European Banking Industry Committee

European Banking Federation (EBF) • European Savings Banks Group (ESBG) • European Association of Cooperative Banks (EACB) European Mortgage Federation (EMF) • European Federation of Building Societies (EFBS)
European Federation of Finance House Associations (Eurofinas)/European Federation of Leasing Company Associations (Leaseurope)
European Association of Public Banks (EAPB)

EBIC RESPONSE TO THE GREEN PAPER ON FINANCIAL SERVICES POLICY (2005-2010)

The European Banking Industry Committee brings together European banking associations with a mandate to provide advice, assure a comprehensive consultation of market participants and ensure a representative industry view throughout the process of drafting, adopting, implementing and enforcing EU-financial legislation and thereby provide input for the European institutions and their relevant sectoral committees. It is amongst the declared aims of EBIC to advise the Commission on relevant legislative banking and cross-sectoral initiatives and any developments at Community level affecting the banking and financial services activities associated with the establishment of a European Single Market for financial services.

EBIC has been established by the main banking industry federations: the European Banking Federation (FBE), the European Savings Banks Group (ESBG), the European Association of Cooperative banks (EACB), the European Mortgage Federation (EMF), the European Federation of Building Societies (EFBS), the European Federation of Finance House Associations (Eurofinas) / the European Federation of Leasing Company Associations (Leaseurope), and the European Association of Public Banks (EAPB).

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1. Key political orientation

The Commission would be interested to hear from stakeholders:

- *whether they agree with the overall objectives for the Commission's policy over the next 5 years;*
- *whether they agree with the key political orientation described above.*

1. EBIC is generally in support of the Commission's key political orientation as well as the general objectives which it has set itself over the next five years.

2. The Commission should be commended on its 'better regulation' approach, one that is very much in line with the wishes of EBIC, and elements of which EBIC further emphasises upon in response to section 2 of this Green Paper.

3. Specifically, EBIC is strongly in favour of the evaluation approach, as outlined by the Commission, which would include repealing measures that are not delivering the expected economic benefits.

4. EBIC believes that the focus of the Commission must now be on the completion of the FSAP, that the priorities are transposition, coherent and consistent implementation and interpretation of EU legislation by member countries, and enforcement.

5. At the same time, FSAP measures must be evaluated against the goals of the single market, and constant monitoring and review must provide regular reports on the effectiveness of the measures in achieving these goals.

6. Dialogue with stakeholders must be continuous. Ex ante consultation must be followed by ex post information and feedback, explaining why certain recommendations made by stakeholders are not taken into account in policy proposals, and justifications for those that are retained above others.

7. EBIC is in favour of supervisory convergence and supports the evolutionary approach that the Commission has outlined in the Green Paper. EBIC strongly encourages the Commission to keep up the momentum and maintain the focus on deliverables.

8. EBIC notes the Commission's focus on retail financial services and would have expected clearer motivations to the proposals in the Green Paper. It considers that targeted harmonisation, i.e. full harmonisation of those key provisions which would facilitate further integration, to the benefit of consumers and business alike, would be the appropriate approach.

2. Better regulation, transposition, enforcement and continuous evaluation

The Commission would be interested to hear from stakeholders:

- *whether they agree with the priority measures identified; and*
- *which additional measures should be taken to foster consistent application and enforcement of European legislation.*

On the priority measures identified by the Commission:

Key principles

EBIC supports the list of priority measures identified by the Commission, and adds the following list of key principles which it would ideally like to see applied:

A. Industry consultation

9. To ensure policy is relevant, European as well as international policy makers need to consult industry and, additionally, should obtain evidence from other relevant sources (including investors, regulators, academic experts) to support decisions about: whether a policy need exists, and if so, the nature thereof; if (and only if) a need exists, what policy approaches might be appropriate; which of the possible policy approaches should be preferred.

10. Making wide and representative industry consultation a standard part of the legislative decision-making process will promote better and more effective legislation, and improve the transparency of policy-making. Consultation should be on the detailed drafting of directives and regulations as well as on the principles. Observing this with the original draft of the Consumer Credit Directive, for example, would have prevented some of the more obvious problems that the original draft has created.

11. If consultation is to be a valuable process for all parties, it must be real. There is little benefit in undertaking consultation if decisions have effectively already been taken. In addition, consultations should be carried out in an open, transparent and systematic way. High consultation standards are also required from standard setters. Furthermore, the timeframe of consultation should be adequate and realistic, permitting the establishment of a dialogue and following consultations a feedback statement should be given.

12. At the international level, the consultation by the Basel Committee on Banking Supervision was conducted in an exemplary manner which set very high standards to be aspired to by other international standard setters such as the IASB.

13. EBIC believes that part of the consultation exercise should also be to assess on a case-by-case basis what type of regulation would serve as the best tool to achieve a particular outcome if there is a perceived need for action. EBIC is strongly in favour of self-regulation being seen as an alternative to binding regulation. Different types of regulation should therefore be given equal consideration in discussions on devising regulatory solutions to European problems. (see annex 2 for further details on the definition of self-regulation, the advantages and disadvantages of self-regulation and the pre-requisites for the effectiveness of self-regulation)

B. Business impact analysis

14. The introduction of new legislation should be strictly assessed on the basis of business impact analyses which could be measured by using such tools as proportionality tests and/or cost benefit analyses. It should furthermore be clear and unambiguous in its wording. EBIC further supports the publication of guidance by the Commission on how certain provisions of Directives should be implemented in order to avoid possible misinterpretations thereof.

15. The important objective of a Single Market in financial services, should, however, not be pursued without regard to the balance of costs and benefits of removing barriers. A theoretically perfect Single Market should not be pursued at all costs. A comprehensive analysis of the relevant existing legislative framework should be an important prerequisite in designing regulation for the European banking market.

C. Quality over speed

16. Where regulation at European level is pursued, quality must prevail over speed. Effectiveness must not be sacrificed in order to meet politically inspired deadlines. A political commitment to the delivery of Single Market objectives must encompass better, more effective and proportionate regulation. Rushed legislation is unlikely to achieve this and risks falling short of the objectives set for it.

