

POSITION PAPER



EBA Consultation Paper
Draft Guidelines on arrears and foreclosure
EBA/CP/2014/43

ESBG (European Savings and Retail Banking Group)

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General comments:

ESBG welcomes the opportunity to provide comments on the EBA consultation paper 'Draft Guidelines on arrears and foreclosure' (hereinafter the "**Guidelines**").

Question 1: Do you agree with the proposed Guidelines? If not, outline why you disagree and how the Guidelines could be improved. Please respond separately for each of the five Guidelines.

1. Establishment of policies and procedures

In Guidelines **1.1, 1.2** (as well as throughout the Guidelines) EBA has chosen to use the term '*payment difficulties*', while the terminology used in technical standards on supervisory reporting on forbearance and non-performing is '*financial difficulties*'. It is unclear whether the same meaning is intended. Please note, though, that the terminology '*payment difficulties*' indicates that a transaction approach (the specific loan) has been used. This, however, is not in line with how creditors normally monitor and assess their consumers. They rather use a debtor approach or, with other words, a total risk approach. It also makes sense from a consumer's perspective to assess his/her total economic situation instead of just monitoring the payment capacity of a specific loan. If a consumer has payment difficulties regarding a specific loan, this is normally the first sign of financial difficulties. Following a total risk approach also increases the toolbox for possible forbearance measures. Additionally, a transaction approach that measures whether the consumer's economic situation has deteriorated is contradictive to the mentioned ITS, that state that financial difficulties shall be assessed at debtor level. It needs to be clarified whether a difference is intended, and if so, why different approaches are taken in these two frameworks. If no difference is intended, the terminology ought to be harmonized to avoid any doubt.

Regarding the scope of **Guidelines 1.1 and 1.2** it should be considered that the most important 'early warning system' is a well installed and smoothly functioning level of communication between the consumer and the creditors. Consumers themselves are the first ones who become aware of possible problems in meeting their payment obligations. They can discuss those problems with their creditors at any time. Furthermore, creditors already have a system in place which informs them once consumers fail to pay instalments as agreed. In this case, creditors contact the consumer and ask him/her to explain the delayed payments and try to find an amicable solution. Further '*procedures to detect early indications of consumers going into payment problems*' which exceed the installed communication level are neither practicable nor justifiable under a cost-benefit viewpoint. The already existing measurements have a proven track record and should, therefore, be kept. ESBG would like EBA to note that measures above and beyond this are neither necessary nor viable.

Regarding Guideline **1.3** ESBG would like point out the difficulties for creditors to provide adequate training for staff dealing with consumers on payment difficulties. ESBG thinks that competence of the staff needs to be develop in all fields of the credit process and not only particularly in the debt collection process. Thus, this Guideline EBA over-regulates an area which is already taken care of as a part of the whole collection process.



2. Engagement with the consumer

The Guidelines do not yet properly reflect that a client with payment difficulties is still a responsible person and his/her responsibility as such cannot be shifted towards the creditors.

The requirement in Guideline **2.1** is already part of the normal process. But an important point is still missing: The Guideline says *'the creditor should work with the consumer'*. However, whether the consumer himself wants to work with the creditor lies not in the creditor's scope of influence. In fact, creditors can only **offer** the consumers to assess the payment difficulties. Therefore, the Guideline should be redrafted accordingly.

In greater detail:

Obviously, based on an ideal scenario firstly the creditor assesses the consumer's payment difficulties and secondly - on the basis of the prior assessment - defines adequate measurements. However, this is the ideal procedure which is unfortunately not always in line with reality. The creditor can only engage with the consumer, if the consumer for his/her part is willing to cooperate. In fact, it is not uncommon that a consumer in a stressed economic situation puts on blinkers and does not want to face reality. There are cases in which consumers who face financial difficulties are not communicating/cooperating with the creditor at all. Those consumers simply do not pay. If a consumer refuses to communicate with his/her creditors, measurements cannot be defined on the basis of a prior assessment of his/her situation. In such cases the creditor can only contact the consumer by written reminders, claims etc. If nevertheless the consumer does not pay, the creditor acts according to the conditions set out in the credit and collateral agreement. Experience shows, that in particular such creditors' actions trigger the consumer to start talking to his/her creditors to find a common solution beneficial for both parties. Based on this assessment ESBG suggests to redraft the Guidelines as follows:

*'When a consumer goes into payment difficulties, the creditor should **aim to** work with the consumer to establish why the difficulties have arisen and for the creditor to take appropriate steps.'*

Regarding **Guideline 2.2** ESBG would like to add that creditor communicates with consumers not only by having meetings. There are also other forms of communication, such as SMS, phone calls, written letters etc. Regarding data protection, a reference to existing legislation which provides a balanced and fair framework for the disclosure of information would suffice. Therefore, we suggest to redraft the Guideline accordingly, for instance as follows:

'While communication with consumers in relation to their payment difficulties the creditor should respect their privacy and having regard to data protection legislation'



3. Provision of information and assistance to the consumer

Please note that it can be difficult to communicate legally correct and at the same time in clear and plain language. ESBG therefore suggests to redraft **Guideline 3.2** as follows:

'The creditor should communicate as clearly and in plain language as possible.'

Regarding **3.3 c)** ESBG would like EBA to clarify which costs will be classified as *'charges incurred as a result from the payment shortfall'*.

