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Citations:

Bluebook 21st ed.

Natalie Staff, Consumer Protection in Mortgage Lending, 3 EUR. J. COMP. L. & GOVERNANCE 385 (2016).

ALWD 7th ed.

Natalie Staff, Consumer Protection in Mortgage Lending, 3 Eur. J. Comp. L. & Governance 385 (2016).

APA 7th ed.

Staff, N. (2016). Consumer Protection in Mortgage Lending. European Journal of Comparative Law and Governance, 3(4), 385-454.

Chicago 17th ed.

Natalie Staff, "Consumer Protection in Mortgage Lending," European Journal of Comparative Law and Governance 3, no. 4 (2016): 385-454

McGill Guide 9th ed.

Natalie Staff, "Consumer Protection in Mortgage Lending" (2016) 3:4 Eur J Comp L & Governance 385.

AGLC 4th ed.

Natalie Staff, 'Consumer Protection in Mortgage Lending' (2016) 3 European Journal of Comparative Law and Governance 385.

MLA 8th ed.

Staff, Natalie. "Consumer Protection in Mortgage Lending." European Journal of Comparative Law and Governance, vol. 3, no. 4, 2016, p. 385-454. HeinOnline.

OSCOLA 4th ed.

Natalie Staff, 'Consumer Protection in Mortgage Lending' (2016) 3 Eur J Comp L & Governance 385

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Consumer Protection in Mortgage Lending

A Comparative Analysis of the Impacts of the Mortgage Credit Directive in Sweden and the United Kingdom

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Abstract

For different reasons, such as the financial crisis of 2007, the EU has adopted a directive with the purpose of harmonising consumer mortgage lending law whilst ensuring a high level of consumer protection. This article assesses the impacts of the Mortgage Credit Directive in Sweden and the United Kingdom. The focus is residential mortgage lending from a consumer protection perspective on the basis of the main areas of the directive; communications, advice, information, disclosure, responsible lending and repayment. The practical processes of mortgage lending and the ways these fields are regulated are significantly different in the two Member States; however, many similarities on a principle level can be found. The study is an example of how harmonisation is made within the EU and how two Member States with almost opposite starting points are able to harmonise law and still preserve the characteristics of their own solution.

Keywords

consumer protection – comparative law – mortgage credit directive – harmonisation – mortgage lending – Sweden – the UK

1 Credit Agreements and Consumer Protection

For many European citizens the purchase of residential property¹ lies ahead or has taken place. It will for many of them be a once in a lifetime experience

¹ A residence is a particular locality, where someone has his home with the purpose to remain for an undetermined period. H. C. Black, *Black's Law Dictionary* (6edn, St. Paul: Minn West Publishing CO, 1990) [cit. Black] 1309. "Residence". A property is everything that is subject

and likely the biggest financial commitment of their life, since few will afford it without borrowing money.

In the European Union (EU), residential mortgage² lending comprises about 50 percent of the EU Gross Domestic Product. This translates to the incredible amount of 6 trillion euros (EUR), a number that is constantly rising.³ The importance of mortgage lending for European citizens as well as its importance on the financial market makes consumer protection in this field a particularly important and interesting issue.⁴ On top of this, many consumers are vulnerable due to lack of understanding or experience with financial services, making this a very crucial subject.⁵

Mortgages related to residential property have significant importance because a person's home assures their security; thus, a person's home is put at risk. Because of the sensitivity surrounding a home, residential mortgage lending requires additional consideration and caution.⁶ Furthermore, consumer

to ownership. *ibid.* 1216, "Property". A residential property is someone's home, whether it is a house or apartment, which he owns for himself.

- 2 When granting a credit it is likely that the creditor would want something more than a contract to secure his interest. The creditor may find a solution in taking a security in a property owned by the borrower. A mortgage is a security, created by contract, which confers the lender's interest in payment of the debt. In return, the mortgage gives the lender the opportunity to repossess the property if the debt is not paid as agreed. W. R. Fisher, *Fisher and Lightwood's Law of Mortgage*, 12edn, W. Clarke (ed.) (Butterworths Law, 2006) 3–4.
- 3 Proposal for a directive of the European Parliament and of the Council on credit agreements relating to residential property, (COM (2011) 142 final). [Cit. COM (2011)] 2. The number is from 2008 but can be used as a reasonable indication.
- 4 Art. 4(1) of the Mortgage Credit Directive: Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU), OJ L 60, 28.2.2014, p. 34–85 [cit. MCD] defines consumer with a reference to the CCD. A consumer is a natural person who in transactions covered by the directive is acting for purposes which are outside his trade, business or profession. The MCD definition is used in this article and the reasoning is based on protection of consumers as they are defined in the MCD.
- 5 P. Rott, 'Chapter 33: The Low-Income Consumer in European Private Law', in: *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, Purnhagen Kai & Rott Peter (eds), Studies in European Economic Law and Regulation volume 3, (Spring 2014) 676.
- 6 L. Whitehouse, 'The First Legal Mortgagor: a Consumer Without Adequate Protection?', *Journal of Consumer Policy: Consumer Issues in Law, Economics and Behavioural Sciences*, 38 (2015) 161 at 174. [Cit. Whitehouse].

protection is important since the amount of money that is being granted is often large in relation to most consumers' private means.

Over the last twenty years, house prices in many EU Member States have generally increased, resulting in consumers likely borrowing more money and spending a larger share of the household income on their residential property.⁷ According to a Eurobarometer from 2008, 16 percent of EU citizens had difficulties with paying bills.⁸ Related to the growing use of loans is the risk of over-indebtedness among consumers, which might deprive them of their ability to access an adequate standard of living or healthcare.⁹ Furthermore, consumers might be put in a vulnerable position as a result of severe changes in their income or sudden unexpected necessary costs, such as unemployment, medical emergency or funeral expenses. In this vulnerable position, consumers might be willing to enter unfair agreements. In other words, desperation might force individuals to enter agreements that are excessively onerous.¹⁰

A mortgage lending agreement is a long-term financial commitment with features and terms of the contract that can be difficult for a consumer to understand.¹¹ This difficulty might be caused by misleading practices, hidden terms or consumers not noticing problematic issues. On top of this, the consumer might not understand the mortgage agreement's problematic terms, or lack proper financial knowledge.¹² Another reason why consumers might misunderstand the contract is because their attention is directed towards the property being purchased rather than the mortgage agreement. Therefore, the consumer might not pay attention to the fact that the mortgage agreement as such is a product that he or she is about to purchase.¹³

7 Commission Staff Working Paper: Impact Assessment Annexes 1–5 Accompanying Document to the Proposal for a Directive of The European Parliament and of The Council On Credit Agreements Relating To Residential Property, (SEC (2011) 356 final) 24. [Cit. SEC (2011)].

8 Ibid. 38; The European Union Today and Tomorrow, Standard Eurobarometer 69 – TNS Opinion and Social, (Spring 2008) 219; 89.

9 C. Ondersma, 'A Human Rights Framework for Debt Relief', *University of Pennsylvania Journal of International Law*, 36 (2014) 269 at 297.

10 C. Ondersma, 'A Human Rights Approach to Consumer Credit', *Tulane Law Review*, 90 (2015) 373 at 379. [Cit. Ondersma 2015].

11 P. Rott, H-W. Micklitz & N. Reich, *Understanding EU Consumer Law* (Cambridge: Intersentia, 2009) 180. [Cit. Rott].

12 Ondersma 2015 (n. 10) 386.

13 Whitehouse (n. 6) 174.

The consumer's lack of understanding might be abused by a lender as a part of an aggressive sales tactic.¹⁴ In 2005, 59 percent of European consumers considered it difficult to understand the information given by lenders regarding how mortgage lending agreements worked and the risks they involved.¹⁵ For example, in 2005, less than 10 percent of Swedish borrowers found the information they received clear and understandable.¹⁶

The complexity of mortgage credit products is ever growing. The market provides plenty of available products and providers, but unfortunately many consumers do not possess adequate financial knowledge.¹⁷ The increasing difficulty for consumers to understand credit products, the consequences of their product choice and the increasing complexity of mortgage loans cause many EU consumers to seek mortgage advice. However, there is generally a low level of credence towards the mortgage advice that is provided; the result is a low level of consumer confidence.¹⁸ The multifaceted features of mortgage lending therefore create a significant need for consumer protection.

Diversity in consumer protection laws of the Member States makes it difficult for creditors to act safely in foreign markets and creates a high cross-border transaction cost. The lending traditions vary across the union and together with other factors, this has formed the reason for the EU to regulate the mortgage market and ensure consumer protection through harmonisation. Over the years, several attempts to regulate the internal market in the field of consumer credit law have been made.¹⁹ The harmonisation in the field of consumer credit agreements relating to residential property forms the starting point of this analysis. The adoption of a directive in 2014 that aims to strengthen consumer protection in this field awakens the question of how the directive is going to affect different Member States.

The field of law covering mortgage lending is diverse and may be approached from a number of perspectives. The following analysis revolves around the consumer protection issues related to mortgage lending raised by the directive adopted in 2014. This includes a wide spectrum of legal aspects, ranging from

14 Ondersma 2015 (n. 10) 383.

15 SEC (2011) (n. 7) 157; Public Opinion in Europe on Financial Services, Special Eurobarometer 230/Wave 63.2-TNS Opinion and Social, August 2005, 84. [Cit. Public Opinion in Europe on Financial Services].

16 Public Opinion in Europe on Financial Services (n. 15) 64.

17 SEC (2011) (n. 7) 157.

18 Ibid., 160.

19 Rott (n. 11) 181.

marketing rules and anticompetitive practises to second charge mortgage regimes and responsible lending. Not only is the spectrum of legal aspects significant, the field of law is also highly technical and complex. The web of regulations blurs the distinction between regimes and is on top of that highly influenced by EU law. Anyone who seeks to grasp the technicalities of mortgage lending regulations benefits from an understanding of mortgage lending, not only as a legal field, but as a working model. This is due to the fact that mortgage lending is a highly practical exercise.

The features of mortgage lending mentioned above, both as a field of law and as a working model, trigger questions of how harmonisation is to be carried out. Not only do the methods of mortgage lending vary across the union, but differences in legal traditions are generally an obstacle to this harmonisation. The directive needs to be adjustable to the practical traditions of the Member States without falling into the trap of being too broadly defined in order to fulfil its purpose. This analysis explores the question of how harmonisation has been made possible, despite the challenges mentioned, by using the example of two Member States.

1.1 *Choice of Legal Systems to Compare*

The *tertium comparationis*, a common denominator or common point of departure, is an essential part of the comparative method.²⁰ In this case, the ongoing harmonisation process throughout the EU has been chosen as a starting point. Member States of the EU all share the feature of being affected by decisions of EU institutions. On top of this, rising levels of debt and the cost of living are challenges that face all EU household credit markets.²¹

Although Member States share other challenges, mortgage lending remains a particularly difficult field to regulate due to mortgage lending traditions and regulations varying greatly across the union. Such is the case regarding the two Member States chosen for comparison: Sweden and the United Kingdom (UK).

These two states share a *tertium comparationis* in the fact that they are outside the Eurozone; because of this, Swedish and UK banks are not directly affected by the European Central Bank.²² Additionally, prior to the financial crisis, owner occupation was about 50 percent of the total dwelling stock

20 J. C. Reitz, 'How to Do Comparative Law', *American Journal of Comparative Law*, 46 (1998) 617–639, at 621–623 (Reitz).

