



## **Association of Mortgage Intermediaries' response to HM Treasury's consultation on the Implementation of the EU mortgage credit directive (MCD)**

This response is submitted on behalf of the Association of Mortgage Intermediaries (AMI). AMI is the trade association representing over 80% of UK mortgage intermediaries.

Intermediaries active in this market act on behalf of the consumer in selecting an appropriate lender and product to meet the individual consumer's mortgage requirements. Our members also provide access to associated protection products.

Our members are authorised by the Financial Conduct Authority (FCA) to carry out mortgage and insurance mediation activities. Firms range from sole traders through to national firms and networks, with thousands of advisers.

AMI welcomes the opportunity to respond to HM Treasury's consultation on the Implementation of the EU mortgage credit directive (MCD)

### **Introduction**

AMI's view is that the implementation of the MCD should cause as little disruption as possible to the UK mortgage market. This is because the UK has already reviewed its regulation of the mortgage market through FCA's Mortgage Market Review (MMR). We acknowledge that as part of the MMR, FCA considered the proposed changes to meet the expected MCD requirements. HM Treasury had also previously considered the regulation of the Buy-to-let (BTL) market in 2010, although the focus was on how best to protect tenants rather than the actual borrowers.

The changes required under the MMR were those that the FCA decided were required for the UK mortgage market to meet its objectives of a more sustainable market.

The MCD has similar consumer protection objectives as well as an aim to enhance internal markets. We are unconvinced that the additional provisions in the MCD will provide any additional consumer protections. Furthermore, the variances between member states legal structures, currency and credit risks mean that the MCD is unlikely to enhance the internal market for mortgages from a UK perspective.

That is not to say that the MCD does not provide appropriate provisions in its own right for other EU member states but rather that it does not sufficiently enhance the UK's position to justify the costs of making the required changes. However, it could be argued that by FCA implementing MMR ahead of the MCD the benefits have already

been banked, leaving only the costly implementation of the areas that the FCA did not want to adopt itself under MMR.

### Second charge as a distinctive market

AMI's long held policy position has been to support the regulation of the second charge mortgage market moving from OFT to FCA. This was not a criticism of the previous legislation or policy, but a reflection of the need for more focussed supervision of the market which the FCA (FSA) could deliver.

The remaining question for the second charge market (seconds) was what rule book it would come under at FCA. The MCD seemed to make it clear that second charge lending would be regulated under the same rule books as first charge lending, however, there is no binding mechanism in the directive that forces this to happen in the UK.

The reality is that with an existing regime already built under FCA's MCOB rule book, moving second charge into that regime appears a more practical approach from a regulatory perspective than creating a standalone rule book for seconds.

There are certainly some elements of the second charge market that are very closely aligned with that of the first charge market. However, some aspects such as the sales and advice process, target market and product design are very different.

Some consumers will come to the first charge market as a result of wanting a loan and this may mean that an unsecured borrowing option was considered first. Other consumers may have considered additional borrowing via their principal mortgage but do not want to disturb the current first charge mortgage contract, mainly because that have taken a product with a low fixed rate or low tracker rate. Their current lender may not want to consider a further advance on existing terms.

The FCA mortgage regime may not be an ideal fit but we accept that the limitations set out by the MCD mean that any alternative option for the size of market created in subsequent charge lending may be unachievable. What is perhaps more important is that the differences applicable to the second charge market are acknowledged and understood by FCA and then applied to its thinking on the implementation of seconds into its mortgage regime.

### The cost of double change on firms

We accept that the current situation for firms offering second charge mortgages has been caused by a number of factors. Not least that the transfer of the consumer credit regime out of OFT and into FCA did not coincide neatly with the MCD timetable. This has left firms experiencing the challenge of second charge loans being first regulated under FCA's CONC rule book but then moving to FCA's MCOB rule book once the EU MCD is implemented on 21 March 2016. It is challenging and costly for firms to understand and deal with the new CONC rules but to know that those new rules will only apply for less than two years before they are required to move to being regulated under the MCOB rule book is overly burdensome.

