



## The Advertising Association

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### **RESPONSE TO THE INTERNAL MARKET & SERVICES DIRECTORATE-GENERAL OF THE EUROPEAN COMMISSION “PUBLIC CONSULTATION ON RESPONSIBLE LENDING AND BORROWING IN THE EU”**

The Advertising Association is the only body representing all sides of the advertising and promotional marketing industries, worth £18.6 billion in 2008. Its membership represents advertisers, agencies, media and support services in the UK. Further information about the organisation is available at: <http://www.adassoc.org.uk/>

#### **1. Introduction & Summary**

1.1. The Advertising Association responds here to the “Public Consultation on Responsible Lending and Borrowing in the EU” being conducted by the Internal Market and Services Directorate-General (DG MARKT) of the European Commission (EC). The responses that DG MARKT receives will inform an EC hearing on Responsible Lending scheduled for 3 September 2009. This response is confined to that part of the consultation document relating to practices prior to the lending transaction, specifically advertising and marketing.

1.2. In this response, the Advertising Association:

- (a) argues that the protections the Consumer Credit Directive<sup>1</sup> (CCD) will afford prospective borrowers around advertising should not be revisited by DG MARKT before that 2008 Directive has even entered into force and had its efficacy judged;
- (b) points out the additional protections from misleading or unfair marketing practices that are afforded to prospective customers for mortgage or consumer credit under the Unfair Commercial Practices Directive (UCPD)<sup>2</sup>;
- (c) underlines that whilst there may be no statutory regulation of mortgage advertising deriving from European legislation, Member States may already have their own legal framework covering such activities in place (as is the case in the UK); and,
- (d) considers it unfortunate that DG MARKT has sought evidence from respondents only of poor advertising or marketing practices through its consultation - the risk being that participants in the EC hearing will not be exposed to positive examples of lenders’ activities in this area, thereby narrowing unhelpfully the scope of discussions in that forum.

1.3. The Advertising Association looks forward to publication by DG MARKT of the responses the Directorate-General receives to the consultation on its website. No part of this response should be treated as if it were confidential in nature.

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<sup>1</sup> Directive 2008/48/EC “on credit agreements for consumers and repealing Council Directive 87/102/EEC”

<sup>2</sup> Directive 2005/29/EC “concerning unfair business-to-consumer commercial practices in the internal market”

## **2. Comments on practices prior to the lending transaction: advertising and marketing**

### *Adequacy of regulation of consumer credit advertising via European law*

2.1. The CCD, which Member States must have transposed into domestic law such that it enters into force on 11 June 2010, will further harmonise consumer protection rights and statutory requirements with respect to product transparency across the European Union (EU). In respect of advertising, the CCD will fully harmonise requirements via Article 4 (“Standard information to be included in advertising”) and Article 21 (“Certain obligations of credit intermediaries vis-à-vis consumers”). These two Articles introduce new disclosure requirements into: advertisements for consumer credit; and, advertising by consumer-facing credit intermediaries<sup>3</sup>, respectively.

2.2. Given the CCD has yet to enter into force (and in that sense remains unproven), it is understandable that DG MARKT is concerned that the measures the Directive contains will be insufficient to cope with the present economic circumstances, the severe nature of which could not have been anticipated at the time the legislative instrument was being drafted. Consequently, DG MARKT indicates that it is considering revisiting the regulation of those activities that the CCD did not fully harmonise, such as in the areas of credit intermediaries and the provision of advice. As set out in Paragraph 2.1 above, however, it is worth reiterating that the CCD did set fully harmonised requirements in respect of advertising conducted by credit intermediaries via sub-Article 21(a) of the Directive.

2.3. More generally, the CCD should be given the opportunity to bed down and for DG MARKT only to assess its impact then, instead of the Directorate-General speculating ahead of the Directive coming into force about how effective the legislative measure may or may not prove to be in practice. There is also a risk that any supplementary regulatory interventions proposed now will not actually prove appropriate for the economic circumstances that prevail when they eventually enter into force.

