directive principally applies to credit intermediation in ancillary capacity as well. Entities that limit themselves to merely introducing consumers to a certain creditor or credit intermediary, do however not qualify as credit intermediaries.

12. **Websites** – The individual circumstances of each business shall determine whether or not it qualifies as a credit intermediary under the MCD.³⁷ An activity solely consisting of the provision of information with regard to creditors and/or credit agreements, or the introduction³⁸ and/or referral to credit providers shall not suffice to qualify as a credit intermediation for the purpose of the MCD. Additional intermediary activity (for example with regard to the completion of a consumers’ application or an assessment of the suitability or affordability of the prospective agreements) is required. A price comparison website³⁹ for instance, limiting its activities to providing general information on interest rates, will thus not qualify as a credit intermediary under the MCD as it is not presenting credit agreements as such, nor assisting with preparatory work.

13. **Advisory services** - Next to the aforementioned intermediary activities, the MCD further introduces the concept of ‘advisory services’,⁴⁰ *i.e.* the provision of *personal recommendations* to a consumer in respect of one or more transactions relating to credit agreements as a separate activity⁴¹.

2.3 Tied v. untied intermediaries

14. Credit intermediaries’ relation with-, and degree of independence from creditors can vary considerably. Whereas some credit intermediaries exclusively mediate credit agreements on behalf of one or more creditors, other intermediaries, often referred to as ‘brokers’, are not similarly tied. Different from the CCD, the MCD defines what constitutes a tied credit relation. Since much of the MCD’s provisions apply without any distinction to all ‘credit intermediaries’, one should however not overstate the practical impact of the difference between tied and untied intermediaries.

15. **Tied** – A credit intermediary who acts on behalf of and under the full and unconditional responsibility of only one creditor or one group⁴² qualifies as a tied intermediary under the MCD.⁴³ Thus required first

³⁷ The source of revenue of the price-comparison website is an important factor. Some websites’ profitability is for example solely based on income from advertising or the sale of data to third parties. Also Office of Fair Trading, “OFT Guidance for brokers, intermediaries and the consumer credit and hire businesses which employ or use their services”, November 2011, 65.

³⁸ The MCD diverges on this point with the Insurance Mediation Directive. Article 2, §3 defines indeed insurance mediation as: “the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.”

³⁹ Internet actually appears to be a commonly used tool to get an understanding of the credit market before turning to a creditor or a credit intermediary to negotiate a credit deal. See OPTeM, “Pre-Contractual Information for Financial Services. Qualitative study in the 27 Member States Summary Report”, January 2008, 21.

⁴⁰ Art 4(21) MCD.

⁴¹ Hence, credit intermediaries are not obliged to provide personal recommendations under the MCD: they could limit themselves to offering and/or concluding credit contracts on behalf of a creditor or to assisting consumers with preparatory work. Note however that credit intermediaries should be aware that even when they do not provide advisory services, they are still obliged to deliver adequate explanations as foreseen in Article 16 MCD. The boundaries between these two concepts can thus be rather vague in practice. See about the obligation to provide adequate explanations: M. DE MUYNCK and D. BRULOOT, “Credit intermediation under the 2014 European Mortgage Credit Directive: a Call for Targeted Rules on Intermediary Remuneration”, *ERCL* 2017, 13(1), 20-21. Member states seem however to struggle with this dichotomy the European legislator wanted to establish between intermediary services on the one hand and advisory services on the other hand. An extreme example in that respect can be found in Belgium: by obliging *all creditors and credit intermediaries alike* to provide advisory services, the Belgian Code of Economic Law completely departs from the difference between advisory and other services. See art VII.131 of the Belgian Code of Economic Law.

⁴² Art 4(6) MCD defines ‘a group’ for the purpose of this Directive, as a group of creditors which are to be consolidated for the purposes of drawing up annual accounts, as defined in Directive 2013/34/EU.

⁴³ Art 4(7) MCD. See art 2, § 7 Insurance Mediation Directive for a much similar definition.

is that the intermediary acts on behalf of a creditor or a group⁴⁴. A tied intermediary furthermore acts under the full and unconditional responsibility⁴⁵ of a creditor or a group⁴⁶.

16. **Untied** - Intermediaries not acting on behalf of and under the full responsibility of a creditor or a group, do not resort under Article 4(7) MCD and hence are untied. Untied intermediaries are commonly referred to as brokers. Not distinctly defined under the MCD, untied intermediaries constitute a ‘residual category’.

17. **Appointed representatives** – A last concept to be mentioned in this section is the ‘appointed representative’, *i.e.* a natural or legal person who performs intermediary activities on behalf of and under the full and unconditional responsibility of a single *credit intermediary*.⁴⁷ Member States were, however, not obliged to implement the distinct concept of ‘appointed representative’ into their national laws.⁴⁸

3 ESTABLISHMENT AND SUPERVISION OF CREDIT INTERMEDIARIES UNDER THE MCD

18. This section first sketches the MCD’s establishment and registration framework for credit intermediaries. Subsequently, we outline the supervisory regime for credit intermediaries. An assessment of these elements from a market integration perspective will be made in section 5.

3.1 Establishment and registration of credit intermediaries

19. **Authorisation** - In order to carry out mediation activities, credit intermediaries should be dully authorized by a competent authority in their home Member State⁴⁹. As to the meaning of ‘home Member State’ a distinction must be made between natural persons (state in which his *head office* is situated) and legal persons⁵⁰ (state of the intermediary’s *registered office*)⁵¹. Accordingly, Member States in which a credit intermediary has a branch or provides services are called its *host* Member States.

The MCD only provides for authorisation for credit intermediaries on the institutional level. Member States that allow the appointment of appointed representatives⁵², must establish a registration procedure for these representatives as well.