21 SEC (2011) (n. 7) 18.

22 K. W. Dam, 'The Subprime Crisis and Financial Regulation: International and Comparative Perspectives', *Chicago Journal of International Law*, 10 (2) (2010) 581 at 587 (Dam).

in both states.²³ Furthermore, they have both adopted a unified model of financial service supervision, despite the structure and responsibilities of the supervisory authorities being different.²⁴

The contrasts between mortgage lending traditions in Sweden and the UK make the two an interesting couple of states to compare. Together they can constitute a good example of how harmonisation affects Member States in general, especially considering the great variety of legal traditions. The fact that the legal traditions differ between the two likely contributes to contrasts in mortgage lending traditions: for example, Sweden is traditionally categorised as being a part of the Nordic legal family, whereas the UK is highly influenced by English Common Law.²⁵

Despite the different legal systems in the UK, there is no reason to separate them in this case, since the four countries (England, Wales, Scotland and Northern Ireland) will all be affected in the same way by the EU directive.²⁶ The area of law that is going to be analysed is common for all four countries and the UK will therefore be considered as one entity.

1.2 *Existing Influence of EU Law*

Consumer protection is one of the general objectives of the EU, which means that consumer protection shall generally be taken into account in every EU policy or activity.²⁷ This objective is fulfilled by protecting health, safety and economic interests of consumers and by promoting their right to information, education and to organise themselves in order to protect their rights. The European Parliament and the Council are authorised to adopt legislation to protect consumer rights. Member States are entitled to enforce more rigorous protection in line with the treaties.²⁸

23 SEC (2011) (n. 7) 23. Sweden: 2005, 50.0 %, the UK: 2007, 52.0 %.

24 K. K. Mwenda, & M. J. Mvula, 'A framework for unified financial services supervision: Lessons from Germany and other European countries', *Journal of International banking Regulations*, 5 (1) (2003) 50–51 (Mwenda & Mvula).

25 See later in the article under '9. Comparative analysis,' regarding the differences in legal traditions.

26 The English legal system applies to England and Wales but is separated from the legal systems of Scotland and Northern Ireland. Even though they are different legal systems, they share many similarities and they are all affected by the decisions and legislation coming from the British Parliament. F. Cownie, A. Bradne & M. Burton, *English Legal System in Context*, 6 edn (Oxford: Oxford University Press, 2013) 1.

27 Art. 12 The Treaty on the Functioning of the European Union (2007). [Cit. TFEU]; art. 38 The Charter of Fundamental Rights of the European Union (2012).

28 Art. 169 TFEU (n. 27).

There are a number of directives covering related fields, without taking into account the special characteristics of mortgage lending.²⁹ The Consumer Credit Directive (CCD), adopted in 2008, has had an important influence in the field of consumer lending. It is a full harmonisation directive and was adopted with the aim of creating a well-functioning internal market for consumer credit.³⁰

The CCD applies to credit agreements defined in art. 3 (c) whereby a creditor grants a consumer credit in the form of a deferred payment, loan or other similar financial accommodation. The CCD contains rules on consumer credit loans, advertising, pre-contractual and contractual information, creditworthiness assessments, adequate explanations and disclosure requirements for credit intermediaries. As such, as stated in art. 2 CCD, the directive does not cover credit agreements secured by a mortgage; regardless, a number of Member States have decided to apply selected parts of it to their mortgage lending regimes.³¹ As is clarified in Section 14 of the preamble, the CCD does not cover the granting of credit secured by real estate, nor does it cover credit above 75,000 EUR.

29 For example: The Misleading and Comparative Advertising Directive: Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27.12.2006, p. 21–27; The Unfair Commercial Practices Directive: Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.6.2005, p. 22–39; The Unfair Contract Terms Directive: Council Directive 93/13/EEC of 5 April 1993 concerning unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34; The Capital Requirements Directive, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/82/EC and repealing Directives 2006/48/EC and 2006/46/EC, OJ L 176, 27.6.2013, p. 338–436. Also worth mentioning is the Directive on Consumer Rights: Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. The Directive on Consumer Rights aims to achieve a high level of consumer protection in contractual relations between a consumer and a trader, see art. 1 and 3.

30 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, pp. 66–92. D. Rosenthal, *Consumer Credit Law and Practice: A guide*, 4edn (London: Bloomsbury Professional, 2013) 405.

31 COM (2011) (n. 3) 3.

Since none of the previous directives completely covers the field of mortgage lending, the EU has adopted the Mortgage Credit Directive (MCD).³² It has similarities with the CCD in some aspects. Both directives aim to strengthen consumer protection in the field of consumer lending by regulating information to be included in advertising and the requirements on clear, concise and prominent information in communication with consumers.³³ They also both regulate pre-contractual information and the obligation to assess creditworthiness.³⁴ The biggest difference between the CCD and MCD is the scope of application.

2 Purpose and Scope

The purpose of this analysis is to investigate and assess the differences and similarities between the impacts of the MCD in Sweden and in the UK. To enable this assessment the relevant aspects of the current law also have to be described.

This analysis focuses on situations where the borrower's home functions as security for a debt. As the starting point is the MCD, the study will only focus on residential mortgage lending from a consumer protection perspective. The study does not cover areas such as questions regarding title to a property or the lender's obligations in the case of arrears and reposessions. Credit agreements with special features such as lifetime mortgages, foreign currency loans, self-builds, buy-to-let mortgages and distance contracts are excluded.³⁵ Instead of going into detail, the aim of this analysis is to discuss similarities and differences on an overall level considering generic and principle issues.

The applied consumer protection perspective revolves around the relationship between the consumer and the creditor. The analysis focuses on the main

32 Dir. 2014/17/EU.

33 Art. 4 CCD. For the consumer protection aim of the CCD, e.g. recital 8–9 and 18–19.

34 Pre-contractual information, art. 5–7 CCD. Obligation to assess creditworthiness, art. 8 CCD.

35 Each of the credit agreements mentioned is going to be affected by the MCD and big differences between the legal systems are to be found within the concept of each of them. However, they could all be subject to a study of this size on their own. Some specific kinds of credit agreements are also hard to analyse from a comparative perspective since the *tertium comparationis* may be hard to distinguish. Consequences of the MCD when it comes to e.g. consumer buy-to-lets are not going to be the same issue in Sweden. The SOU mentions that buy-to-lets are likely to be unusual in Sweden. See short discussion in SOU 2015:40 *Stärkt konsumentskydd på bolånemarknaden* (2015) 131 (SOU 2015:40).

areas of the MCD, which are communications, advice, information, disclosure, responsible lending and repayment. The presentation of the current law does not aim to cover consumer protection in mortgage lending as such but focuses on issues that are going to be affected by the MCD. The focus is inspired by the areas that have been identified by the Commission to form barriers within the internal market.

3 Summary of Impacts of the MCD in Sweden and the UK

Despite previous EU harmonisation in neighbouring fields, the analysis shows that differences remain between Member States regarding how consumers are protected in the mortgage lending process. It is also clear that the implementation of the MCD is carried out differently in Member States. Therefore, the process of mortgage lending is likely to continue to be of a domestic character even post-implementation. Reasons for this are the regulatory frameworks, culture, legal traditions and language.

The MCD is likely to diminish the discretion of Swedish lenders when it comes to the process of mortgage lending. UK lenders are accustomed to a highly regulated market that includes rules of conduct, whereas the regulations in Sweden have previously been focused on prudential rules. This can be described in a simplified way: in the UK, the MCOB³⁶ Rules use basic principles to regulate how business is conducted. For example, the MCOB Rules prescribe certain terms and expressions to be used in communications. The Swedish regulation, on the other hand, focuses on the result to be achieved and relies more on prudence when it prescribes principles such as “good lending practices” or “good marketing practices.”

Following the MCD there might be a tendency towards more rules of conduct in the Swedish regulation. This includes for example the requirement introduced by art. 20 MCD that the states explicitly have to introduce an obligation to explain and warn the consumer about the importance of providing correct information. Previously, this requirement has to a large extent been included implicitly in principles of good lending practices.

The European Standardised Information Sheet (ESIS) is a standardised form similar to the KFI used today in the UK and its introduction will cause additional documentation in Sweden. Swedish lenders will also face expanded rules on documentation, information and warnings.

36 Financial Conduct Authority, the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB).

A whole new concept of advisory services will be introduced in Sweden, accompanied by a licensing process that will have to be put in place. In the UK, the largest impact of the MCD is the inclusion of second charge mortgages in the definition of Regulated Mortgage Contracts (RMC).

Although the MCD is going to impact a variety of aspects of the mortgage lending process and perhaps require multiple changes in the two states, it is worth noting that many MCD requirements are mirrored in existing laws and practices in the two states. Many changes made by the states are technical, of minor influence or rather a codification of what lenders already do.

4 Outline

The comparative method applied in this analysis has special characteristics that distinguish it from other fields of law. Therefore, before entering into the material discussion on the functional question of this analysis, the comparative method is going to be presented.

The content of the MCD is introduced in a separate section to give the reader an understanding of what it aims to cover. A more detailed explanation on the articles of the MCD is included in the analysis, explaining the relevant parts article by article.

Following the overview of the MCD, the regulations in the two Member States are presented separately in order to allow a comparative analysis.³⁷ Each presentation includes the law currently regulating consumer protection in the field of mortgage lending. The analysis is based on the presentations and will lead to a conclusion.

5 The Comparative Method for the Purpose of this Analysis

Common sense, a sense of appropriateness and intuition are by Zweigert and Kötz emphasised as being valuable qualities for comparison purposes. To fulfil its purposes, the comparison has to be hypothetical, since a methodical scheme that works perfectly when applied to various cases cannot be made up in advance. As a result, the method in each case will, to some extent, evolve as the comparison proceeds. The conclusion is that qualities, other than plain

37 Separated presentations are needed due to the complexity and technicality of mortgage lending.

legal knowledge, are useful when assessing the result of the study, i.e. the comparison itself and the following conclusion thereof.³⁸ Furthermore, the assessment must include an understanding of the law and its functions within a given society.³⁹ When doing this, the analysis must look beyond the law in itself and include the underlying structures.⁴⁰ Therefore, not only plain legal sources will be used in this study but also other sources such as explanations given by practitioners, statistics and other information found through reliable webpages. In order to make the comparison comprehensible, the study must present the relevant parts of the legal systems that are being compared.

Zweigert and Kötz discuss the 'basic principle of functionality', which emphasises that the question that needs to be posed in any comparative analysis is what function different legal institutions might have within different legal systems. Comparable subjects are only those that fulfil the same function. When comparing two legal systems it should be kept in mind that a legal problem can be solved completely outside the legal system or in different parts of it. When the functional question is formed, the starting point can therefore not be a legal rule within one legal system, but it has to be a real-life problem or a system of rules.⁴¹

The essence of comparative law is the making of explicit comparisons and not merely making a conclusion of what foreign law actually is.⁴² The comparison is the assessment of how two masses of legal information are similar and how they are different.⁴³ Even if the study of foreign law is not in itself comparative law, it is a fundamental condition required to enable a comparison between two or more legal systems. Consequently, obtaining knowledge of foreign law is the first step of the process.⁴⁴

When making the comparison, the gap between the written law and the implementation of the law needs to be considered.⁴⁵ Therefore, this study also gives an example of how the legal rules are applied as a working model.

38 K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3ed (Oxford: Oxford University Press and J.C.B. Mohr, 1998) 33 [Cit. Zweigert & Kötz].

39 E. J. Eberle, 'The Method and Role of Comparative Law', *Washington University Global Studies Law Review*, volume 8 (3) (2009) 451–486, at 457 (Eberle).

40 Eberle (n. 39) 452–453.

41 Zweigert & Kötz (n. 38) 34–39; Reitz (n. 20) 621–623.

42 Reitz (n. 20) 618–620.

43 Eberle (n. 39) 452.

44 M. Bogdan, *Concise Introduction to Comparative Law*, (Groningen: Europa Law Publishing, 2013) 8 (Bogdan); Zweigert & Kötz (n. 38) 40–45.