D. Subsidiarity

17. The principle of subsidiarity needs to be respected.

E. Proportionate regulation

18. Where regulation at European level is appropriate, it must be both effective and proportionate. This applies not only to Directives and Regulations, but also to implementing measures and core standards which result from supervisory cooperation. Proportionate regulation shouldn't favour one type of business model or corporate structure or one type of product over another.

F. All sizes and structures, "same business, same risks, same rules"

19. Financial regulation should be designed for financial institutions of all sizes and structures. It should follow the principle of "same business, same risks, same rules".

G. Coherent Implementation and enforcement

20. European regulators should now focus on implementation and enforcement. Consistent interpretation and application of the FSAP measures (i.e., in a Lamfalussy context, Level 3) and effective enforcement thereof (i.e., in a Lamfalussy context, Level 4) will greatly determine whether or not a Single Market for financial services has been created in the EU. EBIC would therefore appeal to the European Commission to live up to its role as guardian of the Treaties by putting in place the adequate mechanisms to monitor and enforce proper implementation at Member State level. EBIC would therefore recommend that the appropriate resources - at either Commission or Member State level - be allocated for the purposes of monitoring and meeting compliance requirements on a timely basis.

21. EBIC feels it is essential that all efforts be made at the European level to ensure coherent implementation and interpretation of EU legislation by member countries. Striving for such improvements at the national level is essential for the credibility and acceptability of EU legislation and to create a true level playing field. The Lamfalussy level 3 committees have an important role to play in this respect and EBIC stands ready to assist them in this task. Similarly, inconsistencies in EU legislation must be eliminated.

Repealing measures and continuous evaluation

22. EBIC is strongly in favour of the evaluation approach, as outlined by the Commission, which would include repealing fully or in part measures that are not delivering the expected economic benefits. An effective impact assessment together with wide and representative industry consultation (as outlined above), would most likely have prevented the state of affairs with the Consumer Credit Directive. Any market failures identified during an ex post evaluation should be assessed according to the better regulation framework.

<u>On additional measures:</u>

23. In addition to paragraphs 20 and 21 on the important role of the Lamfalussy committees in helping to achieve coherent implementation and enforcement of the FSAP measures, and with regard to that goal, EBIC is keen to promote a real dialogue between European institutions, comitology bodies and stakeholders as represented by the industry and consumer representative bodies.

24. EBIC would like to see included in the Commission's approach to better regulation feedback on consultations which would include explaining why certain recommendations made by stakeholders are not taken into account in policy proposals, and justifications for those that are retained above others. This would increase the transparency, openness and effectiveness of the consultation process.

25. EBIC welcomes the application of the overall principles of better regulation applied widely across all Commission DG's so as to cover all policy areas connected to financial services.

<u>Responding to the contents of ANNEX I, section 2:</u>

Legal coherence

26. EBIC fully supports a robust and clear legal framework which is necessary for the efficient operation of both financial market participants and the public authorities responsible for

regulation and supervision and agrees that the Community framework for EU financial markets and services is highly developed.

27. With regard however to the mention of a "financial services rulebook", EBIC asks for further clarification, in particular on what such a book should comprise, and what its scope should be. EBIC is concerned especially with regard to a possible incorporation of national provisions, and considerable doubts exist in many quarters as to the overall feasibility of such an exercise. EBIC is concerned that the good intention of codification in this case might risk leading to over-regulation and that inclusion of national provisions would constitute a significant interference in national jurisdiction.

28. EBIC invites the Commission to clarify the term 'gold-plating'. EBIC's understanding of the concept is that of unjustified regulatory additions, i.e: over-implementation at the national level, and is in favour of ensuring that the potential for such gold-plating is minimised. When transposing a directive subject to targeted harmonization, EBIC believes that gold plating should be prohibited in the implementation of maximum harmonization provisions (e.g. Art. 31 (1) 2 MIFID) When implementing minimum harmonization provisions, EBIC believes that Member States shouldn't introduce adaptations that go beyond the spirit of the directive.

29. In this regard, the Commission should bear in mind that one of the reasons for gold-plating is often an attempt by Member States to clarify the EU text which is unclear.

Transposition

30. The latest Internal Market scoreboards published by the Commission indicate a growing implementation deficit in various Member States. The newly energised approach of the Commission to enforce EU measures, together with commitment from all interested parties, including the industry, will be critical to the consistent implementation of both the letter and spirit of FSAP rules and therefore to the FSAP's success. EBIC has welcomed the regular publication of the Commission of FSAP Progress Reports. Such reports should continue beyond 2005 and should take the form of specific scoreboards of Member States' performances in terms of implementing and enforcing FSAP rules.

31. EBIC welcomes the DG Markt practice of organising transposition workshops. It would be desirable that the outcomes of these workshops be published.

32. With regard to mediation and alternative dispute resolving, EBIC welcomes the Commission's FIN-NET initiative of establishing an informal contact point network to address consumers' disputes related to financial services. FIN-NET provides consumers with a first point of support, which is extremely valuable in a cross-border situation. This way, costly and lengthy judicial procedures can be avoided. The special merit of FIN-NET is that it makes efficient use of existing national schemes, rather than try and harmonize the existing bodies.

33. Against this background, EBIC is not in favour of introducing harmonized binding rules related to consumers' redress systems such as the European Code of Conduct for all kind of mediators -

as suggested by the Commission in its Green Paper[1] and lately by DG JAI. EBIC strongly feels that the merits of industry-developed schemes, based on flexible and informal resolutions, continue to be the most optimal solution to deal with out-of-court disputes, and FIN-NET confirms this.

3. Consolidation of financial services legislation over the 2005-2010 period

The Commission would be interested to learn from stakeholders:

- *whether they agree with the identified measures where the Commission might decide to take no action, or if there are other concrete areas where the Commission should not bring forward proposals presently in the pipeline or, indeed, areas where the Commission should consider withdrawing;*
- *their assessment if the existing regulatory and supervisory framework is sufficient to tackle the supervisory challenges in the years ahead, what are the gaps and how these can be filled most effectively;*
- *what are the objectives, sectors to be covered and the priority areas in regulatory and cooperative activities on a global scale.*

On the identified measures where the Commission might decide to take no action:

3.1 Finish remaining measures

34. EBIC is generally in support of the areas on which the EC has decided not to make new proposals as well as the area on which it has decided to reconsider proposals.