Member States shall keep an up to date⁵³ (publicly online available) *register* of all the credit intermediaries (and, if applicable, their appointed representatives).⁵⁴ Besides the names of at least the

⁴⁴ The notion acting ‘on behalf of’ refers to an agency relation between the creditor-principal and the middleman. Tied intermediaries are generally charged with the conclusion (*i.e.* signing) of credit agreements on behalf of a creditor.

⁴⁵ Whether the notion ‘full and unconditional responsibility’ is to be understood as a strictly legal or as an economic requirement, is unclear. Questions (particularly stemming from the condition that the responsibility must be unconditional) in this respect are for instance what the influence of a legal right of recourse or a limitation of liability is on the qualification as a tied intermediary. The latter seems to be however the more useful approach. Sometimes, a quasi-symbiotic relationship between an intermediary and the creditor could be described (the intermediary as a mere salesman or full subsidiary of the creditor). Reality often proves however to be more hybrid, see P. Rott, ‘Europäisierung des Rechts der Finanzintermediäre’ *Europäisches Wirtschafts- und Steuerrecht* 2008, 22. Mere financial ties between creditor and intermediary, for instance the fact that the intermediary holds equity in the creditor or *vice versa*, can be at stake as well. Although such relationships are insufficient to be qualified as acting ‘under the full and unconditional responsibility’, they may obviously impact an intermediary’s objectivity, see Grundmann, n 9 above, 268.

⁴⁶ Sometimes, a quasi-symbiotic relationship between an intermediary and the creditor could be described (the intermediary as a mere salesman or full subsidiary of the creditor). Reality often proves however to be more hybrid, see P. Rott, ‘Europäisierung des Rechts der Finanzintermediäre’ *Europäisches Wirtschafts- und Steuerrecht* 2008, 22. Mere financial ties between creditor and intermediary, for instance the fact that the intermediary holds equity in the creditor or *vice versa*, can be at stake as well. Although such relationships are insufficient to be qualified as acting ‘under the full and unconditional responsibility’, they may obviously impact an intermediary’s objectivity, see Grundmann, n 9 above, 268. Finally, it should be noted that an intermediary can be ‘tied’, although not working for only one creditor or group: an intermediary acting under the full and unconditional responsibility of a number of creditors or groups will qualify as a tied intermediary insofar its principals do not represent the majority of the market. Art 4(7)(c) MCD. When they do represent the majority of the market, the intermediary is no longer qualified as ‘tied’.

⁴⁷ See art 4(8) and 31 MCD.

⁴⁸ When Member States do not implement the concept, but do allow entities to perform a role which is comparable to that of appointed representatives, those entities must be subjected to the regime applicable for all credit intermediaries. See consideration 70 of the MCD.

⁴⁹ See article 29, par. 1 MCD.

⁵⁰ See article 4, (19) MCD.

⁵¹ Or, if under its national law it has no registered office, where its head office is situated.

⁵² See above nr. 17.

⁵³ Member States must for instance as soon as possible delete credit intermediaries whose admission has been withdrawn (*cf. infra*). See article 33, §3 MCD.

⁵⁴ Article 29, par. 4 MCD.

person(s) within the management who are responsible for the intermediation business, the register mentions the countries in which the intermediary deploys his activities and whether he is tied or untied.

20. **Exceptions** - The MCD contains three important exceptions to the general rules on authorisation of intermediaries, for credit or financial institutions⁵⁵ and (optional) for intermediaries tied to a single creditor⁵⁶ and credit intermediation in the course of another activity⁵⁷.

21. **Consequences of authorisation** – By making the authorisation to carry out intermediary activities effective for the entire EU without further approval by the competent *host* authorities,⁵⁸ the MCD clearly liberalises the internal market for mortgage credit intermediation⁵⁹. Host authorities yet shall be informed by the home Member State of the intention of the foreign business to carry out mediation activities in their territory⁶⁰. EBA undertook action to smoothen this process of passport notification by providing templates⁶¹.

Host authorities can, however, still condition the activity of credit intermediation to additional requirements in areas not harmonised in Union law (*e.g.* with regard to bridging loans as they are excluded from the MCD's scope of application). Although this type of restrictions should in any case be compliant with general EU law⁶², it is clear that they hamper full market integration.

22. **Professional requirements** – The MCD prescribes an elaborate list of professional requirements intermediaries should meet in order to get an authorisation of their home state authority to perform intermediary activities⁶³. These requirements are largely similar to those imposed by the Insurance Mediation Directive⁶⁴.

A first requirement is that every credit intermediary should possess a *professional indemnity insurance* (or a comparable guarantee)⁶⁵ that covers the territories in which they operate⁶⁶.

Other requirements are all in some way related to the professional qualifications of intermediaries, their managers, and employees. Credit intermediaries must in general be natural persons of good repute⁶⁷. As a bottom line the MCD requires the natural persons to have a clean police record with regard to crimes that touch upon financial activities and the absence of a bankruptcy declaration (unless the person has been rehabilitated in accordance with national law). Furthermore credit intermediaries, their board members and other persons involved in their management must possess an appropriate level of knowledge and competence in relation to the mediated credit products⁶⁸. Finally,

⁵⁵ Entities that qualify as a credit institution as mentioned in Directive 2013/36/EU or as a financial institution according to similar authorisation and supervision regimes under national law, are not obliged to obtain a separate authorisation for intermediary activities under the MCD. See Article 29, par. 9 MCD.

⁵⁶ Member States may allow credit intermediaries tied to a single creditor to be admitted through the creditor on whose behalf they are exclusively acting. In the latter case the creditor is fully and unconditionally responsible for the intermediary's compliance with the MCD's rules. See Article 30 MCD.

⁵⁷ The MCD grants Member States the freedom not to apply the rules on authorisation of credit intermediaries to persons carrying out incidental credit intermediation activities in the course of another professional activity *e.g.* mediating investment products. See article 29, §8 MCD.