45 Reitz (n. 20) 628–631.

Comparative law is essential in any effort to harmonise law, which is currently happening in the EU where directives play an important harmonising role. When difficulties arise in the process of harmonisation as a result of lack of understanding of other ways of legal thinking and other legal concepts, the comparative method can pose a solution.⁴⁶

By finding, criticising and evaluating the content of law, the comparative method can suggest new and better solutions. Therefore, by applying the comparative method, it is easier to find gaps and improprieties in the legal system, all while providing a deeper understanding of it.⁴⁷ This makes comparative law as a whole an efficient field of law for every student or professional trying to deepen his or her knowledge.

The footnotes in this study are used mainly to present the sources that the author refers to. They are also used with an explanatory purpose, giving additional information that may be useful to set the context for a reader not familiar with the legal system being discussed. In addition, as a comparative study aims to be read by professionals of any nationality interested in the specific comparison, some issues need to be explained. Such explanations are completed within the footnotes, as including them in the text would interrupt the reading.

6 Material

This analysis rests on EU as well as domestic legal sources in Sweden and the UK. Even if the study of primary sources is considered to be the best way of finding positive law, when studying foreign law, some exceptions need to be made. Firstly, there can be difficulties to interpret or to make full use of a primary source. Secondly, when there is a lack of appropriate background knowledge, legal writings can present important conflicting opinions. By studying secondary sources, a more comprehensive picture may be presented.⁴⁸ Therefore, such sources will be included in this analysis, even though they would not be used by a domestic lawyer. For the above stated reasons, the list of sources used includes legislation, regulation, case-law, preparatory works, official publications, legal writings, web pages and interviews with practitioners.

⁴⁶ Bogdan (n. 44) 18.

⁴⁷ Eberle (n. 39) 452. For a further discussion on the uses of comparative law, see Bogdan (n. 44), chapter 2.

⁴⁸ Bogdan (n. 44) 30–31; Reitz (n. 20) 628–631.

Discussions with practitioners and practical examples are necessary for an understanding of the studied legal field, since it is of a very complex nature. A further reason to exemplify the practical process is the nature of mortgage lending being highly technical and practical rather than theoretical.

Other legal writings analysing the MCD from a comparative perspective with focus on Sweden and the UK have not been found at the present moment. The analysis has therefore been made on the basis of sources describing present and prospective positive law in the two states and EU acts describing or changing the present situation in the EU.

As the relevant area of law is currently changing across the EU, some questions cannot yet be answered. As regards Swedish law, the legislator has not yet adopted a final solution.⁴⁹ Neither has the government submitted the final Legislative Bill (*proposition*).⁵⁰ What remains as a source is the report of the Committee of Inquiry, which may give an indication, but cannot on its own be relied on as a final source of law.⁵¹ Since the aim of this study is not to find the positive law, but to discuss differences and similarities on a generic level, the report is considered to be competent.

7 The Mortgage Credit Directive

In order to fulfil one of the aims of the EU (to create a functioning internal market, as stated in the TEU⁵² art. 3.3), the EU has adopted the Mortgage Credit Directive (MCD), which is to be implemented by 21 March 2016.⁵³ The directive sets out three main objectives: high level of consumer protection, market stability and responsible creditor behaviour.⁵⁴

⁴⁹ July 2015.

⁵⁰ A Legislative Bill is a legislative preparatory work submitted by the government in the legislative process. It has a high degree of authority among legal sources. L. Carlson, *The Fundamentals of Swedish Law: A Guide For Foreign Lawyers and Students*, 2 edn, (Lund: Studentlitteratur AB, 2012) 46–47 (Carlson).

⁵¹ The SOU 2015:40 (n. 35), which is the report of the Committee of Inquiry, *Statens Offentliga Utredningar*, is a legislative preparatory work that contains proposed legislation. An SOU report is made by experts on assignment of the government drafted in a mandate called *kommittédirektiv* (Carlson (n. 50) 45). The SOU and the *kommittédirektiv* are both used as sources in this analysis but are only the first steps in the legislative process.

⁵² The Treaty on the European Union (1992).

⁵³ Directive 2014/17/EU on Credit Agreements for Consumers Relating to Residential Immovable Property.

⁵⁴ Recital 5–6 MCD.

Previous substantial differences in the mortgage laws of the Member States restricted cross-border activity, according to the EU.⁵⁵ The structure of underlying housing markets, available products and distribution channels were considered to be key aspects of the heterogeneity.⁵⁶ This, together with the effects of the financial crisis, formed the reasons to review the mortgage laws within the Union.⁵⁷

The financial crisis, affecting the global economy since the summer of 2007, has had a great impact on the European market in many aspects.⁵⁸ As affordability amongst consumers decreased, the confidence in the financial sector followed.⁵⁹ As a result of a low confidence in the financial sector, consumers gained an even higher preference for domestic products.⁶⁰ The EU needed to remove the phenomenon of irresponsible lending which had caused a housing bubble.⁶¹ The housing bubble triggered a major banking crisis, a result of the willingness among banks to grant loans exceeding the value of the properties that served as security.⁶²

Prior to the financial crisis, cross-border lending was low despite a growing interest, according to the Commission.⁶³ The Commission identified that the lack of common rules in EU mortgage markets had resulted in at least five barriers to an efficient, functioning internal market. These barriers were also considered as facilitators for irresponsible lending. The five barriers were: pre-contractual information, advice, assessment of creditworthiness, early repayment and credit intermediation.⁶⁴

The MCD aims to create better conditions for cross-border mortgage lending activity within the internal market. It also aims to establish a high level of

55 Recital 2 MCD.

56 SEC (2011) (n. 7) 18.

57 Recital 2–3 MCD.

58 The Commission compares the financial crisis starting off in 2007 with the Great Depression of the 1930's in terms of financial triggers and labels it 'without precedent in post-war economic history'. Triggers mentioned are for example: rapid credit growth and development of bubbles in the real estate sector. European Economy 7/2009, Economic Crisis in Europe: Causes, Consequences and Responses, European Commission: Directorate – General for Economic and Financial Affairs, p. 1.

59 COM (2011) (n. 3) 2–3.

60 SEC (2011) (n. 7) 30.

61 COM (2011) (n. 3) 2–3.

62 M. P. Thompson, *Modern Land Law*, 5edn (Oxford: Oxford University Press, 2012) 461–462 (Thompson).

63 SEC (2011) (n. 7) 18.

64 COM (2011) (n. 3) 2.

consumer protection when dealing with credits secured by residential property, regardless of the purpose of the credit.⁶⁵

The directive applies to credit agreements secured by a mortgage or comparable security relating to residential property or a right related to such property. It contains rules on information provided to the consumer before entering the agreement, design of mortgage lending offers, the consumer's right to a fair period of reflection or withdrawal, creditworthiness assessment and advice on credits.⁶⁶

In addition, the MCD requires increased knowledge amongst creditors who deal with mortgages, by demanding that every creditor and intermediary is authorised by national authorities. It also prescribes restrictions on remuneration, as this could constitute a reason for staff to act in a way that is not in the consumer's best interests. Finally, the MCD introduces new common rules for property valuation.

The reception of the directive has not solely been positive. The critique by different actors and states, such as the UK, concerned doubts regarding the Commission's powers and the possibility of establishing an internal market for mortgage lending.⁶⁷ Along with this, the appropriateness of establishing a single mortgage market has been questioned. Given the diversity in the union when it comes to the mortgage market, cultures and regulatory frameworks, it has been suggested that the MCD merely adds costs and complexity to the mortgage lending process.⁶⁸ Finally, the MCD's capacity to address the financial crisis has been questioned, as has its ability to increase cross-border activity.⁶⁹

Being a directive, the MCD is binding on the Member States, but only as to the result to be achieved. A certain degree of discretion is left to the Member States as how to implement it.⁷⁰ Nothing hinders the Member States from going beyond the minimum level of consumer protection.⁷¹ This discretion leaves a scope for comparison, since two Member States may choose to implement the directive in different ways. This analysis operates within this scope.

65 Recital 15 and 82 MCD (n. 4).

66 The scope of the MCD: art. 3.1. The MCD also covers credit agreements with the purpose of acquiring or retaining property rights in land or in an existing or projected building, and loans in foreign currency.

67 S. Brown, 'EU and UK Consumer Credit Regulation: Principles, Conduct, and Consumer Protection: Divergence or Convergence of Approach?', *European Business Law Review*, 26 (4) (2015) 555 at 565 (Brown).

68 R. Fieth, 'MCD follows MMR', *Mortgage Finance Gazette*, 146 (2015) 19 f.

69 Brown (n. 67) 565.

70 Art. 288 TFEU (n. 27).

71 See also recital 13–14 MCD (n. 4).

Since the regulatory framework in Sweden and in the UK are different, the implementation of the MCD is going to be different. If the regulators consider the existing regulations to be in line with the directive, no changes will be required. Consequently, the level of regulatory changes may differ across the EU.

Table 1 shows an overview of the content of the MCD and the influence of the MCD articles in the two Member States. If the article is going to have an impact on the regulation in either of the Member States, it is marked in the table with an 'X'. Articles that deal with issues outside the scope of this article are not listed.

TABLE 1

| MCD, number of articles: | MCD, content of articles: | Sweden | UK |
|--------------------------------|---|--------|----|
| 1. | Subject matter | | |
| 2. | Level of harmonisation | | |
| 3. | Scope | | X |
| 4. | Definitions | | |
| 5. | Competent authorities | | |
| 6. | Financial education of consumers | | |
| 7. | Conduct of business obligations when providing credit to consumers | X | X |
| 8. | Obligation to provide information free of charge to consumers | X | X |
| 9. | Knowledge and competence requirements for staff | X | X |
| 10. | General provisions applicable to advertising and marketing | | X |
| 11. | Standard information to be included in advertising | X | X |
| 12. | Tying and bundling practices | X | X |
| 13. | General information | X | X |
| 14. | Pre- contractual information (ESIS) | X | X |
| 15. | Information requirements concerning credit intermediaries and appointed representatives | X | X |
| 16. | Adequate explanations | X | X |
| 17. | Calculation of the APRC | | X |
| 18. | Obligation to assess the creditworthiness of the consumer | X | X |

| MCD, number of articles: | MCD, content of articles: | Sweden | UK |
|--------------------------------|--|--------|----|
| 19. | Property valuation | X | |
| 20. | Disclosure and verification of consumer information | X | |
| 21. | – | – | – |
| 22. | Standards for advisory services | X | X |
| 23. | | – | – |
| 24. | Variable rate credits | X | X |
| 25. | Early repayment | X | X |
| 26. | – | – | – |
| 27. | Information concerning changes in the borrowing rate | | |
| 28. | Arrears and foreclosure | | |
| 29. | | | – |
| 30. | Credit intermediaries tied to only one creditor | X | |
| 31. | Appointed representatives | X | |

8 The Mortgage Lending Process

Table 2 describes, in a simplified way, the mortgage lending process as a step by step process, a working model. The Swedish and the UK models are listed alongside each other to make the differences viewable.

8.1 Sweden

Mortgage credits comprise more than 90 percent of lending to consumers, divided between 1.5 million households.⁷² Most residential properties are purchased with a mortgage loan.⁷³ Out of the total mortgage credits, 97 percent are granted by the eight largest banks.⁷⁴ There are 130 credit institutions, most of them acting as creditor and credit intermediary. Companies acting merely

72 SOU 2015:40 (n. 35) 97. The Swedish population reached in February 2015 a number of roughly 9.7 million, according to Statistics Sweden.