3.2 Efficient and effective supervision

35. In line with EBIC's position paper on the integration of European Financial Markets of 10 September 2004, we highlight that the delivery of consistent interpretation and application of regulatory and supervisory requirements will in part be determined by whether or not the appropriate structures are in place to encourage supervisors to co-operate. We also consider that achieving a level playing field in banking supervision in the EU is dependent on a number of steps to be taken in the short to medium term.

The Evolutionary Approach

36. EBIC welcomes the Commission's idea of an evolutionary approach for the supervisory developments 2005-2010. Such an approach could strike the right balance between ensuring effective supervision and financial stability, and minimizing the regulatory burden for firms, systems and markets. EBIC would like to highlight the need to maintain the momentum in achieving the objectives. Therefore, EBIC would like to see more concrete detail, such as definitions, on how this approach will be taken forward in the final White Paper.

Interoperability of financial systems

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[1] Green Paper on Alternative Dispute Resolutions, COM (2002) 196 final, 19 April 2002, where the Commission requests feedback as to whether the structure, composition, set-up and functioning of ADRs should be harmonised at the European level (responsible DG: JAI).

37. EBIC agrees with the Commission's comments on the interoperability of financial systems. There is in fact a demand for supervisory arrangements that better reflect the way in which risk is managed and business is done. In that context, it is a step forward that the Finance Ministries have been included in the Memorandum of Understanding (MoU) on financial crises situations. However, while accepting that constructive ambiguity is necessary to a certain extent, EBIC would like to see more information about the arrangements which have been agreed to be made public. A lack of transparency could be an impediment to taking forward the debate on banking supervision in a timely manner. In particular, industry has concerns over whether the cooperation arrangements which have been put in place are sufficient given that they are based on the current legislative situation. Industry should be involved in an assessment of the management of financial crisis in Europe.

38. We would therefore urge the European institutions and the Member States to disclose to industry:

    - an outline of the arrangements that have been put in place;
    - details of the concrete measures which will be taken to implement the MoU; including
    - information about the stress scenarios which will be carried out on a national level.

3.3 Enabling cross-border investment and competition

An integrated and competitive market

39. In EBIC's view the securities and wholesale markets are more integrated while further progress in the retail banking market could still be achieved. It has to be noted however, that the means to achieve integration should not be strictly of a legislative kind, and non-legislative measures should be also considered (e.g. in the payments area).

40. The European banking sector is pluralist (diversity of providers of financial services) in structure and EBIC considers this an important characteristic which should be maintained, if European banking markets are to remain competitive, provided however that there is the same level playing field for all kind of institutions and that there is no distortion of competition.

Consumer and investor confidence: crucial for an integrated market

41. EBIC is of the view that any European legislative measures aiming to improve the level of integration in financial services should have the expectations, needs and requirements of individual consumers and investors in mind. At the same time, the regulatory environment should enable the financial services industry to meet these consumer expectations without undue bureaucratic constraints or additional and disproportionate costs. In this context, EBIC welcomes the FIN-Net initiative.

42. EBIC firmly believes that a key issue is the need for transparency with regard to product information. It is only by being able to make clear and like for like comparisons that the consumer will be able to compare products from different providers. It is essential that

transparency exists at this level if the industry is to gain consumers' trust with regards to the provision of cross-border financial services.

43. A prerequisite for increased economic growth is the promotion of consumer and investor confidence. This will foster the necessary conditions to increase their willingness to engage in Europe's financial markets. This is an important responsibility, not only for regulators and policy-makers, but also of the industry.

Competition and consolidation in the EU

44. EBIC wishes to emphasize the importance of promoting competition as a driving force for integration, while also highlighting the importance of respecting "diversity between the providers of banking services in the EU, which appears beneficial to consumers" as was already stated in the banking expert report. Members of EBIC agree on the principle of pluralism in the banking sector provided that there is the same level playing field for all kind of institutions and that there is no distortion of competition. EU legislation should not favour one type of business model or corporate structure or one type of product over another.

45. EBIC would like to highlight that the values of an open market economy and free competition are enshrined in the EU Treaty. European competition policy is built on the view that competition is good for the consumer and industry alike. Over the years, increased competition in the banking sector has stimulated banks positively in a number of ways. They have increased efficiency and cut costs; adjusted business strategies, for example by developing new services and distribution channels; and consolidated through mergers and acquisitions. In addition, increased competition has provided consumers with a wider variety of innovative products at competitive prices from a range of different providers, and has thus contributed to increased economic growth in Europe.

46. So far, consolidation of activities has been seen mainly in wholesale banking services such as corporate bond and equity issuance, and mainly within national boundaries or in defined geographic regions such as in the Nordic-Baltic area. Recent developments seem to indicate an increase in cross-border merger activities.

47. The current level of cross-border consolidation partly reflects legal and regulatory differences, such as consumer and competition policies, which make it difficult to develop a pan-European product range as well as the existence of idiosyncratic barriers to integration, such as the specificities of local or regional demand and needs, as well as cultural and language barriers. These facts and market conditions are limiting the extent of consolidation in European financial services.

48. In this context, the full benefits of competition are not always achieved in practice.

   - Decisions of the European Commission have in the past made the case for bank mergers in small countries less attractive (assets sell-off), on the basis of a narrow definition of "national market". This has in effect prevented banks in those countries from building a capital base large enough to compete at EU level. But the EU and national authorities also have a role to play. The enlightened application of competition rules should allow the financial services industry to consolidate in a beneficial way for both EU and domestic economies. It should be

noted however that further consolidation in already highly concentrated domestic banking markets could potentially be damaging for competition and thus detrimental for consumers.

- An increasingly "functional" approach to EU-legislation leads to a situation where more and more entities are given the opportunity to provide banking services conditional on a supervisory regime that is lighter than those of credit institutions (i.e: plans of the European Commission to allow telecom operators to provide payment services). EBIC therefore believes that the principle of "same business, same risks, same rules" should apply. This would not only help to ensure a level playing field, but would also assure equal treatment in terms of costs.

3.4 The external dimension

Competitiveness of EU vis-à-vis the rest of the world

49. In a globalised world, the creation of a European Single Market for financial services is not an end, but rather a means to increasing the international competitiveness of European financial markets. Achieving both a Single Market for financial services and the competitiveness of the EU vis-à-vis global markets involves a difficult balance.