⁵⁸ See article 32, §1 MCD.

⁵⁹ An exception to this principle however remains with regard to credit provided by so-called non-credit institutions; which are defined as creditors which are no credit institution as mentioned in point 1 of Article 4(1) of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms; see article 4, (9) MCD. Credit intermediaries are not allowed to mediate credit agreements by non-credit institutions in another EU Member State where such non-credit institutions are not allowed to operate (article 32, par. 1 *in fine* MCD).

⁶⁰ See article 32, §3 MCD. The credit intermediary can carry out his activities abroad one month after the Home supervisor informed him of the notification to the Host supervisor. See article 6 Insurance Mediation Directive for a similar provision.

⁶¹ See EBA Guidelines on passport notifications for credit intermediaries under the Mortgage Credit Directive, 11 August 2015, EBA/GL/2015/19.

⁶² A Member State that for instance wishes to restrict the number of creditors that a credit intermediary can be tied to, shall therefore among other things have to demonstrate that aforementioned requirement is non-discriminatory, proportionate, etc. Note that this requirement was originally mentioned in Consideration 52 of the Council text but did not make it to the final version.

⁶³ See MCD. Note that Member States might impose additional registration requirements. National supervisors might for instance demand the payment of a supervision fee. *Cf.* article VII.181, §1, 6° of the Belgian Code of Economic Law.

⁶⁴ See article 3 and 4 Insurance Mediation Directive. The Insurance Mediation Directive additionally contains financial capacity requirements in order to prevent intermediary moral hazard (for example the situation where intermediaries are "judgment-proof" by undercapitalization).

⁶⁵ The home Member State may stipulate in national law that insurance or a comparable guarantee can be provided by a creditor for which the *tied* credit intermediary is empowered to act. See article 29, §2, (a) MCD.

⁶⁶ See article 29, §2, (a) MCD.

⁶⁷ Or if the credit intermediary is not a natural person: the board members and natural persons performing equivalent tasks within the credit intermediary.

⁶⁸ This obligation must be read in combination with the general obligation regarding knowledge and competence on intermediary activities for all *staff* members (*infra*).

and more in-depth regulated – is that all members of a credit intermediaries’ staff⁶⁹ should possess an appropriate level of knowledge and competence with regard to credit intermediation activities.⁷⁰ In principle, the *home* Member State is charged with the establishment of regulation incorporating this requirement⁷¹. With regard to cross-border intermediary services, however, the MCD provides a distinction between credit intermediation through a branch and credit intermediation under the freedom to provide services. When a credit intermediary provides services in another Member State through a branch, the *host* Member State shall be responsible for providing adequate legislation incorporating the general obligation regarding knowledge and competence of all staff members of that branch.⁷² Where the services on the other hand are provided under the freedom to provide services, it shall still be the home Member State who is in general⁷³ required to do so.

In establishing the requirements for staff members, the text of the directive prescribes that only the *home* Member States have to take into account the principles set out in Annex III of the directive. According to the named Annex, besides an appropriate level of financial and economic competency, the requirements need to cover at least appropriate knowledge of: mortgage credit products; credit agreement related consumer protection regulation; the immovable property purchasing process; security valuation; land registers; the market in the relevant Member State; business ethics standards; and the consumer’s creditworthiness assessment process.⁷⁴ Annex III requires the Member States to determine the appropriate level of knowledge and competence on the basis of professional qualifications⁷⁵ or experience.⁷⁶ Remarkable is that the MCD does not require *host* Member States to observe the principles set out in Annex III of the directive when providing national legislation. When cross-border intermediary services are thus provided through a branch, the minimum knowledge and competence requirements applicable to the staff of that branch shall not necessarily adhere to the principles described above.

23. *Withdrawal of authorisation* – The competent authority of the home Member State may withdraw the authorisation to carry out intermediary activities if the authorised credit intermediary⁷⁷:

- (1) has expressly renounced the authorisation or has not carried out credit intermediation activities (nor provided advisory services) for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (2) has obtained the authorisation through false or misleading statements or any other irregular means;
- (3) no longer fulfils the requirements under which the authorisation was granted (home Member States must for instance ensure that authorised credit intermediaries comply with the aforementioned professional requirements *on a continuing basis*⁷⁸);
- (4) falls within any of the cases where national law, in respect of matters outside the scope of the MCD, provides for withdrawal of authorisation; or
- (5) has seriously or systematically infringed the provisions adopted pursuant to the MCD governing the operating conditions for credit intermediaries.

Whenever the authorisation of a credit intermediary is withdrawn, the competent authority of the home Member State shall as soon as possible, and at the latest within 14 days, notify the competent authorities of the host Member States by any appropriate means.⁷⁹

3.2 The supervisory framework for cross-border credit intermediation

24. In the following paragraphs we briefly sketch the MCD’s supervisory framework for cross-border

⁶⁹ Article 4 (11) defines “staff” as “(a) any natural person working for the creditor, or credit intermediary who is directly engaged in the activities covered by this Directive or who has contacts with consumers in the course of activities covered by this Directive; (b) any natural person working for an appointed representative who has contacts with consumers in the course of activities covered by this Directive; (c) any natural person directly managing or supervising the natural persons referred to in points (a) and (b).”

⁷⁰ See article 29, §2 *juncto* article 9 MCD.

⁷¹ See article 9, §2 MCD.

⁷² See article 9, § 3 MCD.

⁷³ Host Member States may however establish the minimum knowledge and competence requirements related to: credit agreement related consumer protection regulation, the immovable property purchasing process, land registers, and the market in the relevant Member State. See article 9, §3, (ii) MCD.

⁷⁴ See Annex III, §1 MCD. No “one-size fits all” approach is required though: Member States may differentiate the content of the knowledge and competence requirements between the level on which the person at stake is acting; like staff of creditors, staff or credit intermediaries, management of credit intermediaries, etc.; see Annex III, §2 MCD.