73 Dir. 2014:13, *Genomförande av EU- direktiv om bostadslåneavtal*, 2.

74 SOU 2015:40 (n. 35) 97. The eight banks are: Danske Bank, Handelsbanken, Länsförsäkrings Bank, Nordea, SBAB Bank, SEB, Skandiabanken och Swedbank.

TABLE 2

| Step | Sweden | The UK |
|------|--|---|
| 1. | The buyer applies for a loan commitment | The buyer finds a property to purchase |
| 2. | The lender completes credit worthiness assessment | The buyer approaches the lender or an intermediary |
| 3. | The buyer finds a property to purchase | The buyer instructs a solicitor to do the legal work |
| 4. | The buyer approaches the lender | The lender completes the 1 st meetings and the Fact Find |
| 5. | The lender completes the valuation (and a credit worthiness assessment if no loan commitment has been granted) | The lender completes the 2 nd meeting |
| 6. | The seller and the buyer sign the first sales contract | The lender instructs a solicitor to ensure a good title |
| 7. | The buyer pays the deposit | The lender instructs the appraiser |
| 8. | The buyer gets access to the property | The solicitor and appraiser give reports |
| 9. | Conveyance is made with the assistance of the lender | The loan is opened and money sent via the lender's solicitor |
| 10. | – | The solicitor completes the conveyance |

as intermediaries are rare.⁷⁵ The overall value of the residential loan amounts outstanding was about 2. 300 billion SEK in 2013.⁷⁶

Credit agreements as such have been regulated by statute since the beginning of the 1900's, foremost by *Lagen* (1915:219) *om Avbetalningsköp* from 1915. This act is the oldest example of Swedish consumer protection law and aimed at protecting the buyer if he could not keep up with payments.⁷⁷ A consumer credit act came into force for the first time in 1979: *konsumentkreditlagen*

75 SOU 2015:40 (n. 35) 98.

76 Dir. 2014:13, p. 2.

77 L. Grobgeld & A. Norin, *Konsumenträtt*, 15edn, (Stockholm: Norstedts Juridik AB, 2013) 143 (Grogeld & Norin).

(1977:98), amending *Lagen om Avbetalningsköp* and the previous consumer purchase act from 1973.⁷⁸ Credit agreements unrelated to the purchase of goods or services, such as bank loans, were unregulated until 1993 when another consumer credit act came into force, *konsumentkreditlagen* (1992:830).⁷⁹ In 2010 it was replaced by a new consumer credit act, *konsumentkreditlagen* (2010:1846) (KkrL).

Being a supervisory authority accountable to the Ministry of Finance, *Finansinspektionen* (The Swedish Financial Supervisory Authority) is responsible for supervision, regulation and authorisation on the financial market.⁸⁰ As part of this the authority shall ensure a high level of consumer protection.⁸¹ *Finansinspektionen* has the power to take disciplinary action against participants in the financial market not fulfilling their obligations.⁸² *Konsumentverket* (The Swedish Consumer Agency) safeguards consumer interests in general. It has the responsibility to ensure consumer rights, provide information to consumers on their rights, and to supervise the observance of regulations.⁸³ *Konsumentverket* supervises the observance of KkrL when it comes to promotions and disclosures and has the power to take disciplinary action.⁸⁴

8.1.1 The Law in Practice⁸⁵

a) Loan Commitment and Finding a Property

When looking for finance the buyer can approach a credit intermediary, although this is rare. In most cases the buyer approaches the lender and asks for a loan commitment, which is an agreement to advance a certain level of

78 *Konsumentköplagen* 1973:877; NJA II 1977 s 151 Prop. 1976/77:123 *Konsumentkreditlag*.

79 A. Eriksson & G. Lambertz, *Konsumentkrediter: kommentar till 1992 års konsumentkreditlag*, (Stockholm:Norstedts Juridik AB, 1993) 14.

80 1 § *förordning* (2009:93) *med instruktion för Finansinspektionen*.

Supervision of commercial banks in Sweden reaches back to 1659, when the first supervisory authority was established. In 1840 the supervision was taken over by the Ministry of Finance. After 161 years of supervisory development the Private Insurance Supervisory Services and the Bank Inspection Board became one single authority with the name *Finansinspektionen*, in 1991 (for information on the history of *Finansinspektionen*: www.fi.se). The authority was established by legislation, *lag* (1991:936) *med anledning av finansinspektionens inrättande* and its supervisory powers are regulated in chapter 13 LBF. Further provisions on the responsibilities and powers of *Finansinspektionen* are regulated in *förordning* (2009:93) *med instruktion för Finansinspektionen*.

81 2 § *förordning* (2009:93) *med instruktion för Finansinspektionen*.

82 15 Chapter LBF.

83 1 § *förordning* (2009:607) *med instruktion för Konsumentverket*.

84 49–53 §§ KkrL.

85 Interviews with Jim Engdahl, Account Manager, Handelsbanken Kumla, April 2015.

funding. In order to give an offer the lender makes a creditworthiness assessment on the basis of an extract from *Upplysningscentralen* (the Swedish credit reference agency, UC) and information from the consumer.⁸⁶ If there is a loan commitment, the lender has to approve that the property that is to be purchased offers suitable security and that it has a value that corresponds to the committed amount. If not, the offer will have to be amended. If the buyer has not previously been granted a loan commitment, the creditworthiness will be assessed when the lender is approached.

b) Valuation

In order to assess whether the property offers suitable security, the bank has to complete a valuation. Usually, the valuation is completed by the account manager himself or by an internal valuer. The valuer will take several issues into consideration and use a description of the property, submitted by the estate agent.

c) Access to the Property

As soon as the loan is granted, the parties enter into a binding contract, usually with the assistance of an estate agent. Since both parties usually need some time to move out or purchase a new property, a three-month period between the signing of the contract and the buyer's access to the property is often agreed. When the contract is concluded, the buyer pays a deposit to a client account of the estate agent. The deposit is a part of the purchase price and is usually not granted as a part of the credit.

As the day agreed for completion of the conveyancing contract arrives, the parties and the estate agent meet at the bank, in most cases the bank of the buyer. The buyer and the account manager meet in advance, often the same day, to discuss the type of mortgage that is suitable as regards the repayment. The buyer signs the terms of payment that have been agreed on and the debt instrument.

86 The UC extract contains information on: Civil registration number, current address and past addresses, total income of the last three years (including what taxes have been paid), all existing credits and how they have changed in the last 12 months (as a result of amortisation), the lender with whom the consumer holds his current credit, whether there are any red flags (for example that the consumer has failed to pay fees when they are due), properties that the consumer owns and if he owns part of it or 100 percent, the value of the properties owned by the consumer, the type and size of the property, whether the consumer is married or not, the number of demands for extract that have been made in the last 12 months, and by what lender (so called 'footprints').

The estate agent has made all the relevant enquires as regards the title, e.g. that the seller is the actual owner with the legal rights to sell the property. At the bank, the estate agent assists the parties in signing the second contract (required by Swedish land law). In the meantime, the account manager transfers the purchase price. The estate agent provides the account manager with instructions on how and where to transfer the money. When the meeting is finished, the buyer gets immediate access. The account manager submits the relevant documents to complete the conveyance.

8.1.2 The Pre-Existing Legal Framework

The main sources of law are the two acts KkrL and *lagen* (2004:297) *om bank och finansieringsrörelse* (LBF). The KkrL, which came into force in 2011, was a result of an EU directive. KkrL is a private and market law act regulating consumer protection in relation to a creditor with requirements on information, creditworthiness assessment, interest, fees etc. Terms and conditions of a credit agreement that are a disadvantage to the consumer in comparison to KkrL are not enforceable, according to the 5 §.

LBF is a banking and finance law act regulating requirements on the lender such as its license to act on the credit market, its supervision by *Finansinspektionen* and its obligation to carry out creditworthiness assessments. Additionally, *marknadsföringslagen* (2008:486) (MFL) is applicable to a broad scope of commercial promotions, including financial promotions according to the 2 §. Complementary guidelines are issued by *Finansinspektionen* and *Konsumentverket*.⁸⁷ The guidelines are regulations that clarify how KkrL and MFL should be interpreted.

Table 3 shows an overview of the provisions in KkrL and MFL that falls within the scope of this analysis.

8.1.2.1 Scope

KkrL applies to any credit agreement granted, offered or advertised to a consumer by a firm, either lender or intermediary. Further, it applies whenever a firm mediates credit according to 1 §. The act has a broad scope and aims to cover most situations when it comes to consumer lending. Certain exemptions apply to different types of credit.⁸⁸ MFL applies whenever any kind of firm promotes or requests any products. MFL aims to ensure commercial and

⁸⁷ Dir. 2014/13.

⁸⁸ The Legislative Bill states that the scope of the act is to be interpreted widely and aims to cover most credit agreements, prop. 2009/10:242 Ny konsumentkreditlag, p. 85. (prop. 2009/10:242). 4 § of the act contains instructions on what paragraphs apply to different

TABLE 3

| Paragraph | Content | Presented under |
|-------------|--|---|
| KKRL | | |
| 6 § | Good lending practices | 8.1.2.3 Advice and information 8.1.2.5 Responsible lending |
| 7 § | Financial Promotions | 8.1.2.2 Communication |
| 8 § | Pre-application disclosure | 8.1.2.4 Disclosure |
| 11 § | Application of MFL in case of non-compliance | 8.1.2.2 Communication |
| 17 § | Interest rate and fees | 8.1.2.6 Repayment |
| 18 § | Interest rate and fees | 8.1.2.6 Repayment |
| 19 § | Interest rate and fees | 8.1.2.4 Disclosure |
| 32 § | Early repayment | 8.1.2.6 Repayment |
| 36 § | Early repayment | 8.1.2.6 Repayment |
| 48 § | Rules regarding credit intermediaries | 8.1.2.2 Communication |
| MFL | | |
| 1 § | Scope and application of MFL | 8.1.2.1 Scope |
| 2 § | Scope and application of MFL | 8.1.2.1 Scope |
| 5 § | Good marketing practices | 8.1.2.2 Communication |
| 10 § | Prohibition on misleading marketing | 8.1.2.2 Communication |

consumer interests and prevent unfair promotions, 1–2 §§ MFL. The generic scope implies that financial promotions are covered by the overall rules of MFL as well as the complementary promotion rule in 7 § KkrL.⁸⁹ LBF has a generic scope and applies to banks and financial businesses.⁹⁰

Finansinspektionen's general guidelines regarding consumer credit (FFFS 2014:11) apply to undertakings under the supervision of *Finansinspektionen* that issue loans to consumers. The guidelines contain regulations on the granting of loans, housing loans and early repayment of housing loans with

types of credit. Certain paragraphs do not apply to credit secured by mortgage: 16 § Payment plan, 21–25 § Right to withdrawal, 37 § Termination of certain credit agreements.

89 Grobgeld & Norin (n. 77) 145.

90 Definition in 1:3 LBF, a bank is a firm that provides payment and deposit services. Definition in 1:4 LBF: a financial business is a firm that aims to provide financial services such as credit.

fixed interest rates.⁹¹ To a great extent it clarifies the concept of good lending practices, which is an important part of consumer protection in lending. The guidelines regarding limitation on credit secured by a mortgage (FFFS 2010:2) apply to banks and credit institutions.⁹² Marketing and information prior to entering into a credit agreement are not regulated by *Finansinspektionen* but by *Konsumentverket* and fall within the scope of *Konsumentverket's* general guidelines regarding consumer credit.⁹³

8.1.2.2 Communication

According to the concept of good lending practices, financial promotions should always be proportionate.⁹⁴ This includes that the promotion may not mislead the consumer regarding the economic consequences of the loan or impose that the credit is going to be a limited burden on the private means of the consumer. The fact that a loan can be granted quickly may not be given a prominent position in the promotion or be presented on its own as a crucial argument.⁹⁵

Marknadsdomstolen (The Swedish Market Court, MD) determined in MD 2010:30 that a way of marketing small amounts of credit, quick, easy and targeting a vulnerable group of consumers was a breach of the requirements under MFL. The advertisements, which were made online, contained several expressions indicating an exceptionally fast credit granting process.