50. Recent research on the competitiveness of nations (IMD World Competitiveness Yearbook 2003) has led to the conclusion that market access (openness) is one of the most important factors for improving a region's competitiveness. Open markets foster competition, thereby increasing quality and reducing prices for consumers while at the same time giving firms incentives to innovate.

51. Unless proposed regulations and standards undergo a competitiveness test, the prospects of the EU meeting the Lisbon objective of becoming the most competitive economy in the world by 2010 will be much diminished. Systematic assessments of the business impact of EU regulation should therefore be undertaken.

A stronger EU voice at international level

52. The development of technology has led to an unprecedented globalisation of the financial sector. Confidence in the global system is the corner stone of further development. It is of utmost importance to promote confidence of investors and depositors as well as confidence in inter-bank relationships. EU positions should be defended efficiently when developing, common standards for all players/market participants, in particular in areas such as capital adequacy, money laundering, fight against terrorism financing, data protection and accounting standards.

53. There are international bodies that provide guidance on a number of these issues (Basel Committee for Banking Supervision, IOSCO, FATF, IASB, etc.). Given the fact that the European Commission/Union is not always a full member of these international bodies, but rather (some) Member States of the EU, does clearly not facilitate the representation of European interests in these fora. In certain cases, this may affect the ability of the EU to influence the content of international standards and therefore be contrary to European interests. Due to the different nature and role of these fora, ad hoc solutions between European "participants/members" should be preferred over a one-size-fits-all approach. Possible solutions

may include inter alia a strengthening of the role of the Commission. Once they are firmly established and have developed a balanced European view of policy, the Level 3 Committees (CESR, CEBS and CEIOPS) might also play a role in some of these bodies (e.g. CESR in IOSCO).

54. The EU should develop a stronger voice at international level to influence the outcome of the deliberations on international standards.

55. To ensure consistency and avoid overlap EBIC recommends closer liaison between international standard setting bodies on inter-related matters. For example, regular meetings between the Basel Committee on Banking Supervision and the IASB.

56. Convergent accounting standards play a vital role in global markets, allowing financing decisions to be taken on the basis of agreed standards. However, increased efforts need to be taken to ensure that the standards adopted at the global level meet the needs and requirements of the European Union's banking industry.

57. In conclusion, EBIC believes that international standards should be integrated into European legislation in a way that is not only consistent with the remaining "acquis communautaire", but also ensures a degree of democratic accountability. International standards should therefore be evaluated on a case-by-case basis.

58. The importance of the transatlantic relationship for both the EU and the US cannot be underestimated and EBIC welcomes the role played by the Commission in the EU-US financial markets regulatory dialogue. The concept of regulatory equivalence is at the core of this dialogue and requires extensive EU-US cooperation and convergence on common principles.

59. EBIC welcomes the initiatives of the Commission to establish similar structured dialogues with other international partners such as China and Japan.

On the objectives, sectors to be covered and the priority areas in regulatory and cooperative activities on a global scale:

60. EBIC welcomes the approach outlined by the Commission on the 'external dimension', and supports efforts to ensure that European influence is maintained on the global stage, especially at the level of the various international bodies such as BASEL, IOSCO, FATF and IASB (see also above on 'a stronger EU voice at international level'). EBIC would however welcome more feedback on the dialogues between the Commission and these bodies, and would also welcome more opportunities for the industry to be involved in these dialogues.

4. Possible, targeted new initiatives

The Commission would be interested to learn from stakeholders:

- *whether they agree with the new identified priority areas;*
- *what are the (dis)advantages of the various models for crossborder provision of services, whether there is a business case for developing a 26th regime, and which business lines might benefit;*
- *how to enable consumers to deal more effectively with financial products and whether this means more professional and independent advice, improved education or financial literacy training are needed;*
- *whether they agree with the issues identified in the above list of retail products, or if they would suggest other areas where additional action at EU level could be beneficial.*

On the priority areas:

Asset management

61. EBIC is in support of the Commission's objectives aimed at making the pan-European market for asset management more efficient.

Retail financial services

62. EBIC is of the view that the integration of retail banking market requires a different policy approach than that for wholesale banking markets. It is therefore important that the Commission adopt a 'case by case' analysis approach to further integrating retail financial services. EBIC therefore welcomes the Commission's idea to establish forum groups for specific retail products and stands ready to provide its expertise in these groups. Action should be taken when there is evidence that it would bring an added value to further integration of retail financial markets.

CCD = test case

63. The revision of the CCD is considered as a test case both in terms of better regulation principles but also in terms of harmonization approach (as far as EBIC understands a combination of targeted harmonisation and mutual recognition is envisaged for the planned revision). EBIC believes that the better regulation principles should be applied when revising the directive and we would invite the Commission to present an impact assessment that compares the planned revision of the original directive to the current situation.

EBIC's view on harmonization approaches

64. As already stated in its response to the banking expert group report, EBIC favours targeted harmonization, i.e. full harmonization of those key provisions which would facilitate further integration (as outlined in paragraph 69 below). EBIC regrets that these proposals have so far not been included into the Green Paper to seek the views of other stakeholders on them.

65. One way of promoting an integrated retail market and equally enhance consumer confidence would potentially be to harmonize consumer protection provisions at the EU level. Different harmonization approaches have been used over time such as minimum harmonization and full/maximum harmonization. Minimum harmonization in theory provides a fairly modest level

of harmonization but allows Member States to introduce, or maintain, more stringent requirements by means of their national legislation. Maximum/full harmonization, in contrast, would prevent Member States from introducing more stringent provisions.

66. The minimum harmonization approach has been predominantly used in the past but its application has not helped to promote integration as Member States have complemented the text of the EU directive by (often different) national provisions. Recent experience with maximum/full harmonisation[2] reveals that this harmonisation approach has tended to equate to the highest possible levels of harmonization, given the fact that Member States are prevented from introducing provisions others than those laid down by any given directive. To further illustrate this argument, reference can be made to the FSC report, where Member State representatives are quoted as saying that "full harmonisation may fail to reflect differences in consumer preferences, business models and other factors between Member States". Experience at Council level shows that Member States tend to insist on integrating their highest consumer protection rules. As a result, the industry and customers alike are faced with unworkable legislation leading ultimately to higher costs, and not operating in the interests of any of the stakeholders[3].