⁷⁵ *E.g.* diplomas, degrees, competency tests etc.; see see Annex III, §3 MCD.

⁷⁶ See Annex III, §3 MCD.

⁷⁷ See article 30, §1 MCD.

⁷⁸ See article 29, §7 MCD.

⁷⁹ See article 30, §2 MCD.

credit intermediation. Besides the analyses with regard to the rules on establishment and the harmonisation of the substantial rules on mortgage credit, the supervisory framework is an important building stone to assess the MCD's market integration potential.

25. **Home state supervision** - The supervision of credit intermediaries is principally entrusted to the supervisory authority of the *home* Member State.⁸⁰ The MCD however grants *host* Member States a large number of supervisory powers. One has to distinguish in this regard between cross-border credit intermediation through a branch (*infra* a) and credit intermediation under the freedom to provide services (*infra* b). By meticulously allocating secondary powers and competences⁸¹, the MCD furthermore seeks to prevent that competent authorities fall prey to supervisory deadlock triggered by the inertia of other supervisors. It shall finally be clear that aforementioned assignment of tasks, of course, only applies for the fields that are covered by the MCD.

26. **Cooperation** - Host and home state authorities shall in any case closely cooperate with each other and the EBA.⁸² They have to (1) exchange information and (2) cooperate in any investigation or supervisory activities whenever this is necessary to carry out their duties under the MCD.⁸³

(a) **Cross-border credit mediation through a branch**

27. **Host state** - The MCD attributes wide supervisory powers to *host* authorities in case of cross-border credit mediation through a branch. It thus is of great importance to know what is to be considered as a branch. Whereas the MCD itself does not provide a definition⁸⁴, we may assume that the ECJ's leading definition applies: "*The concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.*"⁸⁵ Branches are for supervision purposes actually to a very large extent treated in the same way as locally incorporated intermediaries, except for their initial registration.

The branch's host state shall supervise the obligation for the intermediary to act honestly, fairly and professionally; the knowledge and competence requirements; the intermediary's advertising; the provision of general and personalised pre-contractual information (including the specific duties for credit intermediaries in this respect); the provision of adequate explanations; the rules with regard to the calculation of the annual percentage rate; the disclosure and verification of consumer information; the standards for advisory services and dispute resolution mechanisms.⁸⁶

28. **Home state** - With regard to credit intermediation through a branch, the competences that remain with the home Member State are limited. Most important in this respect is their competence to monitor compliance with the conditions for authorisation. In exercise of residual competences, home Member State authorities may conduct onsite inspections in the branch, after having informed the host Member State supervisor of their intention. Authorities, of course, maintain their competences in the fields that are not covered by the MCD⁸⁷.

29. **Breach of obligations** - Whenever the competent authority of the *host* Member State ascertains that a credit intermediary is in breach of his obligations under the MCD in one of the fields for which it is

⁸⁰ See article 34, §1 MCD. See for the exact meaning of the concepts of "home" and "host" state in this context, above nr. 19.

⁸¹ For instance a cascade of powers, rebounding supervisory competences or a possible referral to the European Banking Authority.

⁸² The European Banking Authority plays its common coordinating role. See in this regard article 31 of EU Regulation No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, *OJ L* 331, 15 December 2010.

⁸³ See article 36 MCD.

⁸⁴ Nor the Eleventh European company law directive on branches does; see Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State.

⁸⁵ ECJ 22 November 1978, *Somafer SA v Saar-Ferngas AG* (Case 33/78), nr. 12.

⁸⁶ See article 34, par. 2 MCD.

⁸⁷ For example contract law relating to the validity of the credit agreement.

attributed competence, it shall require the intermediary to halt the irregular situation. If the intermediary fails to take the necessary steps, the host authority shall take the necessary measures that put an end to the irregular situation and communicate these measures to the home authority. If the credit intermediary, despite these measures, persists, the host authority shall take the necessary measures to penalise further irregularities and, prevent (if necessary) the credit intermediary from initiating further transactions in its territory.⁸⁸ Both the competent authority of the home Member State and the European Commission shall be informed about these actions.

30. Where a competent authority disagrees about the procedure or content of an action or inaction of a competent authority of another Member State, the European Banking Authority (EBA) may assist the authorities in accordance with article 19 of Regulation (EU) No 1093/2010⁸⁹. If the competent authorities at stake fail to reach an agreement within the time limit set for conciliation, the EBA may take a decision requiring them to take specific action or to refrain from action in order to settle the matter⁹⁰.

31. If *host* authorities have clear and demonstrable grounds for concluding that an intermediary which has a branch within their territory is in breach of obligations *that belong to the competence of the home State supervisor*, they shall refer those findings to the competent home State authority. This will particularly be the case when host state authorities are confronted with elements that suggest that the intermediary is no longer meeting one of its registration requirements. If the home state supervisor fails to take necessary measures within one month from obtaining those findings, or where, despite such home Member State's measures, an intermediary persists in acting in a manner that is clearly prejudicial to the interests of the host Member State's consumers or the orderly functioning of the markets, the competent authority of the host Member State shall take, after having informed the competent authority of the home Member State, all appropriate measures necessary to protect consumers and ensure the proper functioning of the markets, including by preventing the offending credit intermediary from initiating any further transactions within their territories. It shall inform the EBA and the European Commission. In addition, the host Member State could refer the matter to the EBA⁹¹.

