Feedback on the European Commission's Proposal for a Directive on credit servicers, credit purchasers and the recovery of collateral

Berlin, 8 June 2018

---

1. FENCA

FENCA, the Federation of European National Collection Associations, represents the interests of European credit servicers and credit purchasers, coordinating with the institutions of the European Union, stakeholders in the European financial services industry, consumer groups and the European public.

Founded in 1993, FENCA's members are the 23 national associations representing 75% of all credit management, debt collection and debt purchase companies in the EU and the EEA. Holding 80% of market share within the EU, with well over 80,000 staff providing services for more than five million businesses, the client base includes credit institutions and other European and overseas banks, SMEs, as well as the public sector across the EU.

One of the key activities of FENCA is to set and continuously improve business standards and good practices within the sector across the EU, to which its members subscribe in order to provide the best possible service to creditors, clients and consumers alike. We are also in the process of finalising a Code of Conduct for GDPR in the sector.

European credit servicers and purchasers return between 45 and 55 billion Euros to the European economy each year, thereby securing above all the liquidity of micro, small and medium enterprises across the EU, while helping to keep the cost of credit at a reasonable level for all consumers.

2. Summary feedback

FENCA broadly welcomes the provisions of the Directive, as we recognise the need to address the continuing high levels of NPLs across Europe. Specialised credit servicers and purchasers form a key part of the solution, and a proportionate regulatory framework could help to continue the progress already being made in many Member States. We support the concept of a level playing field for authorisation and supervision, and the assistance given to credit servicers and purchasers to operate cross-border.

In general, we feel that the intentions underlying this legislation highlighted by the Commission are sound, but need to be enhanced to recognise the price gap currently encountered in the less mature markets for debt sale in some Member States. Where banks in such jurisdictions are inexperienced in debt sale, they will generally overvalue their portfolios because they do not wish to recognise the full write down required for such sales, and will also be unlikely to possess, or want to share, full data with potential purchasers.

We wholeheartedly support the additional safeguards for consumers detailed in the Directive, including the fair treatment of borrowers, taking into account their financial situation, and referral to debt advice or social services where available.

FENCA welcomes most of the proposed provisions for authorisation of credit servicers and purchasers in relation to conduct and supervision in those Member States where such rules do not as yet exist. However, duplication of supervision and reporting duties must be kept to a minimum in more mature markets if reasonable deal costs, and thus viable sale prices, are to be maintained.

We agree with the proposals on granting authorisation, including the requirements that servicers and purchasers must have a clean police record and must not be subject to insolvency procedures. FENCA also sees the need for firms to have appropriate governance, internal control and complaints procedures.

However, the proposed system for Member State notifications and registers is unnecessarily burdensome, would be impractical to maintain, and would be of dubious value, as it will not even provide a full picture of debts sold or transferred. The registration of individual credit agreements and of the intention to enforce any debt are particularly troublesome, and would create a massive data overhead impossible to reconcile across competent authorities. This part of the proposals, which would inevitably fall foul of GDPR requirements and would only be a partial register at best, should in our view be abandoned.

One possible solution to this issue would be to incorporate any genuinely necessary registers into a single pan-European register of authorised firms.

We believe that one of the greatest challenges of the proposal is whether Member States with limited regulatory resources will be able to devote sufficient budget to the new regime to ensure they have the expertise, resources and operational capacity to fulfil all the requirements of the Directive. These issues are exacerbated by the very short timescales for implementation and authorisation.

We welcome the proposal under Article 14 on EBA technical standards, and we will seek an opportunity to meet with the EBA in order to make sure that not only the views of credit institutions, but also those of credit purchasers are heard in the process.

Finally, we welcome the proposal for accelerated recovery of collateral by means of the accelerated extrajudicial collateral enforcement procedure, so that banks will be able to sell secured assets in more efficient secondary markets without protracted legal action. We strongly agree that the AECE should apply only to business borrowers.

We would be happy to discuss our response and detailed feedback (included below) with DG FISMA at the appropriate time and wish to thank the Commission for this opportunity to give feedback on the proposed Directive.