67. In this context, EBIC is in favour of "targeted harmonization", i.e. full *harmonization of those key provisions* which would facilitate further integration (as outlined in paragraph 69 below). It is the belief of EBIC that promoting such a pragmatic and flexible approach to policymaking will improve the effectiveness of EU legislation.

68. EBIC would however strongly advise against product and services standardisation via legislation as it would likely lead to market distortions. It should be left to financial institutions to design banking products in response to customer needs and to reflect the economic realities of the market.

69. In concrete terms, EBIC recommends that targeted harmonization be undertaken in the following areas (see annex 1 for details)

- Definition of the consumer
- Pre-contractual information requirements
- Annual Percentage Rate of Charge
- Right of withdrawal
- Rules for on-line identification and authentication
- Contracting online;
- Recognising equivalence of 'KYC' standards (to be implemented by the third Anti-Money Laundering Directive)

70. EBIC believes that if the Commission wants to remove such inconsistencies to see the supply of retail products advanced on a cross-border basis, as a general rule targeted harmonisation is the appropriate approach to do so.

[2] See Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM(2002) 443 final.
[3] See footnote above.

Principle of Mutual Recognition

71. Regarding the principle of mutual recognition, it has to be recognised that the second banking coordination directive provides for a European passport for credit institutions. According to this directive, all banking activities listed in it and permitted in one Member State should be recognised and could be practised throughout the European Union. According to Article 22 paragraph 5 of the directive, however, Member States are able to impose their national provisions on the basis of protection of the general good. This situation was and remains in some circumstances an obstacle to the achievement of the Single Market for Financial Services. Based on experience so far, mutual recognition stops where contract law (consumer protection regulation applicable to products) starts. In general, EBIC believes that applying mutual recognition in the field of law applicable to consumer contracts would indeed risk affecting consumer confidence as – in a cross-border context – the consumer would require information about consumer protection provision in another Member State, i.e. the home country provisions of the bank. Rather, targeted harmonization (as outlined above) should be used as a more effective way to achieving the goals of the single market

26th Regime in the area of retail financial services

72. EBIC acknowledges the current, ongoing debates that are being held on this issue at the EU level.

73. In line with the Commission, EBIC agrees that the benefits of "26th regimes" remain to be proven, and it welcomes the Commission proposal to conduct a feasibility study, on which it hopes, as the sector's representative body, to be invited to contribute in due course.

74. It is the view of EBIC however that the onus should now be on the promoters of such an idea to further develop the application of 26th Regimes in the area of retail financial services via the appropriate test case(s).

75. EBIC believes, that a 26th regime should be used on a cross-border as well as on a "national" basis. Furthermore, it should be open to all banks rather than restricting it exclusively to banks operating on a pan-European basis.

76. At this stage, it is still too early to identify the business lines to which an application of a 26th Regime could be put into practice. It is therefore important that the application of such a regime be approached on a case by case basis.

77. EBIC wants to make clear, however, that it does not see 26th regimes as a substitute to targeted harmonization (which it outlines above). In any case, EBIC strongly prefers targeted harmonisation to any "26th regime". The 26th regime should therefore be seen as an option in cases where targeted harmonisation is not feasible. EBIC remains open to investigating further the possibility of a 26th regime being offered on the basis of the appropriate test cases that may be put forward by industry promoters of the concept.

78. In addition, EBIC underlines that neither targeted harmonisation nor 26th regimes should lead to product standardisation (see also paragraph 68 above).

Mortgage credit

79. EBIC fully supports the approach that was taken in this area with regard to the consultative process on mortgage credit. EBIC looks forward to actively participating in the consultation for the Green Paper on mortgage credit.

Codification

80. EBIC is in favour of codification if it improves convergence and does not lead to a higher level/more detailed regulation (for further detailed comments see paragraph 27).

81. In the context of codification the CFR-NET initiative should be looked at in more detail. The banking industry is concerned that there was no ex-ante exchange of views on the usefulness of such an exercise, and the objectives aimed for are unclear. First experience with the CFR-NET initiative in particular indicates that the CFR project seems to go far beyond the claimed objective of increasing convergence via a "building block approach". Instead the broad scope and high level of detail point towards the will to establish a European civil law book. If a European civil law book was the final objective, the legal basis for such an exercise would need to be examined, and the necessity for it would need to be questioned (in the context of the subsidiarity principle). In addition, the better regulation principles should be applied at the latest when the results of the common frame of reference on contract law are available and before any legislative initiative at the EU level is launched.

Information requirements

82. EBIC strongly believes that the issue of "information overload" needs to be addressed in this context: There should be less pre-contractual information and the information requirements should be more consistent across directives. EBIC would therefore recommend the establishment of a uniform list of appropriate pre-contractual information, which should apply to all EU consumer protection directives in the financial services area. In order to enable a consumer to compare offers and to make an informed decision – especially in a cross-border environment - Member States should refrain from keeping or introducing additional requirements other than the ones listed below:

    - Basic information on the supplier (complete identification and contact details);
    - The (final) price the consumer will pay to the bank;
    - The main attributes of the product or service offered;
    - Important contractual conditions such as the existence of a right of withdrawal or reflection period and the duration of the terms announced in the offer/advertisement;
    - Early repayment terms (if any);
    - Minimum fixed time period of commitment binding the consumer to the contract, if any, and conditions to give notice for cancellation;
    - All relevant information should be provided in a durable medium.

83. The use of the European Standardised Information Sheet (ESIS) as a tool to achieve the above mentioned objective should be analysed on a case-by-case basis in full consultation with the stakeholders.

84. While the basic set of pre-contractual information as described above should in general be given for all products/services, EBIC would like to present some examples where flexibility should be applied:

   - ⇨ On the one hand, exemptions should be foreseen for very specific products i.e. banks should not be requested to provide the complete list of information for a revolving credit at each interval.
   - ⇨ On the other hand, this basic list of information might need to be complemented by additional binding pre-contractual information for specific, more sophisticated products (e.g. investment or pension fund product). or specific situations (distance selling or doorstep selling)

85. The above-mentioned remarks on information requirements were already presented in EBIC's response to the consultation on the FSAP.

Consumer education

86. Measures to improve consumer education and financial literacy are the responsibility of Member States and in line with the principle of subsidiarity, the EC should encourage initiatives to improve it. EBIC regards further efforts in these areas as effective and appropriate ways of achieving greater levels of consumer confidence.