(b) ***Cross-border credit mediation under the freedom to provide services***

32. ***Home state supervision*** - What concerns mortgage credit intermediation activities under the freedom to provide services, supervisory competences remain predominantly with the *home* Member state. The only thing the competent authority of a *host* Member state can do if it has clear and demonstrable grounds for concluding that a credit intermediary acting within its territory under the freedom to provide services, is in breach of one of its obligations stemming from the MCD, is referring those findings to the supervisor in the home state.⁹² It is, subsequently, up to this home state supervisor to take appropriate action within one month from obtaining the information. Only if the latter fails to do so or when, despite the actions taken by the home state supervisor, the intermediary persists in acting in a manner which is clearly prejudicial to the interests of the consumers or the functioning of the markets in the host state, the host state supervisor may undertake action. They can either refer the matter to EBA, or directly take the appropriate measures in order to protect consumers and ensure the proper functioning of the market⁹³.

33. ***Websites*** - Whereas one may assume that cross-border credit intermediation under the freedom to provide services shall not seldom take place through a website, some important questions with regard to supervisory competence surface. Foremost, when exactly does an intermediary provide cross-border services in a particular Member State? According to the *Alpenhof/Pammer* case law of the ECJ⁹⁴ one would conclude that it is not sufficient that a consumer in another Member State is able to conclude a

⁸⁸ See article 34, par. 2 MCD. Note that the suspension or withdrawal of the intermediary's authorisation is a home state competence.

⁸⁹ See above footnote 82.

⁹⁰ This decision is binding for the competent authorities. Where a competent authority does not comply with EBA's decision, the latter may adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law, including the cessation of any practice.

⁹¹ And request its assistance in accordance with article 19 of Regulation (EU) No 1093/2010; see article 34, par. 4 MCD.

⁹² Article 34, par. 4 MCD.

⁹³ See for details article 34, par. 4, al. 2 MCD.

⁹⁴ ECJ December 7 2010, combined cases C-585/08 en C-144/09, available on www.curia.europa.eu

credit agreement through a foreign website to trigger supervisory competences under the freedom to provide services regime. Additional indicia should be present. As soon as it becomes clear that a website is specifically targeting consumers within a certain member state, not being the intermediary's home member state, the authorisation and supervision scheme for credit intermediation activities under the freedom to provide services will be applicable.

Three nuances should however be made in this respect. First the MCD rules will – of course - only apply if the website is actually providing credit intermediation activities according to the directive. Mere price comparison tools do not qualify as such (*cf. supra* nr. 11). Secondly, the fact that an intermediary provides its services exclusively or predominantly through digital means, does not exclude that an intermediary can be considered having a *branch* in a member state, other than its home member state, where it is actively and specifically deploying its online activities. The actual situation must be compared with (a contemporary interpretation of) the ECJ's definition of a branch (*cf. supra* nr. 27). Finally, a more problematic situation can exist where a single website is actively targeting consumers in different member states. In this situation, several authorities are in some way competent over the intermediation activities offered through a single website: the home state supervisor retains full competence for the mere “domestic” (non-cross-border) mediation activities, while several different host state authorities should play their role as sketched earlier regarding activities provided through the same website. Although contrary to the idea of creating an internal market, the use separate websites for the different host states may be helpful from the perspective of compliance with supervision, and could moreover be even necessary in the light of the minimum harmonisation approach followed within the MCD.

4 HARMONISATION OF THE SUBSTANTIAL RULES ON MORTGAGE CREDIT

34. The MCD aims to harmonise the substantial rules on mortgage credit. Whilst harmonisation could definitely foster cross-border supply side activity on the market for mortgage credit, the employment of minimum harmonisation does not jeopardise the ability of the Member States to impose more stringent (consumer protection) provisions on credit intermediaries. Minimum harmonisation, catering for diffuse layers of consumer protection in the Member States, could however obstruct the attainment of a more integrated market for mortgage credit. Taking into account amongst others the associated compliance costs, legal fees, diverging operational requirements (IT), this may hinder (especially smaller) credit intermediaries to provide their services cross-border.

Rather than an exhaustive overview of the harmonised substantial rules on mortgage credit, we hereinafter aim to illustrate both the MCD's internal market enhancing potential, as well as some challenges, by providing exemplary cases stemming from the harmonised regulatory framework.

35. ***The MCD's potential – illustration of internal market “enablers”*** – In order to facilitate an informed credit decision by the consumer, the credit intermediary shall, without undue delay after the consumer has given the necessary information on his needs, financial situation and preferences,⁹⁵ provide the consumer with personalised information on the basis of the *European Standardised Information Sheet* or ESIS.⁹⁶ The ESIS should be provided⁹⁷ by the creditor and/or credit intermediary *in good time* before the consumer is bound by any credit agreement or offer.⁹⁸ Compared to the ‘extensive catalogue of information’⁹⁹ to be provided through the CCD's *Standard European Consumer Credit Information*

⁹⁵ See art 14, par 1(a) MCD.

⁹⁶ See Annex II of the MCD. The G20 High-Level Principles on Financial Consumer Protection emphasize the importance of standardised information as well as of specific disclosure mechanisms; see in this regard Principle 4 G20 High-Level Principles on Financial Consumer Protection, OECD, October 2011: ‘(...) *Standardised pre-contractual disclosure practices (eg forms) should be adopted where applicable and possible to allow comparisons between products and services of the same nature. Specific disclosure mechanisms, including possible warnings, should be developed to provide information commensurate with complex and risky products and services.*(...)’.

⁹⁷ The ESIS should be supplied on paper or on another durable medium. A durable medium is any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored (see art 4(18) MCD j° art 3(m) CCD).

⁹⁸ See art 14, par 1(b) MCD.

⁹⁹ EUROPEAN PARLIAMENT Policy Department Economic and Scientific Policy, *Broad Economic Analysis of the impact of the proposed Directive on Consumer Credit*, April 2007, IP/A/IMCO/FCW/2005-58/LOT 4/SC1, 47. For a critical analysis with regard to the information-overload in recent European Commission initiatives: see Opinion of the European Economic and Social Committee on ‘Consumer information’ (own-initiative opinion), 11 February 2011, C 44/65, 3.5: ‘*Contrary to that which is stated in recent Commission papers, it is not the quantity*

Sheet (SECCI),¹⁰⁰ the ESIS contains ‘only’ 15 mandatory items to be disclosed.¹⁰¹ Apart from the provisions on the calculation of the APRC, the provisions of the directive dealing with the usage of the ESIS are the sole ones subject to maximum harmonisation.¹⁰² The ESIS may accordingly generate a stimulus for the internal market for mortgage credit.