Guideline 3.4 obliges the creditor to provide the consumer with general information on payment difficulties. ESBG likes EBA to clarify that it is not the creditors' task to do any kind of debt counselling. This is not a service creditors generally provide to their customers. Thus, credit institutions do not have the necessary expertise in this area. Above that, it is also not recommendable from a consumer's point of view to receive some kind of debt counselling from its creditors which have a vested interest in the fact whether the debtor can pay them and therefore might not be able to assess the creditor's situation impartially and objectively.

4. Resolution process

At first, we would like to refer again to the under **1.** mentioned terminology of *'payment difficulties'*. **Guideline 4.1** shows a clear link between the definition of forbearance and the term *'financial difficulties'*, in contrast to the use of *'payment difficulties'* in other parts of the Guideline. Again it needs to be clarified whether the terminology means the same or is intended to have different meanings. Furthermore, the Guideline refers to *'financial commitments'* in plural which also hints that a debtor approach is intended.

Guideline 4.1 contains a list of concessions for cases in which the consumer is facing, or about to face, difficulties in meeting his/her financial commitments. Problematic is that this Guidelines seem to oblige creditors to grant concessions to consumers in arrears. ESBG urges EBA to clarify that creditors are not be obliged to take forbearance measures or to make concessions. Such an obligation would be extremely problematic for several reasons:

- Consumers could purposely not pay their instalments knowing that they will receive concessions. Consequence would be a significant impact on risk-weighted assets, which then results in increased costs of mortgage loans and the risk of credit crunch phenomena.
- The legal principle *'pacta sunt servanda'* is opposed to any obligation regarding forbearance measures and cannot be ignored. An interference with the principle *'pacta sunt servanda'* by ignoring the concluded conditions of a contract could even affect the stability of legal systems in general. Respecting this principle is crucial for the strengthening of mutual trust and functioning contractual relationships.
- In addition, some concessions could even be judged as being an "unfair preference" (legal term arising from some Member States' bankruptcy/insolvency law), if the consumer afterwards is still unable to pay his/her dept. Concessions creditors have made after the consumer's



foreclosure can be interpreted as evidence for their knowledge of an impending illiquidity. In such cases the creditor can be obliged to repay each payment. To avoid such scenarios, creditors might feel the need to file for bankruptcy/insolvency comparatively early, which would also not be in the consumers' interests.

To sum up, ESBG considers it essential that the Guidelines reflect that the creditors are free to make their own properly weighted decision which steps and – when indicated - concessions need to be taken in each particular case. Against this background, ESBG suggest to redraft the Guideline as follows:

*'The creditor should take into account the individual circumstances of the consumer, the consumer's interests and rights and his/her ability to repay **when deciding upon possible** forbearance measures. **The creditor is not obliged to take forbearance measures or to make concessions.** Forbearance measures consist of concessions towards a consumer facing, or about to face, difficulties in meeting his/ her financial commitments. Concessions to the consumer **can** include: [...]'*

Finally, under **4.1.2.b** it is unclear what is meant by 'change the type of the mortgage'. Does it mean that the bank should consider changing the mortgage to some other form of collateral? This needs to be elaborated.

5. Documentation of dealings with the consumer and retention of records

First of all ESBG would like EBA to adequately reflect in the Guidelines that each decision of the creditor for a concession is at the same time a decision to waive its related claims resulting from the contract. So when the creditor offers some kind of concession its decision is based upon a number of components, often related to the individual debtor and his/her situation.

The Guideline distinguishes between (1) documentation of the reasons for offered measures and (2) the retention of adequate records for a reasonable period of time.

ESBG doubts the usefulness of an obligation to document the reasons. Such documentation obligations are not only a considerable administrative burden for the creditors but can also only be of a subjective nature. Consequently, the added value of this documentation is minimal. Additionally, the current Guideline would lead to uncertainties regarding liabilities. Especially, as the interests of creditors and consumers do not necessarily coincide. The terminology of an 'appropriate option' is not self-explanatory and should be clarified.

In view of the second obligation, ESBG suggest to clarify the length of the 'reasonable period' during which the creditor should document and retain records regarding whether the 'options offered to the consumer are appropriate for his/her individual circumstances' and on their 'dealings with the consumer in payment difficulties'. The period of a 'reasonable time' is not clear enough and leaves room for different interpretations.



Question 2: Are there any additional requirements that you would suggest adding to the Guidelines? If so, outline the reason(s) for each proposed additional requirement.

The Guidelines should take into account that the consumer might not be willing to work together with the creditor (see above under Guideline 2.). Therefore, we suggest to add a provision to the Guidelines that clarifies the consumers' obligation to co-operate with the creditor.



About ESBG (European Savings and Retail Banking Group)

ESBG brings together savings and retail banks of the European Union and European Economic Area that believe in a common identity for European policies. ESBG members support the development of a single market for Europe that adheres to the principle of subsidiarity, whereby the European Union only acts when individual Member States cannot sufficiently do so. They believe that pluralism and diversity in the European banking sector safeguard the market against shocks that arise from time to time, whether caused by internal or external forces. Members seek to defend the European social and economic model that combines economic growth with high living standards and good working conditions. To these ends, ESBG members come together to agree on and promote common positions on relevant matters of a regulatory or supervisory nature.

ESBG members represent one of the largest European retail banking networks, comprising of approximately one-third of the retail banking market in Europe, with total assets of over €7,300 billion, non-bank deposits of €3,480 billion and non-bank loans of €3,950 billion (31 December 2012).



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