Financial mediation

87. EBIC believes that EU regulation on intermediaries needs to be first and foremost consistent, proportionate and appropriate for all types of intermediaries. EBIC suggests opening a dialogue with the Commission at this stage to identify the key-issues at stake regarding financial mediation.

88. EBIC is in favour of achieving consistency in terms of MIFID and the insurance intermediaries directive. Any new intermediary directive or revision of the existing directives needs to be brought in line and result in consistent provisions. The revisions should however be used to improve the current legislative framework for intermediaries.

89. EBIC is fully in support of achieving transparency for the customer in terms of the final price of the product (from an economic point of view, this refers to the communication of final price by financial intermediary to the client). This principle of transparency should however not be imposable in the context of the relationship between the provider and the intermediary, which should be left to the markets.

Bank accounts

90. EBIC understands the aim for the European Commission is to foster customer mobility in relation to bank accounts, i.e. opening, closing, transferring of accounts and the barriers encountered when handled on a cross-border basis.

91. We remark that issues have already been addressed by the European Commission in a Communication on the New Legal Framework for payments in 2003 and were not pursued

based on reactions received from the industry. EBIC take notes with some surprise of the Commission's ambitious suggestion to examine obstacles to opening accounts cross border. These proposals deserve meticulous investigation before their implications can be fully assessed.

92. For recollection, the main concerns developed by the European Payment Council (EPC) in changing bank account numbering structures as proposed by the European Commission Communication in 2003 are the following ones:

93. The European banking industry believes that the subject of account number portability should remain outside any legislative EU initiatives.. Account numbers underpin almost every contractual relationship between a bank and its customers and consequently lie at the core of a bank's business.

94. The Commission should recognize that the introduction of legal measures to achieve portability of account numbers would create disproportionably high costs compared to the benefits. If the objective is to address perceived obstacles to customer mobility, then alternative measures of a non re-engineering kind can be envisaged.

95. Concerning the Commission's advice to launch studies aimed at creating a more simplified numbering system for credit transfers, the industry would like to highlight that the IBAN structure was successfully introduced in order to be able to maintain the existing account numbering in each of the 25 EU countries, therefore not disrupting the more than one billion existing numbers used by 500 million consumers and companies every day, without mentioning the thousands of corporate, bank and infrastructure IT applications based on these existing account numbers. Touching the account numbering system means touching the very core of the whole banking system and should thus be restrained from. Instead, further promotion of IBAN usage by all stakeholders, i.e. corporates, governments, consumer organisations, will definitively help to enhance efficiency of payment transactions.

96. Portability of account numbers would be as cumbersome as trying to implement portability of postal addresses.

97. Furthermore, the existing and very recent Regulation 2560 refers to IBAN and BIC which have been promoted and sponsored by the European Authorities, including the ESCB. The IBAN numbering standard is accepted and well functioning across the EU, proving its success.

98. The introduction of 'simplified numbers' (where 'simplified' is already debatable) will not help to make customer mobility easier and won't increase competition either. A single account number without the portability of value added services will be of no use to the customer.

99. In addition to the EPC view outlined above, EBIC would expect the Commission to carry out a comprehensive cost benefit analysis in order to demonstrate clearly that the net benefits of any proposal on bank accounts would be substantial enough to warrant such action.

100. EBIC would also highlight that initiatives in the area of bank accounts would create serious obstacles in the development of the single European payments area as conducted by the EPC.

On other areas where additional action at EU level could be beneficial:

Fiscal barriers

101. In recent years, the range of financial services available to businesses and consumers has vastly expanded. Financial markets have become much more competitive. In order to stay competitive and to be able to cope with the burden and cost of rapidly changing information technology and increased pressure for financial performance, financial groups and groups of banks have been obliged to seek structural cost savings and exploit synergies by integrating, centralizing and rationalizing their functions internally and by outsourcing to third parties (e.g. cross-selling of financial products and centralized production of IT and other support services). As a result of this integration and centralization of functions and as a result of the obligation to comply with transfer pricing regulations, the amount of intra-group cross-border supplies and cost allocations has increased dramatically in the financial services industry.

102. With that in mind, EBIC is of the view that fiscal barriers are among the biggest obstacles to integration in European financial markets and that the Commission and member states should continue their work to abolish them.

Company taxation: Elimination of problems related to cross-border losses and transfer pricing

103. The lack of ability to set off tax losses in one Member State against taxable profits in another Member State results in excessive tax costs. In the worst case the tax exceeds overall profit. There is an urgent need for legislative changes to allow losses of companies to be set off against taxable profits of related companies resident elsewhere in the EU. Therefore EBIC looks forward to seeing the innovative solution which the Commission announced it would propose.

104. Double taxation arises where one country makes an adjustment to taxable profits on intra-group transactions and the second country fails to make a corresponding adjustment. EBIC believes that there is a need for an EU-wide accepted form of documentation regarding intra-group transactions and transfer pricing adjustments. In addition, all tax treaties should be updated to OECD standards. Above all, financial institutions need binding arbitration procedures to avoid double taxation.

105. The issue of capital allocation to branches has not been specifically addressed by the Commission but is of primary concern to EBIC. Unless there is a common EU-wide interpretation of deemed branch capital, double taxation is likely to occur. Capital attributions to branches should be consistent and there should be binding arbitration to ensure that any tax adjustment is matched by an equivalent reciprocal adjustment in profits at Head Office level. EBIC is further concerned that tax discrimination still arises whereby a Member State gives more favourable tax depreciation for assets leased locally compared with assets leased to customers in another Member State. There is a need for an equal relief for capital equipment leased cross-border and capital equipment leased domestically.

Withholding tax on interest payments made between companies

106. Withholding tax on interest payments between companies results in a lack of competition. When a withholding tax is imposed, resident EU banks are put at a disadvantage compared with

local banks within a country. There should be no withholding tax on intra-EU cross-border interest payments between companies.