As soon as the promotion is other than abstract and generic, any information should be clear, correct, neutral, objective and easily accessible for the consumer.⁹⁶ When a credit application form is attached to marketing materials such information requirements are of even more crucial importance.⁹⁷

5 § MFL is a general clause stating that all promotions shall be made in accordance with good marketing practices, which means that they should be

91 S 1, Finansinspektionens allmänna råd om krediter i konsumentförhållanden, FFFS 2014:11 [Cit. FFFS 2014:11].

92 S 1.1, *Finansinspektionens allmänna råd om begränsning av krediter mot säkerhet i form av pant i bostad*, FFFS 2010:2. [Cit. FFFS 2010:2].

93 S 1.1, *Konsumentverkets allmänna råd om konsumentkrediter*, KOVFS 2011:1. [Cit. KOVFS 2011:1].

94 Grobgeld & Norin (n. 77) 147. The concept of good lending practices is regulated by law in 6 § KkrL and its content is further determined by the general guidelines issued by *Finansinspektionen*.

95 S 2.2.2, KOVFS 2011:1 (n. 93).

96 S 2.2, KOVFS 2011:1 (n. 93).

97 S 2.2.2, KOVFS 2011:1 (n. 93).

reliable.⁹⁸ 10 § MFL states that no marketing may contain incorrect or misleading representations or exclude vital information in a misleading way. If the information is not given correctly either in marketing or required disclosures, MFL is applicable regarding the sanctions, according to 11 § KkrL.

When promoting credit agreements a firm shall inform the consumer on the Annual Percentage Rate of Charge (APRC⁹⁹) by providing a representative example, according to 7 § KkrL.¹⁰⁰ The example shall mirror the most common lending situation, be expressed by percentage and specify the date of calculation.¹⁰¹ If the promotion contains information on interest rate other than APRC the firm is also obliged to provide a representative example on interest rate, fees, amount of credit, term, amount payable by the consumer, size of instalments and cash contribution. Information should appear directly in the text, not in a diminished font and according to 7 § KkrL it must be given in a clear, concise and prominent way.¹⁰²

When marketing, a credit intermediary is obliged to inform the consumer whether he is independent or collaborates with a lender and to inform the consumer of any fees payable, according to 48 § KkrL.

8.1.2.3 *Advice and Information*

Good lending practices, regulated by 6 § KkrL, demand to a large extent that the lender takes the consumer's best interests into consideration, but only by way of exception follows an obligation to give advice.¹⁰³ The obligation to explain is not in itself equal to an obligation to give advice.¹⁰⁴ On some occasions good lending practices demand that the lender advises the consumer against entering into an agreement. That could be the case if the credit agreement is a disadvantage to the consumer in comparison to other available credit options or if there is a risk of excessive indebtedness.¹⁰⁵

Högsta Domstolen (The Swedish Supreme Court, HD) stated in NJA 1996 s. 3 that there is no obligation for the lender to investigate the purpose of the

98 Prop. 2007/08:115 *Ny marknadsföringslag*, p. 144.

99 Previously the abbreviation 'APR' (Annual Percentage Rate) has been used in the UK. In the future 'APR' is going to be replaced by 'APRC' (Annual Percentage Rate of Charge). Since the terms mirror the same concept and since 'APRC' is the EU definition, "APRC" has been used throughout this paper for the sake of preciseness and to prevent misunderstanding.

100 APRC is defined in 2 §. The mathematical formula is stated in *Förordning* (2010: 1855) *om Beräkning av Effektiv Ränta vid Konsumentkrediter*, and was introduced by the CCD.

101 S 2.2.3, KOVFS 2011:1.

102 Ibid.

103 SOU 2015:40 (n. 35) 184.

104 G. Lennander, *Kredit och säkerhet*, 10edn, (Uppsala: lustus förlag AB, 2011) 24–25.

105 S 2.1.1, KOVFS 2011:1 (n. 93).

loan and that good lending practices do not stretch further than considering repayment ability. Only on exceptional occasions could a failure of the creditworthiness assessment result in the invalidity of the agreement under 36 § *Avtalslagen*.¹⁰⁶ 36 § *Avtalslagen* (The Terms of Contract between Tradesmen Act) is a general clause under which unfair terms and conditions of an agreement may be invalidated.

The lender is, according to 6 § KkrL, obliged to provide the consumer with the explanations needed to make a decision as to whether the agreement meets his needs or not. The explanations should be adjusted to the individual and enable a choice between different options and an estimation of all costs.¹⁰⁷ If the agreement is complex, hard to understand or constitutes a high risk to the consumer, the lender should assume that the consumer needs detailed explanations. The lender should always make sure that the consumer understands the important parts of the explanation and disclosures.¹⁰⁸

8.1.2.4 *Disclosure*

8 § KkrL states that when the loan is secured by mortgage the marketing rules in 7 § 1 s and 2 s 1–4 apply for pre-application disclosure. Thus, when entering into a mortgage agreement the pre-application disclosure must contain a representative example explaining the APRC, whether the interest rate is fixed or variable, fees, amount of credit and term to maturity.

The information should allow the consumer to understand the meaning of the agreement, evaluate the benefits, compare different alternatives and understand the economic consequences.¹⁰⁹ It should be given in a document or other durable medium and in such a way that the consumer is allowed a reasonable time of reflection before the agreement is concluded.¹¹⁰ When determining a reasonable time, the knowledge of the individual and the complexity of the agreement should be considered.¹¹¹ There is no requirement that the consumer must leave the office or that the communication must be interrupted.¹¹²

The agreement should be made available in a document or other durable medium, e.g. electronically.¹¹³ A loan commitment should be in writing

106 Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område.

107 Prop 2009/10:242, p. 91.

108 S 2.1.1, KOVFS 2011:1 (n. 93); Prop. 2009/10:242 (n. 88) 95.

109 S 2.2.4, KOVFS 2011:1 (n. 93).

110 Prop. 2009/10:242 (n. 88) 97.

111 S 2.2.4, KOVFS 2011:1 (n. 93).

112 Prop. 2009/10:242 (n. 88) 94.

113 Prop. 2009/10:242 (n. 88) 103.

and contain terms and conditions.¹¹⁴ Rights and obligations must be specified and vital information should be easily accessible from the document.¹¹⁵ A copy must be given free of charge. Apart from the terms and conditions the agreement should clearly and concisely state certain information listed in 8 § KkrL.¹¹⁶

19 § KkrL regulates disclosure post sale stating that the lender should always inform the consumer in a document or other readable durable medium before a change of interest rate comes into effect. The information may be given through advertisement in a national newspaper, but the consumer must also be informed individually.

8.1.2.5 *Responsible Lending*

6:4 LBF requires that firms acting on the financial market be run in a healthy way. The aim of this provision is to ensure strong trust in the financial market and prevent improper selling.¹¹⁷ *Finansinspektionen* has issued guidelines to clarify the interpretation stating that the loan to value ratio should not exceed 85 percent at the time the loan is granted.¹¹⁸

The consumer's best interests should always be taken into consideration according to 6 § KkrL. The aim is to emphasise the lender's obligations and responsibilities when granting credit. It forms a basic element in the consumer credit regulations and has a supplementary function to situations that the act does not explicitly cover.¹¹⁹

Before entering into the agreement, as well as during the contractual period, the lender should act judiciously and responsibly towards the consumer. It should always be kept in mind that a credit agreement will in many cases have a great impact on the consumer's economic situation. The responsibility to

114 S 2, FFFS 2014:11 (n. 91).

115 S 2.4, KOVFS 2011:1 (n. 93).

116 The required information is: the kind of credit agreement that is provided and what security is being used, name, address and registration number of the lender and the consumer, amount of credit and terms and conditions, term to maturity, information on applicable interest rate including APRC and total amount payable by the consumer, information on instalment payments, applicable fees, consequences of arrears, the consumer's right to early repayment and applicable fees, the consumer's right to a plan for payment, insurance required by the lender, the lack of right to withdraw, how to terminate the agreement, name and address of supervisory authority.

117 Prop. 2002/03:139 *Reformerade regler för bank- och finansieringsrörelse*, p. 283.

118 FFFS 2010:2 (n. 92). Loan to value ratio is a percentage of the purchase price to be financed with a mortgage loan (Black (n. 1), 'loan to value ratio'). Example: If the purchase price is 100, 85 may be financed with a mortgage loan.

119 Prop. 1991/92:83 *om ny konsumentkreditlag*, 33 [prop. 1991/92:83].

carry out a creditworthiness assessment before entering into an agreement and to discourage excessive indebtedness is fundamental to the concept of good lending practices. Further, it follows from 8:1 LBF that a credit institution must only lend money if the borrower can be expected to be able to fulfil the obligations. The grounds on which a decision is made should be notified clearly and further information may be requested by the consumer.¹²⁰

Regardless of the amount of credit or term to maturity the lender is obliged, under 6 § KkrL, to examine the consumer's repayment ability and to establish sufficient information on the consumer's economic situation.¹²¹ The lender should ensure that staff making credit decisions have enough information to carry out the assessment, according to 8:2 LBF. The assessment includes having to gather information, to calculate the solvency and to determine whether the credit should be granted or denied.¹²² The assessment should be based on written material such as a credit report and take into consideration income, assets, expenditure, debts and guarantee undertakings. A loan may be granted only if the assessment shows that the consumer can afford it.

The information that is collected to carry out the creditworthiness assessment should be gathered from different sources and give an up-to-date picture of the consumer's situation. Appropriate living expenses should be taken into consideration.¹²³ As a part of this, a lender should perform a housing cost calculation.¹²⁴

8.1.2.6 *Repayment*

An adjustment of interest rate during the contractual period may, according to 17 § KkrL, be carried out only if the loan is a variable-rate loan. Further, 17 § KkrL specifies special circumstances when the interest rate may be changed in a disadvantageous way for the consumer. Clauses enabling changes of interest rate must be applied equally to increase and reduction and the lender must act just as quickly in both cases.¹²⁵ On request of the consumer, the lender should state the reason for adjustment.¹²⁶

The lender may, apart from the interest rate, charge the consumer for costs caused directly as a consequence of the credit granting. The charges are restricted by 18 § KkrL stating that the consumer may be charged only as a part of

¹²⁰ S 2, FFFS 2014:11 (n. 91).

¹²¹ S 2.3, KOVFS 2011:1 (n. 93).

¹²² Grobgeld & Norin (n. 77) 148.

¹²³ S 2.3.2, KOVFS 2011:1.

¹²⁴ S 3, FFFS 2014:11 (n. 91).

¹²⁵ Prop. 1991/92:83 (n. 119) 117.