Leigh Berkley, Vice President FENCA (leigh.berkley@tessera.co.uk)

Dr. Andreas Bücker, Director General FENCA (andreas.buecker@fenca.eu)

FENCA - Federation of European National Collection Associations
Friedrichstrasse 50-55
10117 Berlin
Germany
www.fenca.eu

Identification number: 69597322458-18

3. Detailed feedback

The following table sets out our observations on each Article of the proposed Directive:

Art.	Detail	FENCA feedback
1 & 2	Subject matter Art 1 (a) and (b) and Scope Art 2.	We note that only credit agreements issued by credit institutions are in scope. There is therefore a good case to include credit institutions in some of the requirements of the Directive (complaints, customer circumstances, income and expenditure) rather than excluding them in Art 2.4 (a), so as to provide a consistent customer journey.
5	Authorisation of credit servicers – requirements for granting authorisation	Requirements should be preserved and not duplicated in Member States where already in place. Requirement (b) (i) for "sufficiently good repute" needs further clarification at national level. (c) & (d) FENCA agrees with these requirements on governance, borrower treatment, financial situation and debt advice. Appropriate minimum standards will need to be set and agreed by Member States to ensure consistent standards of customer treatment. (e) borrower complaint systems are also necessary, and like (c) & (d) will need to be reviewed by competent authorities.
6	Granting or refusing an authorisation	Where adequate national authorisation regimes already exist, these should be preserved and deemed sufficient to achieve EU authorisation under Art 6. Paras 3 and 4 provide very short timescales for competent authorities to grant authorisation. By contrast, Para 5 allows a competent authority to keep an applicant waiting 6 months before they can lodge an appeal. These provisions should be reviewed.
7	Withdrawal of authorisation	It is cumbersome for the competent authorities to assess a lack of use of authorisation within 12 months. Communication would be needed with the firm to ensure they are not about to start trading in the home or host state.

8	Register of authorised credit servicers	This is welcome as a basic register. However, the maintenance of these cross-border registers will be very difficult for competent authorities to keep up to date and accurate. A single online pan-European register would work better for all parties.
9	Contractual relationship between creditor and servicer	Para 1 states that a written contract should always be in place, and this is already done in the vast majority of relationships. Para 3 requires data retention for 10 years. This period should be decided by Member States, and a 10-year period under Para 3 (a) will create breaches of GDPR provisions of data minimisation. Any retention period should not be linked to the date of the contract, but rather to the receipt of data by the servicer. As drafted, a nine year old contract would require data retention for only one year.
10	Outsourcing	Para 10 (g) requires the servicer to retain the expertise and resources to provide the outsourced services after the agreement is terminated. This undermines the rationale for most outsourcing, which is undertaken by specialist outsourcers or to ease resource issues at the servicer. This requirement is unworkable and should be removed.
11	Credit servicing in a host Member State	We support the intention of this Article, but the burdensome system of notifications cross border will be difficult for competent authorities and servicers alike. We would propose an online pan-European central register of servicers and purchasers, which would provide a definitive register of authorised firms, and would enable all stakeholders to quickly access the relevant information.
12	Supervision of cross-border servicers	Para 1 is sensible in terms of supervision by the home Member State. However, the remainder of Art 12 requires close cooperation between home and host Member States in respect of a branch in a host Member State. This creates dual regulation and supervision, and will be burdensome for the competent authorities, requiring new inspection and liaison teams across the Union. A complaints-driven or risk-based approach to supervision could help to reduce these issues, and FENCA would be happy to discuss these with you.

13	Right to information	Para 1 establishes an important principle, as one of the barriers to debt sale in less mature markets is that adequate information is sometimes withheld by creditors because it may harm the purchase price or because it is not easily retrievable. This creates a price gap between the price the seller wants to achieve and the price the purchaser can justify based on partial information. However, we strongly disagree with the remainder of this Article. Para 2 introduces a notification regime for every single debt sold across the EU, with requirements for communication of information to home Member States and to the Member State of the borrower under Para 3. The data created by this Article will be gigantic, difficult to maintain accurately across Member States, and of dubious value to Member States as it will only form a partial record of debt sales. It would also inevitably breach GDPR requirements unless updated on a monthly basis, which would involve a massive commitment on the part of the Member States and purchasers. For these reasons, and due to the disproportionate overhead imposed on authorities, purchasers and servicers, we strongly oppose any register of individual debts or portfolios, and urge you to reconsider this aspect of the Directive.
14	Technical standards for NPL data	We support this initiative, and since FENCA represents the majority of credit purchasers across Europe, we would be happy to contribute the views of the purchasers to the EBA in terms of what information is needed from credit institutions so that purchasers can properly assess the value of credit agreements.
15 & 17	Obligations of credit purchasers & representatives of purchasers not established in the Union	These Articles, while logical from an administrative standpoint, may limit investment from outside the Union. Provisions for equivalent adequacy of local authorisation outside the Union could help to solve this problem.