36. Illustrations of regulatory challenges – In order to provide consumers with a more comprehensive overview of the range of credit products on offer and the key characteristics thereof, the MCD imposes an obligation on creditors and *tied* credit intermediaries to make available clear and comprehensible general¹⁰³ information regarding the offered credit agreements.¹⁰⁴ According to the MCD this general information has to be available at all times on paper or on another durable medium¹⁰⁵ or in electronic form. From this provision it follows that, insofar as national legislators do not impose more stringent requirements, tied credit intermediaries can limit themselves to making the general information accessible on their website. It is furthermore noteworthy that the directive does not require Member States to impose civil sanctions on creditors and tied credit intermediaries who fail to make the prescribed general information available.¹⁰⁶ Whether untied credit intermediaries face the same general information obligation entirely depends on the Member States’ legislative action.¹⁰⁷ The fact that a Member State does not broaden the scope of the general information obligation to untied credit intermediaries, shall however not jeopardise the obligation of untied credit intermediaries to provide consumers with personalised pre-contractual information through the ESIS.¹⁰⁸

Since Member States might (1) require tied credit intermediaries to provide additional general information; (2) demand credit intermediaries to make the general information available through other media than their website; (3) impose diffuse civil sanctions on credit intermediaries who violate the general information obligation; and (4) broaden the scope of general information obligation to untied credit intermediaries, it is doubtful whether the general information obligation could enhance cross-border credit intermediation activity.

37. Some obligations stemming from the directive are solely imposed on creditors. Member States can however impose these on credit intermediaries too. This optionality again dilutes the potential strengthening of supply-side competition in the European mortgage credit market. Albeit the MCD for instance charges creditors with a creditworthiness assessment¹⁰⁹, no such obligation is imposed on credit intermediaries. National legislators could however require that credit intermediaries conduct a (similar) creditworthiness assessment.¹¹⁰ The same may also apply to the know-your-customer obligation imposed on *creditors* (not credit intermediaries) by the directive.¹¹¹

of information that counts; information ought to meet consumers’ real needs and expectations and its suitability should be gauged in line with the following: purpose, content, presentation and context’. See in this respect for instance as well: Rott, n 4 above, 194.

¹⁰⁰ For a noteworthy critique on the SECCI, see DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT, *Implementation of the Consumer Credit Directive*, IP/A/IMCO/ST/2011-15, January 2012, 31-32.

¹⁰¹ For a psychological analysis and critique, see D. Pogrud Stark and J.M. Choplin, ‘Consumer protection initiatives in the EU Mortgage Market: a behavioral economic based critique and proposal’ 25 (2011) *Temple International & Comparative Law Journal* 7 and the following.

¹⁰² Cf. consideration 2 MCD.

¹⁰³ The list in article 13 MCD of items to include contains features common to all credit agreements on offer, *i.e.* article 13 MCD only targets *non-personalised* information.

¹⁰⁴ See article 13 MCD.

¹⁰⁵ For a definition of durable medium, see *supra* footnote 97.

¹⁰⁶ For instance in Belgium article VII.125 of the Belgian Code of Economic Law transforms the MCD’s general information obligation into national law, but does not impose any specific civil sanction on non-compliance, see R. STEENNOT, ‘Nieuwe regelen inzake hypothecair krediet: een verruimd toepassingsgebied en de introductie van gedetailleerde precontractuele informatieverplichtingen’, *In het vennootschapsbelang - Liber amicorum Herman Braeckmans*, Antwerpen, Intersentia, 427-449.

¹⁰⁷ The Belgian law provision mentioned in the previous footnote does for example not provide in a distinction between tied and untied credit intermediaries, thus imposing the general information obligation on *all* credit intermediaries.

¹⁰⁸ See consideration 38 MCD.

¹⁰⁹ *I.e.* creditors must, before concluding a credit agreement, make a thorough evaluation of the prospect for the debt obligation resulting from the credit agreement to be met; art. 4(17) *juncto* 18 MCD. See about the creditworthiness assessment: M. DE MUYNCK and D. BRULOOT, ‘Credit intermediation under the 2014 European Mortgage Credit Directive: a Call for Targeted Rules on Intermediary Remuneration’, *ERCL* 2017, 13(1), 19-20.

¹¹⁰ See for instance the ‘light’ version of the creditworthiness assessment imposed on credit intermediaries under Belgian law; art. VII.147/29, §1 of the Belgian Code of Economic Law.

¹¹¹ Art. 20 MCD. Credit intermediaries are, however, obliged to accurately submit the information obtained from their customers to the relevant creditor to enable the latter to properly perform the creditworthiness assessment. Notwithstanding art 20 MCD elaborates the information gathering in reference to the creditworthiness assessment, the requirement is however equally relevant for the provision of personalised information and adequate explanations which is imposed upon creditors and intermediaries alike. Art 14 MCD for instance requires that the personalised information is provided ‘*without undue delay after the consumer has given the necessary information on his needs, financial*

38. The MCD's general conduct of business rule, requiring credit intermediaries to act '*honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers*'.¹¹² could be mentioned as a final example of the challenges related to the achievement of the MCD's objective of increased supply-side mortgage market activity. The exact implications of this high level standard are unclear.¹¹³ The standard should in any case be distinguished from a real duty of loyalty¹¹⁴ or a suitability requirement¹¹⁵ as (at least outside the perimeter of advisory services - see nr. 13) it does not require that credit intermediaries put consumers' *best* interests first. Credit intermediaries are therefor – strictly spoken - not required to present the most suitable credit among the credits offered. Whereas article 7, par. 1 MCD, as the majority of the provisions of the MCD, is only subject to minimum harmonisation, Member States could and did in this regard impose more stringent provisions on credit intermediaries (in Belgium for instance, a fully-fledged duty of loyalty requiring credit intermediaries to put the consumer's best interest first). Albeit more detailed regulation or guidelines based on Article 7 MCD's general conduct of business rule on Member State level could enhance the consumer protection policy objective, EU market integration may be worse off by a patchwork of national conduct of business rules. More detailed guidelines in this respect on a European level, for instance by EBA, could counter additional internal market barriers in this regard.