¹²⁶ S 2, FFFS 2014:11 (n. 91).

the agreement. A change of charge may only be carried out as a consequence of increased costs related to the credit.¹²⁷

The consumer has an unconditional right to repay the loan early, completely or in part, under 32 § KkrL.¹²⁸ If the interest rate is fixed the lender is entitled to an interest rate differential charge, a fee to cover the extra costs or losses that arises as a result of the early repayment. The interest rate differential charge may not exceed what is reasonable under good lending practices, according to 36 § KkrL.¹²⁹

8.2 *The United Kingdom*

Prior to the financial crisis, the UK had the highest number of housing transactions in the EU, with twice as many transactions as Spain, France and Italy.¹³⁰ In 2010, the UK mortgage market was one of the largest in Europe.¹³¹

Mortgage lending comprises roughly 88 percent¹³² of the total lending to individuals, divided between 7.5 million households.¹³³ 80 percent of the houses are purchased with a mortgage loan.¹³⁴ There are about 300 mortgage lenders, granting loans to individuals secured by a first charge mortgage.¹³⁵ Six banks grants 75 percent of the mortgage loans.¹³⁶ In Q4 2014, the overall value of the residential loan amounts outstanding was £ 1, 259.6 billion.¹³⁷

Consumer credit has been regulated by statute since the first Bills of Sale Act was passed in 1854. The act stated the requirement to register written bills of sale and was followed by amendments and supplements during the 1800's.

¹²⁷ Prop. 1991/92:83 (n. 119) 118–120.

¹²⁸ Ibid, p. 129.

¹²⁹ Ibid, pp. 136–139.

¹³⁰ SEC (2011) (n. 7) 24.

¹³¹ Dam (n. 22) 587.

¹³² Based on Bankstats Monetary & Financial Statistics, April 2015, Bank of England, table A5.2. Total amount outstanding: £1, 434, 381 million, of which secured on dwellings: £1, 263, 485 million, of which consumer credit: £ 170 896 million.

¹³³ The population in the UK is roughly 64 million, according to the Office for National Statistics, May 2015.

¹³⁴ R. J. Smith, *Introduction to Land Law*, 3edn (Edinburgh Gate: Pearson Education Limited, 2013) 294.

¹³⁵ Bank of England, Prudential Regulation Authority, *Statistical Release: Mortgage Lender and Administrators*. Statistics for Q4 201, p 8 (Bank of England, statistical release).

¹³⁶ Statistics from Bank of England: Trends in Lending, April 2015, p. 1. The six banks are Banco Santander, Barclays, HSBC, Lloyds Banking Group, Nationwide and Royal Bank of Scotland.

¹³⁷ Bank of England, statistical release (n. 135) 1.

Following abuse of the market, the first Moneylenders Act was passed in 1900. It required registration of moneylenders whilst also empowering the courts to re-open harsh and unconscionable money lending transactions. The act, even if its success was questionable, was designed as a source of consumer protection, but applied equally to commercial loans.

In 1927, the money lending legislation was strengthened by a new act which required annual licensing for registration. The new act imposed severe restrictions on business methods used by moneylenders. Rules regulating the right to advertise in newspapers or contracts required to be evidenced by a note of memorandum in writing and a copy supplied to the borrower are some examples. This created new and wider protection for consumers.

Following another era of abuse, inappropriate selling and methods of circumnavigating legislation, the Consumer Credit Act 1974 (CCA) was written into law and remains in force today, although it has been subject to a number of amendments over the years.¹³⁸

The Financial Conduct Authority (FCA) was created in 1997 (at that time named The Financial Services Authority, FSA). The FCA has independent regulatory power, including the responsibility for mortgage business regulation, with one of its aims being to regulate financial services and thereby secure an appropriate level of consumer protection.¹³⁹ The power and aim of the FCA were amended in the Financial Services Act (2012),¹⁴⁰ and as a regulatory body, it is accountable directly to the Treasury and Parliament.¹⁴¹ The powers of the FCA include the authority to put in place, supervise and enforce rules related to mortgage activities.¹⁴²

8.2.1 The Law in Practice¹⁴³

a) The Buyer Approaches a Lender or Intermediary

In some cases the buyer approaches the lender and asks for a loan commitment. However, this example takes its starting point from when the buyer finds a property, as this appears to be the most common way. To finance the

¹³⁸ About the history of consumer credit agreements in English law: R. M. Goode, *Consumer Credit Law* (London: Butterworths Law, 1989) 1–4.

¹³⁹ Read more about FCA at www.fca.org.uk.

¹⁴⁰ Amending FSMA 2000, which also regulates the power of the Prudential Regulation Authority.

¹⁴¹ FSMA 2012, s 1(1A-T). Read more about the objectives of FCA in the article: Journey to the FCA, published 31/10/2012 at www.fca.org.uk (last modified 12/09/2014).

¹⁴² Consultation outcome, s 1(4).

¹⁴³ Interviews with Nick Felvus, Legal Adviser, Handelsbanken United Kingdom, April 2015.

purchase, the buyer may approach a lender or a mortgage intermediary, which is common. Mortgage intermediaries and lenders perform the same function in relation to advice and recommendation. The procedure looks as follows (for simplification purposes, the process is described without involving an intermediary).

When approached with a request, the account manager introduces the mortgage lending process and gives the consumer a Terms of Business Letter, which explains what mortgages are sold by the lender and also what the remuneration charging process is. As this first meeting is a fact-finding session, the account manager records a lot of data. This part of the process is evidenced by the buyer signing a declaration within the Fact Find. The Fact Find is the document used by the lender to gather all the required information for the mortgage. The account manager does not suggest a solution but summarises the information gathered and books a second meeting that is used to present a recommendation.

Between the first and the second meeting, the account manager completes the Fact Find (which includes a recommendation), a Key Facts Illustration (KFI), and a Mortgage Application Form. In the second meeting, if the consumer accepts the recommendation, he is asked to complete the Mortgage Application Form that has been prepared. The Fact Find or Application Form contains the required authorities to allow the lender to complete a Credit Reference Agency (CRA) search and to instruct a valuer and solicitors.

After the second meeting a formal Mortgage Offer Letter is completed and forwarded to the consumer. The account manager completes a CRA search, which provides relevant information for the creditworthiness assessment.¹⁴⁴

b) The Buyer Instructs a Solicitor to Ensure Good Title

In order to ensure good title to the property the buyer employs a solicitor to complete the legal work. As the lender is also going to employ a solicitor, it is normal practice that both parties use the same solicitor.

c) A Valuer and Solicitor are Appointed by the Lender

The lender instructs a valuer to ensure that the property provides adequate security. It also instructs a solicitor to complete the legal formalities on its

144 Where the consumer lives, county court judgments made against the consumer, insolvencies, past and current credit agreements, including debt and repayment history. See: www.callcredit.co.uk.

behalf. Once all of the security formalities have been completed, the loan is opened and the funds sent to their solicitor. The lender's solicitor forwards the funds to the solicitor of the seller, which will complete the conveyance of the ownership of the property. The Buyer attends a meeting at a solicitor of their choice with the purpose to complete the lender's security documents.

The solicitor employed by the lender ensures that the seller has good title to the property and also that the property does not have any features that would risk the lender's security. The lender forwards the valuer's report to the solicitor to ensure that the correct property has been investigated. Once the transaction is completed the solicitor registers the lender's security at the land registry.

8.2.2 The Pre-Existing Legal Framework

Since the adoption of the CCD, two regimes are applicable to consumer credit agreements: one within the scope of the directive that applies up to a prescribed limit, and one within the English consumer credit law that applies irrespective of any limit. The principle regulation in the CCA of 1974 continues to apply to credit agreements outside the scope of the directive.¹⁴⁵

Consumer credit agreements are regulated under the CCA and the Consumer Credit Regulations (2011).¹⁴⁶ Neither of them covers credit secured by a first charge mortgage. All consumer credit agreements, including further advances that are secured by a first legal mortgage on residential property are exempt from the CCA.¹⁴⁷ Consumer credit agreements of this kind, RMC, are regulated by a separate regime within the scope of the Financial Services and Markets Act (2012) (FSMA) (see further under 'scope'). Agreements regulated by FSMA are under ultimate authority of the Treasury and fall under the jurisdiction of the FCA.¹⁴⁸

The FSA adopted the first rules regulating consumer credit relating to residential property, on 31 October 2004, under the terms of FSMA 2000.¹⁴⁹ Residential property loans are nowadays regulated by the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB). MCOB regulates activities that come within the scope of FSMA. MCOB, applicable to any firm offering

¹⁴⁵ Rosenthal (n. 30) 1–2.

¹⁴⁶ D. Bryan, *A straightforward guide to The Rights of The Consumer* (Brighton: Straightforward publishing, 2015) 59.

¹⁴⁷ CCA 1974, s 16(2)(b) and The Consumer Credit (Amendment) Regulations 2011, SI 2011/11, s 11(5).

¹⁴⁸ Rosenthal (n. 30) 59.

¹⁴⁹ FSMA 2000, s 2(2)(c) and s 138.

TABLE 4

| Chapter | Content | Presented under |
|---------|--|--------------------------------|
| 1. | Application and purpose | 8.2.2.1 Scope |
| 2. | Conducts of business standards | 8.2.2.5 Responsible lending |
| 3. | Financial promotion of qualifying credit, home reversion plans and regulated sale and rent back agreements | 8.2.2.2 Communication |
| 4. | Advising and selling standards | 8.2.2.3 Advice and information |
| 5. | Pre-application disclosure [disclosure] | 8.2.2.4 Disclosure |
| 6. | Disclosure at the offer stage [disclosure] | 8.2.2.4 Disclosure |
| 7. | Disclosure at start of contract and after sale [disclosure] | 8.2.2.4 Disclosure |
| 8. | (Equity release / lifetime mortgage, excluded) | - |
| 9. | (Equity release / lifetime mortgage, excluded) | - |
| 10. | Annual Percentage Rate | 8.2.2.2 Communication |
| 11. | Responsible lending, and responsible financing of home purchase plans | 8.2.2.5 Responsible lending |
| 12. | Charges | 8.2.2.6 Repayment |
| 13. | Arrears, payment shortfalls and reposessions: regulated mortgage contracts and home purchase plans | 8.2.2.6 Repayment |

home finance activities,¹⁵⁰ contains e.g. rules on communications, advising and selling standards, disclosure, APRC, responsible lending and repayment.¹⁵¹ Failure to comply with the rules does not invalidate the mortgage itself, but may lead to disciplinary action from the FCA.¹⁵²

Table 4 shows an overview of the MCOB rules and under what section of the article the MCOB chapters are presented.

¹⁵⁰ MCOB1 (n. 36), s 1(2)(1) and 1(2)(2). The term 'home finance activities' includes activities carried out in respect of regulated mortgage contracts. Four types of firms are mentioned: lenders, administrators, arrangers and advisers. The latter two are referred to as intermediaries.

¹⁵¹ FCAs Reader's Guide: an introduction to the Handbook, version 3.0 (December 2013) p. 11.

¹⁵² Thompson (n. 62) 478.

8.2.2.1 *Scope*

MCOB applies only to regulated mortgage contracts (RMC).¹⁵³ RMC is defined in FSMA (Regulated Activities) Section 61,¹⁵⁴ as a contract under which the lender provides credit to an individual and the obligation to repay is secured by a first legal mortgage on land.¹⁵⁵ A first legal mortgage is a legal mortgage ranking in priority ahead of all other mortgages.¹⁵⁶ Second charge mortgages take secondary priority behind the first charge and are not covered by MCOB.¹⁵⁷ Before entering into an agreement, the lender must take all reasonable steps to establish whether or not the contract is an RMC in order to assure that the right rules are applied.¹⁵⁸

8.2.2.2 *Communication*

When communicating any financial promotion the lender must adhere to MCOB3.¹⁵⁹ To communicate financial promotions in the course of business a person must be authorised.¹⁶⁰ Alternatively, the content of the promotion has

¹⁵³ An RMC is a contract under which a person provides credit to an individual or to trustees and the obligation to repay is secured by a first legal mortgage on land in the UK. At least 40 percent of the land has to be, or be intended to be used as or in connection with a dwelling by the borrower, or (if trustee) by an individual who is a beneficiary of the trust or by a related person. The definition of RMC is enacted in The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (FSMA (Regulated Activities)) Section 61(3). MCOB applies to RMCs entered into after 31 October 2004 (MCOB1, Section 1(6)) (n. 36).