The fact that much of the CONC rule book comes from OFT old guidance documents will come as little comfort as because of the different in approach between the FCA and OFT.

What is an even more inequitable position is that these firms are required to apply for full consumer credit permissions under FCA's landing slot timetable ahead of the implementation of the MCD. This leaves first charge firms in the unenviable and expensive position of applying for a full consumer credit permission to cover them for seconds, which they may only hold for a year, before their existing mortgage permission covers them for this activity from on 21 March 2016.

#### A more appropriate solution than firms paying double authorisation costs

Firms involved in the second charge mortgage market, whether MCOB first mortgage firms or OFT Consumer Credit firms, or those covering both facets, have been aware of these changes since 2011. Many of these firms have been preparing for the likely outcome that second charge mortgages would be regulated under the mortgage regime. However, they cannot control the authorisation process being applied by FCA, even though FCA has been equally aware of these impending changes.

A better position would have been to accept that firms offering second charge mortgages, but not undertaking other consumer credit activities, should not need to apply for a full consumer credit permission. Instead they should remain in the FCA's interim regime until 21 March 2016 when their existing mortgage permission would cover them for second charge activities. Firms have also suffered from FCA not fast-tracking mortgage network permissions, so reducing workloads from their Appointed Representative firms.

#### Buy-to-let broker regulation

The changes to BTL regulation will create artificial distinctions which may marginalise some parts of the market. This will not be a good outcome for some consumers.

In addition we are concerned that whilst most BTL lending will sit outside the regulatory regime, brokers will be fully captured under the consumer credit provisions which remain opaque. We would request that HM Treasury reconsiders its stance on this issue. Only regulating the brokers under consumer credit provisions for unregulated BTL places an unfair burden on these participants.

Overall from a mortgage broker perspective it might be better if the whole of the BTL market was regulated. This would be in line with the way that the majority of firms currently structure their business. However, we are aware that this is not the case for some lenders so we accept that an alternative regime would be a more appropriate option for the industry. We would ask HM Treasury to consider further reducing the scope of the "accidental landlord" definition to only include those who inherit and then decide to rent.

## **Consultation questions**

### **Question 1**

**Do you agree with the government's proposed approach to implementation of the MCD, building on the existing regulatory architecture where it exists?**

The UK mortgage market has seen an extensive and rigorous period of consultation, analysis and debate to reach the rules set out in the MMR, which has now been incorporated in to the FCA's MCOB rule book. A simple copy out approach may be the standard position of Government to adopt in most cases, however, the FCA's revised MCOB rule book allows for a package of measures that are appropriate to both UK consumers and industry.

We support the proposals to build on the existing regulatory architecture where appropriate.

### **Question 2**

**Do you agree with the government's proposed timeline for putting in place the legislation necessary for the implementation of the MCD?**

The timeline is tight but given the requirement to implement the directive by 21 March 2016 is set in the MCD we see little room for any meaningful movement.

What would be needed is a greater consideration of the issues around firms' pipeline business at cut over. A period of transition would be welcomed by industry and would help ensure the changes brought about by the MCD being implemented do not adversely impact on those consumers who entered the process prior to 21 March 2016. It is important that agreements made just prior to the cut-off date do not need to be re-worked. We consider this might need some enabling legislation.

### **Question 3(a)**

**Do you agree with the government's proposal to amend the scope of FCA mortgages regulation to cover both first and second charge mortgage lending?**

The MCD applies to both firsts and seconds (or any other subsequent charge) but there is no requirement that firsts and seconds are regulated under the same rule book. However, we would consider it practical for the regulation of the second charge market to move to the same regime as the first charge market. It would seem logical that if further advances are caught under the mortgage regime then other forms of additional borrowing secured against a residential property should come under the same regime. We also consider that the same rules should apply to all of these types of borrowing.