Legal certainty about VAT treatment of financial services

107. The current VAT treatment of financial services causes major problems for the European financial industry. VAT on intra-group cross-border transactions, and in some cases within one country, prevent the efficient organization of business. Due to their reduced right to deduct input VAT, financial institutions incur multiple VAT taxation on intra-group allocations of external costs. Centralized internal costs (payroll costs, self-developed software, Head Office costs) that are allocated to other group entities result in substantial additional costs where there are no VAT grouping provisions. European financial groups would only be able to maintain a competitive position in global financial markets if they are given the opportunity to cooperate, integrate and centralize their functions in a VAT neutral way in order to achieve synergies and structural cost savings.

108. In addition, the European financial sector has to cope with legal uncertainty about the VAT treatment of financial services.

ANNEX 1: General ambitions for the further development of a single financial market

Definition of the consumer: EBIC believes that the definition of a consumer as "*a natural person acting for purposes which can be regarded as outside his trade or profession*" should not only be identical throughout all European legislative texts, but – more importantly – should be implemented identically throughout Europe. European consumer protection rules can only be efficient if they are addressed to the same addressees all over Europe;

Pre-contractual information requirements: EBIC strongly believes that the issue of "information overload" needs to be addressed in this context: There should be less pre-contractual information and the information requirements should be more consistent across directives. EBIC would therefore recommend the establishment of a uniform list of appropriate pre-contractual information, which should apply to all EU consumer protection directives in the financial services area. In order to enable a consumer to compare offers and to make an informed decision – especially in a cross-border environment - Member States should refrain from keeping or introducing additional requirements other than the ones listed below:

- Basic information on the supplier (complete identification and contact details);
- The (final) price the consumer will pay to the bank;
- The main attributes of the product or service offered;
- Important contractual conditions such as the existence of a right of withdrawal or reflection period and the duration of the terms announced in the offer/advertisement;
- Early repayment terms (if any);
- Minimum fixed time period of commitment binding the consumer to the contract, if any, and conditions to give notice for cancellation;
- All relevant information should be provided in a durable medium.

Whether or not the use of ESIS is a valuable tool to achieve the above mentioned objective, and under what conditions it could be used in the perspective of this desirable harmonisation of pre-contractual information, should be analysed on a case-by-case basis in full consultation with the stakeholders. While the described basic set of pre-contractual information should in general be given for all products/services, EBIC would like to present some examples where flexibility should be applied

- ⇨ On the one hand, exemptions should be foreseen for very specific products i.e. banks should not be requested to provide the complete list of information for a revolving credit at each interval.
- ⇨ On the other hand, this basic list of information might need to be complemented by additional binding pre-contractual information for specific, more sophisticated products (e.g. investment or pension fund product).

APRC: EBIC feels that a single APRC including exclusively those costs levied by the lender for his benefit should be introduced as this is the only way to provide a useful and consistent means of comparison for consumers.

Right of withdrawal: EBIC would recommend the development of a uniform set of rules concerning the right of withdrawal along the following lines:

- Principle: a common and uniform time period of 7 working days should be established for any consumer contracts for practical and legal certainty reasons at the EU level.
- Exceptions: exceptions to this general principle would need to be made for the following reasons:

  - Contracts involving a market risk or price and/or capital market fluctuations, such as foreign exchange, money market instruments, transferable securities, units in collective investment undertakings, financial future contracts including equivalent cash-settled instruments, forward interest-rate agreements (FRAs), interest-rate, currency and equity swaps and options to acquire or dispose any instrument referred to in this list of exemptions.
  - If the consumer has received full advice. For instance, as is the case with contracts concluded before a notary, court or other similar public authority entrusted to guarantee that the consumer has received all information required.
  - In the case of an opt-out possibility/or reduction of the withdrawal period, as long as the consumer is properly advised about the consequences of these provisions (crédit lié)
  - If there exists a pre-contractual right of reflection in national legislation. In this case, the bank should not be obliged to provide the consumer with a post-contractual right of withdrawal.

- Need for a general stop/end date : Directive 85/577/ EEC on the Protection of the Consumer in respect of Contracts negotiated away from the business premises, as well as Directive 2002/65/EC on Distance Marketing of Financial Services do not provide for any stop/end date of the withdrawal period. Equally, the proposed draft for the revision of the consumer credit directive does not contain a stop/end-date. The right to withdraw from an agreement for an 'unlimited period' leads to an unacceptable situation of legal incertitude for any supplier of goods and services and it could also result in an increase of prices to cover the risk of eventual abuses in using the right of withdrawal. Against this background, the introduction of an end-date, as contained in the general distance marketing directive[4], seems indispensable from the point of view of EBIC.

In any case, EBIC recommends that a uniform set of provisions on the right of withdrawal along the lines described above should be developed at the EU level and uniformly enforced throughout the EU at the national level.

Harmonising rules for on-line identification and authentication: Opening of (cross-border) on-line accounts over the internet should be made considerably easier. This should be achieved by enforcing existing legislation (the Electronic Signatures Directive) and by establishing harmonised rules for identification and authentication, while respecting the technical options on identification standards that Member States may choose to explore ("uniform rules, not uniform solutions", i.e. technological neutrality). At present, the procedure customers have to follow to provide proof of

[4] Article 6 of the Directive 97/7/EC on the protection of consumers in respect of distance contracts provides a three months stop/end date of withdrawal period .(Art. 6, para. 1:"...if the supplier has failed to fulfil the obligations laid down in Article 5, the period shall be three months").

identity varies from one Member State to another, but is always a cumbersome and distinctly "off-line" exercise. This time-consuming and costly procedure could be avoided if the EU established a legal basis explicitly permitting accounts to be opened throughout the EU with a qualified electronic signature. This would provide the banks with the legal certainty they need.

Interdiction of contracting on-line: Some Member States do not allow guarantee agreements or consumer loan contracts to be concluded over the internet, but explicitly prohibit such contracts being concluded "in electronic form". In other Member States e-contracting is permitted. This situation results in distortion of competition and is detrimental to banks operating in Member States where e-contracting is prohibited. EBIC believes that there is no good reason to prohibit consumer loan agreements being concluded over the internet: the right of withdrawal foreseen in the Directive on Distance Marketing of Financial Services provides consumers with an adequate level of protection.