5 ASSESSMENT OF THE MCD'S RULES ON INTERMEDIARIES FROM AN INTERNAL MARKET PERSPECTIVE

39. The MCD is nothing less than a milestone for the coming into existence of an internal market for mortgage credit. Up until now, cross-border activity in the market for mortgage credit has been almost non-existing. In particular by fostering the supply side of the market for cross-border mortgage credit, the European legislator aimed to remove regulatory barriers for an internal market for mortgage credit. Whereas credit intermediaries could, in this regard, play a crucial role, we analysed whether the MCD has been successful in developing a legal framework for mortgage credit intermediaries with a beneficial effect on their activities.

We tend to answer this question in a prudent affirmative way. Referring to the 3 questions to evaluate how the MCD achieves its internal market objectives mentioned at the outset of our paper (supra nr. 2), we indeed consider that the MCD may especially bolster the intermediation, by credit intermediaries in their local markets of credit offered by creditors based in another EU Member State (i.e. cross-border provision of credit through local credit intermediaries), as well as (online) cross-border credit intermediation as such (i.e. credit-intermediaries offering intermediary services in other EU Member States). We deem it on the other hand unlikely that the MCD will move consumers to actively seek credit intermediary services offered by a credit intermediary established in another EU Member State.

situation and preferences in accordance with Article 20 [own underscore].¹¹² A know-your-customer principle is, furthermore, also indirectly to be found in the context of article 7 MCD's general conduct of business rule: creditors/credit intermediaries shall take into account all relevant information relating to a consumer's specific circumstances and any specific requirement made known by him. The general conduct of business rule is discussed *infra* nr. 38.

¹¹² See article 7, par. 1 MCD. The MCD furthermore requires Member States to ensure that remuneration policies are aligned with the general conduct of business rule, see article 7, §2 MCD. For an analysis of the impact of intermediary compensation schemes on intermediary incentives, we refer to an earlier published paper where it was argued that the actual impact of this high level principle is rather limited. See M. DE MUYNCK and D. BRULOOT, "Credit intermediation under the 2014 European Mortgage Credit Directive: a Call for Targeted Rules on Intermediary Remuneration", *ERCL* 2017, 13(1), 31. Note also that, in line with the general conduct of business rule, article 10 MCD contains an obligation for Member States to require, by adopting appropriate national legislation, that '*any advertising and marketing communications concerning credit agreements are fair, clear and not misleading*'.

¹¹³ A similar obscurity exists on MiFID's duty of loyalty (see art 19, § 1 MiFID); see in this respect e.g. M. Kruihof and W. van Gerven, 'A Differentiated Approach to Client Protection: The Example of MiFID', WP 2010-07 (Gent: Financial Law Institute, 2010) 40.

¹¹⁴ See in this respect eg M. Kruihof, 'Conflicts of interest in institutional asset management: is the EU regulatory approach adequate?', in L. Thévenoz and R. Bahar (eds), *Conflicts of Interest Corporate Governance and Financial Markets* (Alphen aan den Rijn: Kluwer Law International, 2007) 281.

¹¹⁵ A mandatory suitability requirement charges creditors or credit intermediaries with the decision whether a given loan fits a borrower's situation (note that this is broader than merely the borrower's ability to repay the loan). Under Belgian Law creditors and/or credit intermediaries are required to propose, from all the credit agreements they usually offer or mediate, the most appropriate type of credit for the consumer, taking into account the consumer's financial situation and the purpose of the credit agreement. See article VII.131, § 1 of the Belgian Code of Economic Law. On 'suitability' requirements, see also Organisation for Economic Co-operation and Development, *Report on OECD Member Countries' Approaches to Consumer Contracts*, 22–29.

40. The MCD first clearly bolsters the intermediation, by credit intermediaries in their local markets, of credit offered by creditors based in another EU Member State (*i.e.* cross-border provision of credit through local credit intermediaries) (*cf. supra question 3*). The directive indeed fosters both a similar structuring of mortgage credit contracts as well as the use of standardised concepts throughout the European Union. The full harmonisation approach that has been adopted with regard to the ESIS is most helpful in that respect. The ESIS indeed facilitates the pre-contractual assistance of consumers by (untied) intermediaries in comparing credit offers from creditors based in different member states.

To what extent intermediaries will actually play a stronger role in opening up the pan European mortgage credit markets, depends however on factors outside the MCD as well. Important in that respect are the applicable conditions and procedures for intermediaries wanting to start their business, besides the conditions and procedures implementing the rules of the MCD. Furthermore, creditor willingness to provide cross border mortgage credit will of course be crucial.

41. What concerns the MCD's potential to incite credit intermediaries to offer intermediary services in other EU Member States (*cf. supra question 2*), the establishment of a passport regime for credit intermediaries is most vital, next to the already existing regime for credit institutions. Thanks to the MCD intermediaries and credit institutions alike are indeed able to operate freely throughout the EU, whether under the freedom to provide services, or by setting up branches (and whether offline or online), without having to meet additional (administrative) requirements. The meticulous allocation of secondary powers and competences, preventing supervisory deadlocks, could also be welcomed. Additional requirements by host authorities, in areas not harmonised in Union law, could however hamper the passport regime (*supra. nr.21*).