### **Question 3(b)**

**What will be the costs to second charge firms associated with the government's proposal that they are required to secure a FCA mortgages permission rather than a FCA consumer credit permission?**

No comment

#### **Question 4(a)**

**Do you have any comments on the government's proposed legislative changes to bring mortgages into FCA regulation if any part of the property is occupied by the borrower or their relative and the borrower is acting for purposes which are outside his trade, business or profession?**

The MCD's definition of a regulated mortgage is different to that currently applied under FMSA. As such we accept that the current definition will need to be amended to meet the MCD requirement. The main issue is that the MCD defined a BTL mortgage as one which includes, as a term of the contract, a requirement that the property cannot be occupied at any time by the borrower or a family member.

The lack of a 40% threshold mean that where the borrower is a consumer who occupies less than 40% of the property, the mortgage would need to be regulated. This change will increase the number of mortgage caught under FCA's regime. However, the number of mortgages caught in this way is still low.

Many of these types of mortgages are already considered as being regulated by lenders and brokers. However, since the implementation of MMR we have seen that the availability of these types of mortgages has reduced.

Our concern is that this low number of mortgages would create a niche market that would be so small that many lenders may simply chose not to operate in it. This could leave a group of consumers struggling to get finance simply as a result of a change in definition being imposed upon them.

In order to avoid the risks above, we would ask HM Treasury to consider further reducing the scope of the "accidental landlord" definition to only include those who inherit and then decide to rent.

#### **Question 4(b)**

**Do you agree with the government's assessment that this change will have a limited impact on the market?**

We agree that this change is unlikely to impact on the wider market. However the new definition will create a small niche of consumer whose relatives occupy the property rather than the borrower. Since the implementation of MMR we have seen lenders move away for offering mortgages to meet this type of customer. As the new definition would seem to widen the potential group of consumers caught in this way we could see a larger group of consumers falling into this niche area but lenders not wanting to be active in this space.

#### **Question 5(a)**

**What are your views on the government's proposed use of the provisions in the MCD which allow member states to limit the application of an appropriate framework to buy-to-let to consumers?**

As there is not an existing regulatory regime for unregulated BTL, other than where the broking of such a product is currently caught, we support the proposal not to apply the MCD to this market.

The regulated BTL market is still different from the residential mortgage market. Clearly the main difference is that the consumer's own home would not be at risk from default, although they could be subject to a charging order.

We do not believe that it would be appropriate to apply the full MCD to the regulated BTL market. The MCD does not provide a tailored regulatory regime that would be appropriate for a BTL transaction. In doing so we must accept that an alternative regime is adopted, as this is the only other option available under the MCD.

In terms of an alternative regime for regulated BTL there are some elements of the MCD provisions that could be appropriate to the regulated BTL regime but these should be amended to ensure they are appropriate for the market.

HM Treasury's consultation has made a distinction between those borrowers who are making an active decision to become a landlord, and therefore acting as a business, and those consumers who are not acting as a business. The examples of where a consumer is not acting as a business are; where the property has been inherited or where a borrower has previously lived in a property, but is unable to sell it so resorts to a BTL arrangement.

Whilst we can see that such scenarios are different from those of a typical commercial landlord running a business, even in the examples given the consumer is still make a decision to rent out the property as opposed to any alternative. An inherited property could be left vacant and a consumer who cannot sell their property could elect not to move. In effect we are saying that there will always be an active decision to enter into a BTL.

We would consider that the number cases were a consumer enters into a BTL without it being an active decision would be very limited. However, it would depend on where the line is drawn under the final rule. Further clarity will be needed as to how this definition is set.

The consultation states that lenders will be able to establish whether the borrower is a consumer or a business through their underwriting processes. However, the broker would have already had to make this assessment prior to providing their services to the client. To do this a clear set of guidance will need to be provided. Furthermore, just as the lender will not be able to, the broker cannot rely solely on a customer declaration. To ensure that there is not a reasonable cause to suspect that the customer declaration is incorrect some level of assessment and consideration will need to be undertaken. As such the effectiveness of a declaration is limited.