2.4. The Advertising Association agrees with the view of DG MARKT that advertising for financial services, as with advertising in any other sector, should not mislead or put prospective customers under undue pressure, and that it should also be fair. DG MARKT then identifies in its consultation document two examples of potentially misleading marketing practices pursued by lenders that occur in the EU, before confirming that each of these will, from June 2010, be addressed by Article 4 and sub-Article 21(a) respectively of the CCD<sup>4</sup>, if they could not already have been dealt with under domestic law. The protections accorded to consumers under the CCD are also supplemented by those contained within the UCPD - implemented in the UK via the Consumer Protection from Unfair Trading Regulations 2008<sup>5</sup> (CPRs). There is therefore no convincing case for additional regulatory intervention in the field of consumer credit advertisements or advertising by consumer-facing credit intermediaries at this time.

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<sup>3</sup> ‘Credit intermediary’ is defined in Article 3(f) of the CCD as meaning “a natural or legal person who is not acting as a creditor and who, in the course of his trade, business or profession, for a fee, which may take a pecuniary form or any other agreed form of financial consideration: (i) presents or offers credit agreements to consumers; (ii) assists consumers by undertaking preparatory work in respect of credit agreements other than as referred to in (i); or (iii) concludes credit agreements with consumers on behalf of the creditor.”

<sup>4</sup> The two examples given are: advertising a low interest rate when the criteria for qualification for such a low rate are not made clear to potential borrowers; and, publishing marketing documentation in which credit intermediaries induce borrowers to believe that they can authorise loans, where, in fact, only lenders can make this decision.

<sup>5</sup> Statutory Instrument No. 2008/1277

*Adequacy of regulation of mortgage advertising via domestic law in certain Member States*

2.5. DG MARKT goes on its consultation document to imply that information presented in advertisements for mortgage credit is not subject to regulation. Whilst it may be the case that there is no European legislation operating in this field, advertising for mortgage credit can be regulated on a statutory basis at a national level, and this is the case in the UK.

2.6. DG MARKT refers in its consultation document to the framework for the regulation of mortgage credit in the UK - and the relevant regulator, the Financial Services Authority (FSA) - on a number of occasions within its consultation document, although not in the context of advertising. In fact, the FSA regulates the information to be presented within advertisements for mortgage credit on a statutory basis via Chapter 3 ("Financial promotion of qualifying credit and of home reversion plans") of its *Mortgages and Home Finance: Conduct of Business Sourcebook*. The FSA is authorised to issue these rules, including in respect of financial promotions for mortgages, under powers bestowed on the Authority by the Financial Services and Markets Act 2000.

2.7. Moreover, in the UK, advertisements for both consumer and mortgage credit must also abide by additional specific (but non-statutory) rules governing broadcast and non-broadcast advertising for financial services, which are enforced by the Advertising Standards Authority (ASA). Advertisements for consumer and mortgage credit are also required to abide by the general rules on advertising enforced by the ASA, including those on misleadingness that reflect the legal standards contained within the CPRs.

*Invitation to provide evidence of best practice by lenders: a missed opportunity?*

2.8. It might be considered something of a missed opportunity that DG MARKT has, via Question 1 of its consultation document, invited evidence only of misleading or unfair advertising or marketing practices in the lending field<sup>6</sup>. The Advertising Association anticipates that across the 27 Member States of the EU there will be a number of examples of best practice in this area, but which, given its formulation, Question 1 will fail to elicit. In the UK, for example, lenders are encouraged to abide by *Non-status lending: Guidelines for lenders and brokers*, published by the Office of Fair Trading. Participants at the upcoming EC hearing on Responsible Lending therefore risk being uninformed as to the best practice that may exist in the area of mortgage and consumer credit advertising than might otherwise have been the case.

27 August 2009

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<sup>6</sup> DG MARKT asks in Question 1 of its public consultation: "Do you have evidence of misleading or unfair advertising or marketing practices with regard to mortgage and consumer credit?"