¹⁵⁴ The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544.

¹⁵⁵ MCOB applies to credit provided to an individual, a term which in FCA, the Consumer Credit (Designation) Instrument 2013 (FCA 2013/60), is defined as: (a) a natural person; or (b) a partnership consisting of two or three persons not all of whom are bodies corporate; or (c) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership. Thus, the scope of the term 'individual' is broader than the MCD definition of 'consumer' which only includes natural persons. The consequence is a broader scope of MCOB than the MCD. However, 'consumer' (as defined in the MCD) falls within the scope of MCOB. Since this study revolves around consumers as they are defined in the MCD, only the term 'consumer' is going to be used here for the sake of preciseness.

¹⁵⁶ FSMA (Regulated Activities) (n. 153) Section 61(4).

¹⁵⁷ Implementation of the Mortgage Credit Directive and the new regime for second charge mortgages, feedback to Cp14/20 and final rules. March 2015. Ps15/9, p. 6 (Ps15/9).

¹⁵⁸ MCOB1 (n. 36), Section 1(6)(2G)-Section 1(6)(3R).

¹⁵⁹ Communication in this sense is printed advertising, radio, television broadcasts, personal visit, telephone call, e-mail or internet, MCOB3 (n. 36), s 3(2)(2G).

¹⁶⁰ FSMA 2000, s 31.

to be approved by an authorised person.¹⁶¹ MCOB3 contains rules on form and content of financial promotions and the use of internet and other electronic media. Under certain circumstances, the lender is required to calculate an APRC, to enable a comparison between mortgage offers. Financial promotions have to contain price information and the pre-application disclosure must contain the fees that are included in the APRC.¹⁶²

8.2.2.3 *Advice and Information*

Mortgage advice may be given by a lender or intermediary. Authorisation is needed for any person selling or giving advice on RMCs.¹⁶³ In this regard, the FCA Training and Competence Sourcebook (TC) applies. TC regulates competence requirements in relation to RMC sales and applies whenever the lender gives advice or arranges an execution-only sale in an RMC in relation to a consumer.

The lender must observe the rules in TC and make sure that employees are competent enough to carry on activities that come within the scope of TC, such as RMCs.¹⁶⁴ The TC lists rules on training, qualification and maintenance of competence.¹⁶⁵ Competence is defined as skills, knowledge and expertise needed for the employee's role, including obtaining an appropriate qualification.¹⁶⁶ The competence has to be assessed on a regular basis and appropriate training must be ensured.¹⁶⁷ The lender must ensure technical knowledge, application, skills and expertise. Further, it must ensure competence on changes as regards products, legislation and regulation.¹⁶⁸

The purpose of MCOB4 is to ensure that consumers are adequately informed and that any advice provided to a consumer is suitable.¹⁶⁹ Consumers should, as a main rule, always be given advice before an agreement is concluded.¹⁷⁰

¹⁶¹ MCOB3 (n. 36), s 3(4).

¹⁶² MCOB3, s 3(6)(17R), and MCOB5 s 5(6)(66R). The calculation of the APRC is established in MCOB10, (n. 36).

¹⁶³ FSMA (Regulated Activities) (n. 153), s 61–63.

¹⁶⁴ TC2, s 2(1)(1R).

¹⁶⁵ TC App 1.1 and TC1, s 1(1).

¹⁶⁶ TC1, Section 1(1)(4G).

¹⁶⁷ TC2, Section 2(1)(11G)–Section 2(1)(13G).

¹⁶⁸ TC2, Section 2(1)(13G).

¹⁶⁹ MCOB4, Section 4(2), (n. 36).

¹⁷⁰ MCOB4, Section 4(7A)(1G). Consumers that might decline advice are high net worth mortgage customers, professional customers and loans solely for a business purpose. Vulnerable customers should be given advice in every case.

There is no general duty to give advice in all cases, but when provided the advice must always comply with certain regulatory standards.¹⁷¹

In the initial meeting the adviser must inform on possible limitations, i.e. whether mortgages from the whole or a limited market can be offered. He may not call himself 'independent mortgage adviser' unless the product range is unlimited.¹⁷² Further, the consumer must be informed on what products will be offered, the basis on which the lender will be remunerated and applicable fees expressed as a cash sum.¹⁷³

Generic discussions on the features of mortgages and the mortgage lending process do not fall within the definition of an advised sale.¹⁷⁴ Neither does the term 'initial contact' necessarily refer to when a consumer contacts the lender to arrange a meeting. The rules apply when the contact is made with an attempt to carry out the services.¹⁷⁵ The lender is obliged to make sure that the discussions cannot proceed if the requirements are not fulfilled.¹⁷⁶ Only under certain conditions may the consumer decline advice. If the consumer explicitly wants an execution-only sale a certain procedure of documentation must be followed.¹⁷⁷ The consumer must not be encouraged to opt out of receiving advice and in every case the consumer's best interests must be kept in mind.¹⁷⁸

8.2.2.4 *Disclosure*

If a lender provides information, the means to make an application or advises a consumer to enter into a mortgage agreement, it needs to consider the pre-application disclosure rules.¹⁷⁹ The initial contact must follow a certain procedure as long as it does not merely deal with generic information. The rules aim to enable a comparison between lenders and products by ensuring that, before an application is made, clear information is provided on the features of the deal, linked deposits, linked borrowing, tied products and price.¹⁸⁰

¹⁷¹ SEC (2011) (n. 7) 164.

¹⁷² MCOB4, Section 4(4A)(7G), (n. 36).

¹⁷³ MCOB4, section 4(4A)(1R-8R), (n. 36).

¹⁷⁴ Defined in FSMA 2000 (Regulated Activities) order 2001 (S1 2001/544) Section 53.

¹⁷⁵ MCOB4, Section 4(4A)(13G), (n. 36).

¹⁷⁶ MCOB4, Section 4(4A)(9R), (n. 36).

¹⁷⁷ MCOB4, Section 4(2)(1G), (n. 36). Execution-only sales is a sale where the customer wants to proceed without advice.

¹⁷⁸ MCOB4, Section 4(8A)(4G)-Section 4(8A)(6G), (n. 36).

¹⁷⁹ MCOB5, Section 5(1), (n. 36).

¹⁸⁰ MCOB5, Section 5(2), (n. 36).

The KFI provided for comparison purposes should be completed without unnecessary delay. It has to be submitted for every mortgage and follow the MCOB template.¹⁸¹ MCOB contains provisions on what headings and risk warnings have to be included and how they are worded. The KFI must also contain information on the price or value of the property.¹⁸²

MCOB6 aims to ensure that the consumer receives a clear offer document and applies whenever the lender offers a consumer a mortgage agreement. It is also applicable when there is a request to vary the terms of an existing agreement by adding or removing a party or changing the interest rate.¹⁸³ The information provided is required to be in durable medium and to be clear, fair and not misleading.¹⁸⁴ The offer document must be based on the KFI, be accurate and contain an illustration of the costs and features of the agreement.¹⁸⁵ Apart from the requirements of the KFI, the offer document must contain several explanations.¹⁸⁶

MCOB7 aims to enable the consumer to check that the contract has been set up in accordance with existing rules. The information must be provided

¹⁸¹ MCOB5, Section 5(3), Section 5(5)(14G) and Section 5(6)(2R), (n. 36).

¹⁸² MCOB5, Section 5(6). Example of headings: About this illustration, Which service are we providing you with, What you have told us, Description of this mortgage, Overall cost of this mortgage, Are you comfortable with the risk, What fees must you pay, What happens if you do not want this mortgage anymore, What happens if you want to make overpayments, Additional features, Where can you get more information about mortgages. Example of risk warnings: Your home may be repossessed if you do not keep up repayments on your mortgage, You will need to pay this share in the value of your property either as a lump sum or through extra loan payments: Think carefully about whether you can afford this, What if interest rates go up?: Rates may increase by much more than this, so make sure you can afford this loan.

¹⁸³ MCOB6, Section 6(1–2), (n. 36).

¹⁸⁴ MCOB6, Section 6(3), (n. 36).

¹⁸⁵ MCOB6, Section 6(4)(1R) – Section 6(4)(2G), (n. 36).

¹⁸⁶ MCOB6, Section 6(4)(1R). The offer document must contain information regarding: The period for which it is valid, an explanation of whether the agreement contains additional unsecured borrowing facilities which could result in the consumer borrowing more money, an explanation of when any interest rate change on the mortgage takes effect, an explanation that there will not be any right of withdrawal as soon as the agreement has been concluded, an explanation of the consequences that might arise if the consumer chooses not to enter into the agreement (including possible fees that won't be repaid), an explanation that the consumer has a right to repay the mortgage in accordance with the terms in the contract.

before the first payment.¹⁸⁷ During the lending period annual statements must be provided.¹⁸⁸

8.2.2.5 *Responsible Lending*

The Financial Policy Committee (FPC)¹⁸⁹ has issued a recommendation on loan to income ratios¹⁹⁰ in order to counteract excessive household indebtedness. According to the recommendation, 15 percent of the mortgages granted by lenders that annually grant loans in excess of £100 million should not exceed an income ratio of 4.5.¹⁹¹

The lender must always act honestly, fair, professionally, in accordance with the consumer's best interests and never exclude the duties or liabilities it has towards the consumer.¹⁹² When communicating with a consumer, either orally or in written form, the lender must take reasonable steps to communicate in a way that is clear, fair and not misleading.¹⁹³ When doing this, the lender must consider the knowledge of the consumer.¹⁹⁴

¹⁸⁷ The information must include: The amount of the first payment, the amount of subsequent payments if different from the first payment, the method by which the payments will be collected, information on whether insurance or investments have been purchased through the firm, the first premium of such insurance, confirmation of whether the premium is going to be collected together with the mortgage payment or separately, confirmation of the repayment type of the mortgage, if it is an interest-only mortgage (a mortgage where the customer will only pay the interest, but the principal remains), then a reminder to check that a repayment strategy is in place if not provided by the lender, what to do if the consumer incurs a payment shortfall, confirmation on linked borrowing and deposits and whether the contract permits the consumer to make over or underpayments.

¹⁸⁸ MCOB7, Section 7(5), (n. 36).

¹⁸⁹ The FPC is an independent committee within the Bank of England. The committee's objective is to identify, monitor and take action against risks to protect the resilience of the UK financial system, www.bankofengland.co.uk.

¹⁹⁰ A loan to income ratio is a multiple of an individual's annual income at the time it is assessed for the purpose of entering into an RMC. See: *Guidance on FPC's recommendation on loan to income ratios*, p. 9. Example: If the annual income is 100, a loan to income ratio of 4.5 allows a lending of 450.

¹⁹¹ The recommendation is addressed to the FCA and the PRA that have issued detailed guidelines on how to follow the recommendation. Financial Conduct Authority, Finalised guidance, *Guidance on the Financial Policy Committee's recommendation on loan to income ratios in mortgage lending*, October 2014, p. 2.

¹⁹² MCOB2, Section 2(5A-6), (n. 36).

¹⁹³ MCOB2, Section 2(2)(6R)-Section 2(2)(8G), (n. 36).

¹⁹⁴ MCOB2, Section 2(2)(7G), (n. 36).