#### **Question 5(b)**

**Under these proposals, how many transactions would you expect to be subject to an appropriate framework for buy-to-let mortgage lending to consumers?**

It would be dependent on the final definition and guidance but we would consider that the number of cases where a consumer enters into a BTL without it being an active decision would be very limited.

**Question 6(a)****What are your views on the proposed content of the appropriate framework for buy-to-let mortgage lending to consumers?**

We would welcome a review of the reasons why BTL broking is subject to consumer credit regulation whereas the lending is largely unregulated. We consider that this position should be reviewed as it leaves the act of BTL broking as the only regulated activity in the transaction. We do not believe that this represents appropriate or proportionate regulation.

In terms of an alternative regime for regulated BTL there are some elements of the MCD provisions that could be appropriate to the regime but these should be amended to be appropriate to the market.

The register of consumer BTL mortgage firms should only be a set a firm level. It should replicate the current FCA register. To ensure the consumer is adequately protected the standards applied to a Consumer BTL by an intermediary or a direct sales person should be the same as with any other regulated mortgage contract covered by FCA. We believe that most firms would currently consider this type of transaction as being regulated. We see no reason why a consumer, who has already been assessed as not being a business or investor, should receive a lower standard of protection than any other consumer in the residential space.

We do not believe that firms that are not FCA authorised should be permitted to operate in this market. Again these are Consumer BTL mortgages because of the recognition of the need for greater consumer protection, as such only firms that have been authorised by the FCA should be permitted to provide services to consumers.

We do not believe that an additional Variation of Permission (VOP) should be required by FCA for an authorised firm to carry out Consumer BTL. A simple tick box process would be appropriate. Authorised firms are already bound by FCA's principles and this activity will only represent a very small proportion of their business. In these circumstances a VOP would largely only represent an administrative activity for FCA to undertake.

The framework should be supervised and enforced by FCA. We believe that only FCA authorised firms should be able to operate in this market and appear on the register. If a firm is not currently authorised and wants to operate in this market it should become authorised to do so. The timetable will allow sufficient opportunity for these firms to become authorised.

**Question 6(b)****What are your views on the proposed approach to the supervision and enforcement of the appropriate framework for buy-to-let mortgage lending to consumers?**

See above

### **Question 7**

**What would you expect the costs and benefits to be of the introduction of an appropriate framework for buy-to-let mortgage lending to consumers?**

No comment

### **Question 8(a)**

**What are your views on the number of further changes the government is proposing to align the scope of FCA regulation with the MCD?**

#### Equitable mortgages

We have no concerns about the proposed changes to equitable mortgage. The use of these types of contracts is limited and we can see little reason why the same consumer protections should not apply to these contracts.

#### Secured lending on timeshare properties

We are not aware of this type of lending being offered in the UK. Therefore, the proposed changes should have little impact on consumers or industry.

#### Secured lending to consumers by government

No comment

#### Location of the property

We do not believe the proposal to amend the rules to align them with the MCD will cause substantial impact. Whilst there is the opportunity to passport under the MCD, we do not envisage that many firms will take up this option.

#### Changes to activity of arranging a regulated mortgage contract

We do not see these proposals causing significant change.

#### Limiting the application of some existing regulatory exemptions for mortgage firms

The occasions where such exemptions are applied are limited. Amending these exemptions to accommodate the MCD would have very little impact.

### **Question 8(b)**

**What is your assessment of the impact of these changes on the UK mortgage market?**

Overall these changes impact on only a few niche areas of the market. We do not believe that the proposals would create significant impact on the market.



**Question 9****Do you have any comments or concerns with the government's proposed changes to FSMA?**

We agree with HM Treasury's approach to copy out the relevant sections from the MCD. Further clarification should be given to ensure that it is clear that the reference to Credit Intermediary or Appointed Representative refers to the firm and not individuals.

AMI

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