Mutual recognition of 'KYC' standards: The second Money Laundering Directive's 'Know Your Customer' rules are sometimes interpreted very restrictively by competent authorities in Member States, requiring for instance the submission of certain documents usually required for domestic identification purposes and therefore making it impossible for consumers from certain Member States to open an account. The aforementioned requirements set by the supervisory authorities constitute an obstacle to cross-border business relations. This situation could be remedied by a mutual recognition of the equivalence of national KYC standards in the EU. In this context, EBIC takes note of the Commission's intention to adoption of the third EU Anti-Money Laundering Directive which allows a mutual recognition of KYC standards within the EU , (as provided for in Article 12 a).5 of the proposal for a Third Money Laundering Directive. EBIC calls for a proper and adequate implementation of the Directive by Member States in order to reach its target on this point.

ANNEX 2: Type of regulation: Self-regulation as an alternative to binding regulation

Application range: There is a broad range of approaches to self-regulation including:

- ⇨ codes of conduct: bilateral or multilateral agreements between different parties (typically banks and their customers), e.g. the European Code of Conduct on Home Loans,
- ⇨ market conventions or market driven standards: agreements amongst industry participants on standards or infrastructural tools, for instance, in the clearing and settlement area (e.g. the Master Agreement for Financial Transactions (EMA) and Euribor, Eonia and Eurepo benchmark rates);
- ⇨ good practice guidelines: usually undertaken unilaterally by one organisation or a group of organisations;
- ⇨ industry sponsored accreditation.

Advantages and disadvantages of self-regulation: To illustrate pros and cons, EBIC would like to focus on codes of conduct in the EU:

- ⇨ Advantages of codes of conduct:

First, codes of conduct were originally designed to put the initiative in the hands of a non-regulator. They were initiatives by the industry, or even an individual company, to promote good practice and to indicate goodwill to a specific sector/customer group.

Second, self-regulation utilises industry resources and expertise unavailable to government. Industry assumes responsibility for concerns raised by the community and is able to work directly with stakeholders to resolve outstanding issues.

Third, codes of conduct have sometimes been used to avoid the need for legislative action. Codes of conduct offer a novel solution to the sometimes burdensome problem of legislative or regulatory procedures.

Fourth, codes of conduct can be adopted by the parties concerned with a great deal of speed. Self-regulation allows industry the flexibility to offer greater choice for consumers and be more responsive to changing consumer expectations. It is usually more adaptable than binding regulation.

- ⇨ Disadvantages of codes of conduct:

First, the concept of "code of conduct" is not uniformly understood in the EU, where two different models of self-regulation co-exist:

- o The Binding Model (British, Irish and to some extent Dutch models): the concept of self-regulation is well established in some countries. Banks and consumers have a long and positive tradition of working with codes. There is an understanding that a Code is equivalent to binding legislation as the bank has to comply. In general, compliance bodies regularly monitor the correct implementation of the Code. For

instance, the UK Code is independently reviewed biennially, involving detailed discussions with all stakeholders (including government, consumer groups, the industry and its regulators). Because the Codes are public documents, other mechanisms are effective in ensuring enforcement, e.g. the press.

- The Non-Binding Model (Continental European tradition): in contrast, in continental Europe, Member States commonly use binding legislation/regulation to govern the banking business. Self-regulation is, so far, understood as being complementary to or rather providing interpretation of binding legislation.

Many of the misunderstandings surrounding the code of conduct concept arise from its precipitate transposition in the EU, and the lack of proper education of the parties concerned.

Second, lies the question of precedent setting judicial interpretation: to date, no judiciary rulings can be found in the EU to support the view that codes of conduct are binding, and to find industry liable. A US court, however, has concluded that a voluntary code was binding. In Kasky / Nike, a ruling of 2 May 2002, a California Court treated Nike's public communications regarding its child labour policy as ordinary product advertisement which could establish liability if the content of such communications was found to be false. In the context of the home loan agreement, the Commission services equally argued that the failure of an individual credit institution to implement the home loan agreement - notwithstanding public registration and announcements - could eventually be interpreted as a breach of the directive on misleading advertisement.

Third, European law supersedes national law – but national law supersedes European Codes of Conduct. Many credit institutions struggle with conflicting provisions where implementing the European home loan agreement.

Fourth, at the European level, there is no guarantee that the negotiation and adoption of a code of conduct will be undertaken swiftly (e.g. the EU code of conduct on home loan agreements).

Pre-requisites for the effectiveness of self-regulation in banking:

- ⇨ Self-regulation, like binding legislation, should promote further integration and ultimately benefit customers and market participants alike.

- ⇨ Self-regulation is unlikely to be effective in an area where regulation already exists at Member State level, unless the decision is taken that self-regulation should replace/supersede national regulation.

- ⇨ Furthermore, there is a need for the European Institutions to clearly define how European codes of conduct or self-regulation in general should be understood and accordingly implemented at the national level.

- ⇨ Legal certainty should be provided as to the conditions under which self-regulation does not breach competition law.

- ⇨ Involvement of the European regulator in self-regulation: Such involvement is justified or even to be recommended in so far as he can assist in facilitating the design of self-regulation and in integrating the scheme into the regulatory framework (the EU Home Loan Code was published via an EU communication).

- ⇨ Comparative costs of self-regulation and binding regulation: Self-regulatory schemes promote good practice at affordable costs, generally perceived to be lower than those implied by binding regulation.

- ⇨ Cost Benefit Analysis for industry: There needs to be perceived benefits for those promoting self-regulation. These benefits can be direct, for instance a boost to their sales, or indirect, such as lesser regulatory capital costs.

- ⇨ Proper and effective administration of the schemes (binding model): For a scheme to be successful there needs to be consumer awareness. Schemes should be transparent to beneficiaries. This can be achieved by making sure that beneficiaries are consulted and that the schemes are also promoted by the partner in a bilaterally negotiated code of conduct (i.e. the representative body of the beneficiary – the EU code of conduct on home loans however suffered from the fact that consumer organisations refrained from promoting the code).

- ⇨ Code administration bodies should regularly review the appropriateness of self-regulatory schemes in consultation with government and consumer groups. Forming a body separate from industry is often perceived as preferable to relying on industry associations as it enables equal representation of all stakeholders and is therefore immune from bias.

- ⇨ Any funding arrangement for self-regulation should be transparent and avoid putting some businesses at a disadvantage.

- ⇨ Complaint handling mechanisms: To be effective at addressing consumer concerns, a code needs to address consumer complaints and set performance standards for participants. Effective dispute resolution schemes are crucial.