It is must be admitted however that the MCD's minimum requirements to obtain a registration as a credit intermediary are however in general rather demanding, and can thus have a chilling effect on the number intermediaries on the (internal) market. Nevertheless, as professional literacy and financial viability (through insurance) of credit intermediaries are highly important for both the protection of consumers and the well-functioning of the market, the requirements set by the European legislator could be considered proportionate. In order to guarantee that a passport can be obtained by intermediaries that are not members of a larger group and/or are not backed by a large financial institution, national legislators implementing the MCD should however refrain from introducing more demanding registration requirements or complex procedures in this respect. A diversified ecosystem of intermediary enterprises (incl. types and scale) could after all have a beneficial effect on the functioning of the market. Member states that adopt overly burdensome registration requirements, may moreover be confronted with "supervisory shopping" by intermediaries, towards more flexible and/or less demanding member states.

42. With regard to the MCD's potential to incite credit intermediaries to offer intermediary services in other EU Member States (*question 2*)), the its supervisory framework is furthermore of the essence. The directive's basic supervisory framework for credit intermediaries looks rather balanced, with a different emphasis depending on whether cross-border intermediation activity is being performed through a branch (host state) or under the freedom to provide services (home state). Aforementioned framework is complemented by a comprehensive set of rules about the cooperation between home and host state supervisors and a proper role for EBA. In particular the system of passport notifications, guaranteeing that host state supervisors are at any time aware of foreign intermediaries providing their services within their territory, is to be welcomed in this regard (*cf. supra nr. 21*).

Some pitfalls however risk to persist in practice. Where intermediaries perform their cross-border activities under the freedom to provide services, consumer protection and completion could be hampered by detrimental delays between certain unlawful practices by an intermediary in a host state and a proper intervention by the supervisor in the home state. It may indeed take some time before the host state authorities are aware of the malpractices and could warn the home state supervisor. As the home state supervisor has up to one month to take the necessary measures it shall be clear that following non-efficient cooperation between national supervisors, malpractices may persist for several weeks

before any supervisory action is launched.¹¹⁶ Problematic situations could moreover exist in case various host state authorities have supervisory competence with regard to a single website, targeting consumers in various member states (*supra* nr. 33).

43. The European legislator's choice for minimum harmonisation, leaving various barriers unchecked, is without any doubt most detrimental for the volume of cross-border intermediary activity (**question 2**). Reference could for instance be made to possible diverging national policies with regard to the concept of "advisory services". The same applies to the (related topic of) intermediaries' remuneration.¹¹⁷ The activity of credit intermediaries offering credit contracts from foreign creditors to their local customers (**question 3**), may in our opinion however be expected to be less adversely affected by the choice for minimum harmonisation.

44. Finally, we remain most sceptical regarding the MCD's potential to move consumers to actively seek credit or credit intermediary services offered by a credit intermediary established in another EU Member State (*i.e.* demand side cross border activity) (*cf. supra* **question 1**). Apart from non-regulatory barriers to cross-border credit, significant differences in the member states' legal framework for mortgage credit remain following the choice for minimum harmonisation.

45. Mortgage credit intermediation will, in line with other financial services, become increasingly digital in the upcoming decade. Nonetheless, we do believe that intermediary services will remain relevant to address information asymmetries between creditors and consumers. The digital setting may moreover reduce market barriers for the entrance of new players and/or cross-border intermediary activities.

Whereas the MCD does not specifically address digitalization as an "enabler" for the creation of an internal market for mortgage credit, our analysis shows that the framework that has been developed for an offline business model seems, without major hurdles, *mutatis mutandis* applicable in a digital intermediary context. The question as to which countries could be considered as host countries remains challenging in this context. Contrary to the MCD's formal criteria determining the home state (head office or registered office), specific criteria for host states are non-existent. The ECJ's case law could be expected to provide further guidance in this regard. Beyond mortgage credit and even financial services, in the digital age, such question deserves ample attention by the European policymakers.

6 CONCLUSION

46. The MCD aims to create (a) a Union-wide mortgage credit market with (b) a high level of consumer protection. This paper predominantly focused on the primary policy objective, *i.e.* the facilitation of the emergence of an internal market for mortgage credit. Hereto, we considered the MCD's rules on credit intermediaries, and more specifically the establishment and supervision of credit intermediaries. We also assessed the impact of the harmonisation of the substantial rules on mortgage credit on cross-border credit intermediary activity. At this point, we share the European legislator's view that credit intermediaries could play a vital role in the coming into existence of a European internal market for mortgage credit by reducing existing information asymmetries between creditors and consumers. We consider that the MCD may especially bolster the intermediation, by credit intermediaries in their local markets, of credit offered by creditors based in another EU Member State (*i.e.* cross-border provision of credit through local credit intermediaries) and – to a lesser extent – cross-border credit intermediation as such (*i.e.* stimulating credit-intermediaries to offer intermediary services in another EU Member State), especially in an increasingly digital context. We deem it on the other hand rather unlikely that the MCD in itself will to move consumers to actively seek credit intermediary services offered by a credit intermediary established in other EU Member States, taking also into account various non-regulatory barriers.

¹¹⁶ Note that this problem is not limited to the supervision of mortgage credit intermediaries, but is a mere exponent of a broader issue present in all areas of cross-border financial services supervision. It underlines the importance of permanent close consultation and cooperation between national supervisors and the need of the coming into existence of a common supervisory culture throughout Europe.

¹¹⁷ See in this respect M. DE MUYNCK and D. BRULOOT, "Credit intermediation under the 2014 European Mortgage Credit Directive: a Call for Targeted Rules on Intermediary Remuneration", ERCL 2017, 13(1), 1-37.

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