16	Use of credit servicers	Again, keeping all competent authorities informed of all credit servicers used is burdensome. Purchasers will check the authorisation of all servicers used on a regular basis as part of their own procedures, and it is therefore unnecessary to notify the authorities of every change.
18	Credit purchasers directly enforcing a credit agreement	This Article requires notification of all *proposed* litigation and enforcement actions, which will equate to many millions of cases each year. Again, the notification of individual case data to competent authorities in one or more Member States will be difficult to maintain (the value of the credit agreement can change frequently due to fees and costs), onerous for purchasers and authorities, and of dubious value. FENCA strongly opposes this Article.
19	Transfer of a credit agreement by a credit purchaser	We support this Article. Credit agreements are often transferred between credit purchasers, and the proper authorisation of the transferee must be ensured. However, this should not be needed for each credit agreement where a whole portfolio of agreements is transferred.
20	Supervision of competent authorities	We welcome the raising of standards and compliance envisaged by this Article for Member States, where this is necessary. We do not agree that, under Para 4, more than one competent authority should be appointed, as this will duplicate effort and increase the regulatory burden for servicers and purchasers. We believe it is unlikely that, under Para 6, Member States with limited regulatory resources will have sufficient budget to ensure they have the expertise, resources and operational capacity to fulfil all the requirements of the Directive. These issues are exacerbated by the very short timescales for implementation and authorisation.

21	Supervisory role and powers of competent authorities	We support the need to grant and withdraw authorisations, however the requirement for an annual review of all servicers under Para 2 creates a disproportionate burden on the competent authorities and servicers. A system of complaints-based review or a risk-based approach could provide a far more workable solution, as perhaps envisaged under Para 3, and we would be happy to discuss this. Self-regulation through trade associations such as FENCA and its national members could also provide a viable alternative to an overbearing regime of annual regulatory inspection.
22	Administrative penalties and remedial measures	These measures will need to be carefully implemented so as to be effective, proportionate and dissuasive as per Para 2. The sanction of cancellation of an authorisation under Para 2 (a) should only be used as a last resort, and be subject to an appeals process as suggested in Para 7, since such action effectively puts the servicer out of business. Para 4 makes no reference to detriment caused to the borrower by the actions of the servicer. This should form a fundamental part of the Directive, and needs to be a key factor in deciding any penalties or remedial measures imposed upon the servicer or purchaser.
23-33	Accelerated Extrajudicial Collateral Enforcement	We generally support the proposals for AECE, as this will assist with more timely recovery of security in those Member States where the national legal process can be very protracted. We welcome the exclusion of consumer credits from the AECE provisions, and would be happy to give further views on AECE where our members may be affected, for instance where a credit purchaser buys performing commercial agreements which include AECE provisions.
35	Complaints	Para 1 (b) requires the credit servicer to send a copy of its authorisation to the borrower. We consider this unnecessary, and a notice on the servicers' letterhead, website and other means of communication should suffice. This is already in place in some Member States and should not be duplicated.

37	Cooperation between competent authorities	A great deal of cooperation and communication between Member States and competent authorities will be required to implement this Directive. Consideration should be given to any areas, such as the registration and notification processes and annual reviews, which can be streamlined to avoid excessive regulatory burden and a resulting reduction in debt sales.
41	Transposition	The deadline of 31st December 2020 for the adoption of Member State laws is very tight for such a major change to the regulation of our industry. Article 41 also makes clear that the authorisation and transfer provisions will only apply to credit agreements transferred from six months after the transposition deadline. This is probably sensible, as only new sales will fall under the requirements of the Directive.