The lender is obliged to adopt a written policy setting out the factors that it will take into consideration when assessing creditworthiness.¹⁹⁵ MCOB11 states what the policy must contain, including how income and expenditure is to be assessed by the firm, how future interest rates are taken into account and the calculations used to determine the affordability of the loan. Before concluding the agreement, the lender must assess whether the consumer can afford the sums¹⁹⁶ due and also be able to demonstrate affordability and completed creditworthiness assessment.¹⁹⁷ The assessment is based on income, assets, expenditure and debts. It should also consider potential interest rate increases. If an estimated valuation not provided by the consumer is used the valuation must take into account all the information available at that time.¹⁹⁸ An expectation of an increase in value of the property may not be used as a repayment strategy and merely the value of the property may not be relied on in the assessment.¹⁹⁹

When considering the consumer's income, the lender must obtain independent evidence, e.g. payslips or bank statements.²⁰⁰ As regards expenditure, this includes Committed Expenditure such as contractual commitments, Basic Essential Expenditure such as utility bills and Basic Quality of Living Expenditure which is expenditure that is not essential but still hard to reduce.²⁰¹ When the information is collected, the lender may rely on evidence given by the consumer unless there is a reason to doubt the accuracy. However, the lender must take reasonable steps, such as a CRA search, to obtain confirmation of the consumer's commitments.²⁰²

Remuneration of staff should not be arranged in a way that could give rise to a conflict with any duty towards the consumer, such as the responsibility

¹⁹⁵ MCOB11, Section 11(6)(20), (n. 36).

¹⁹⁶ MCOB11, Section 11(6)(2R)(2), (n. 36). Sums, meaning payments to repay the sums advanced and interest reasonably expected to be accrued under the RMC.

¹⁹⁷ MCOB11, Section 11(6)(2R), (n. 36). This is the main rule, exceptions provided in Section 11(6)(3R), Section 11(6)(57R) and Section 11(7R) refers to: interest roll-up mortgages, forbearance situations, additional borrowing that is required to protect the creditor's security or where a contract variation fee is added to the mortgage.

¹⁹⁸ MCOB5, Section 5(6)(8G), (n. 36).

¹⁹⁹ MCOB11, Section 11(6)(46), (n. 36).

²⁰⁰ MCOB11, Section 11(6)(8R)-Section 11(6)(9R), (n. 36).

²⁰¹ MCOB11, Section 11(6)(10R), (n. 36).

²⁰² MCOB11, Section 11(6)(12R). The CRA provides information about the financial history of the consumer, which includes bankruptcies, insolvencies and past and current credit agreements, www.callcredit.co.uk.

to give accurate advice or sufficient disclosure. Due regard must be paid to the interests of the consumer, and the lender must take reasonable care to organise its affairs responsibly and consider adequate risk management.²⁰³

8.2.2.6 *Repayment*

The lender may only charge consumers in a transparent and fair way.²⁰⁴ Charges for early repayment must be expressed as a cash value to reflect costs incurred as a result of the repayment. Before the lender enters into an agreement, makes a further advance or changes the interest rate, it must provide information on the maximum amount payable as an early repayment charge as regards that contract.²⁰⁵ Any form of variation of the contract, including interest rate changes, is subject to disclosure and advising and selling standards in MCOB.²⁰⁶

In the case of shortfall, the lender may charge the consumer to an extent that it can objectively justify, so long as the charge is equal to or lower than a reasonable calculation of the additional administrative costs caused by the administration of the shortfall.²⁰⁷

When the lender receives repayment from the consumer, it must ensure that the payment is used firstly to pay the shortfall, excluding interest or charges on that shortfall.²⁰⁸ The lender is obliged to adopt a written policy on how to deal with arrears and payment shortfalls and is further obliged to treat consumers who have a payment shortfall fairly.²⁰⁹ This means that the creditor may only, if the first payment attempt is unsuccessful, make one additional direct debit request within the same month. If this scenario takes place two months in a row the creditor must make reasonable efforts to contact the consumer and consider whether this is an appropriate method of payment. The creditor may not add additional costs incurred as a consequence of the direct debit requests during the period of consideration.²¹⁰

203 MCOB2, Section 2(3), Section 2(4), Section 2(5) and principles 3 and 6.

204 MCOB12, (n. 36).

205 MCOB12, Section 12(3), (n. 36).

206 MCOB4, Section 4(1)(4R), (n. 36).

207 MCOB12, Section 12(4)(1R), (n. 36).

208 MCOB12, Section 12(4)(1BR), (n. 36).

209 MCOB13, Section 13(3)(1R), (n. 36).

210 MCOB13, Section 13(3)(1AR), (n. 36).

9 Comparative Analysis

The following comparison assesses how the states have chosen, or is suggested to choose, to implement the directive. This comparison will also make it possible to see whether or not there are differences in provisions in the MCD that are in conflict with or non-existent in the states that are analysed. From this discussion, a conclusion will be drawn on what changes the two states are going through, how the changes may differ and what they may look like.

In both states mortgage lending comprises a predominant part of the total lending to consumers ('individuals' in the UK). Most properties are purchased with a mortgage loan and a relatively small number of banks are granting a vast majority of them. The conclusion is easily drawn that mortgage loans are an important part of the financial market in both states and many consumers are affected. 1.5 million households in Sweden, 7.5 million in the UK, a situation that is similar all across the EU.

Regulation of consumer credit has a history in the UK that goes back to 1854, the Swedish reaches to 1915. However, in both states, acts regulating purely consumer interests in lending were introduced during the 1970's. Credit agreements unrelated to the purchase of goods or services were unregulated until 1993 in Sweden, whereas MCOB did not come into force until 2004. This implies a relatively short history of consumer mortgage lending regulations in both states. However, in recent years, perhaps due to EU regulations, it appears that the legislators have paid more attention to these kinds of consumer issues.

As a general remark, it is clear that the purchase of residential property in the UK involves more parties than in Sweden. The mortgage lending processes contain similar tasks but are in Sweden usually divided between an estate agent and a lender, whereas in the UK they are divided between an estate agent, an intermediary, a lender, a solicitor and a valuer.²¹¹ This, together with the lack of

211 The Swedish estate agent has a bigger role in completing the purchase. The UK estate agent is only involved in the very beginning of the process, whereas the Swedish estate agent takes part all the way to the completion of the purchase. The Swedish account manager will rely on the estate agent making sure that the seller has a good title, whereas the UK account manager will rely on a solicitor. From a consumer perspective, it should not make any difference if the bank's security is confirmed by an estate agent or a solicitor. However, the solicitor in the UK may also act on the consumer's behalf. The solicitor makes sure that the seller has good title to the property and also that the buyer will have a good title after the purchase. A Swedish consumer does not have a solicitor acting on his behalf, which could be considered a lack of protection. On the other hand, since the purchase of residential property is assisted by an estate agent, and also that the process appears easier in Sweden, consumers seem to cope well without the assistance

a regulated sales process, makes the Swedish mortgage lending process more flexible and means that the process can vary depending on the demands of the parties. Although there are fewer regulatory requirements there are still customs among Swedish lenders and certain ways might be more beneficial for the lender and we can see a similar procedure applied in many cases.

Bank supervisory practices vary across the EU, which will have an effect on how the mortgage markets in the Member States are regulated.²¹² The differences between the regulations provided by the FCA and *Finansinspektionen* are partly due to the fact that the FCA has been given the responsibility to provide prudential and conduct of business regulation, whereas *Finansinspektionen* only provides prudential rules.²¹³ As a consequence, the rules provided by the FCA operate differently and are more extensive. The Swedish supervisory authority was created by the merging of banking and insurance inspectorates, whereas the FSA was the result of the merging of nine regulatory bodies.²¹⁴ In Sweden the main source of law is still legislation coming from parliament with relatively few clarifications from other authorities.

MCOB is highly detailed whereas KkrL is worded in more general terms; in this sense, MCOB sets out rules whereas KkrL sets out principles. This said, it must not be forgotten that the FCA handbooks additionally provide an extra layer of overall principles to be considered generally in the conduct of business.²¹⁵ KkrL is, in this regard, better compared with the FSMA, the statutory foundation of the MCOB. FSMA sets out high level principles in a way similar to KkrL.²¹⁶ However, the way that FSMA is supplemented by MCOB differs significantly from the way that KkrL is supplemented by the general guidelines.

of an externally legally educated professional. The estate agent provides the consumer with protection in relation to the title and can be held responsible under the 25 § *fastighetsmäklarlagen* (2011:666) (*fastighetsmäklarlagen*). He is obliged to act on the behalf of the seller as well as the buyer, which includes giving advice and information relating to the conveyance, 8 § and 10 § *fastighetsmäklarlagen*. If the estate agent does not fulfil his obligations under the act, he is liable for any damages that the buyer incurs. In this sense, the estate agent in Sweden fulfils the same purpose as the solicitor does in the UK. In Sweden, the estate agent is also involved when it comes to transferring the funds required for the transaction to be completed. The account manager in Sweden will be provided with the necessary information to transfer the money by the estate agent, whereas the UK account manager will transfer the money via a solicitor.

²¹² Dam (n. 22) 587.

²¹³ Mwenda and Mvula (n. 23) 47.

²¹⁴ Ibid.

²¹⁵ Brown (n. 67) 575.

²¹⁶ Regarding the nature of FSMA, see Brown (n. 67) 574.

The most apparent difference is the comprehensiveness of the regulations provided by the different authorities.

As will be seen in the following discussion, differences in the ways of regulating consumer protection do not necessarily mean a different result in practice with regard to the level of protection. As an example of the differences between the ways of providing consumer protection, it may be pointed out that KkrL invalidates all agreements entered into that are less beneficial for the consumer than the statute provides for. MCOB, on the other hand, does not invalidate agreements that are contradictory with its provisions, but provides for disciplinary actions. The MCD introduces regulations based on general principles in contrast to the CCD, which is rule-based.²¹⁷ Considering the present features of the regulations this might be more foreign to the MCOB than KkrL.

When looking at regulations in the two states it may seem at first glance of the proportions that there is a vast difference in coverage in the area of consumer mortgage lending. The wording of the MCOB extends to nearly 500 pages, whereas KkrL, which is the main statute regarding consumer lending, fits within 11 pages. Furthermore, the MCOB is built to a large extent on rules that regulates the actions of lenders in great detail. In contrast, KkrL provides over-all principles that may appear less far-reaching in comparison. However, the law cannot merely be determined by the wording of legislation or the amount of regulation. For example, the KkrL must be read in conjunction with its preparatory works, a practice that does not apply to MCOB.

When comparing legal systems the differences in legal traditions have to be considered and the regulations have to be seen in context. Therefore, we cannot simply resolve the question of differences by establishing that the number of regulations in the UK is significantly larger than in Sweden. Neither can an evaluation of the consumer protection be based merely on this fact. When comparing the law the differences in legal traditions must be kept in mind.²¹⁸

²¹⁷ Brown (n. 67) 564.

²¹⁸ Sharing certain features with Civil Law as well as English Common Law, the mixture makes the Nordic countries hard to attach to either of these legal systems. Historically, Swedish law was based on old Germanic law but still lacks a civil code. The Swedish law is drafted in a simple and clear way with a preference to casuistic rules (Zweigert & Kötz (n. 38) 277–278). The countries in the UK are all highly influenced by English Common Law. It should be kept in mind that especially Scotland has a legal system that differs from the Common Law. Scotland has been more influenced by continental Europe, which is still characteristic for the Scottish legal system. Since the nineteenth century Scots law has been highly influenced by English Common Law through enactments coming from

Some changes in UK legislation have been necessary to give the FCA the authority to regulate the full scope of the MCD.²¹⁹ In January 2015, Her Majesty's Treasury (HMT) published The Mortgage Credit Directive Order 2015, making amendments to FSMA and CCA to make the implementation of the MCD possible. The final rules were adopted by the FCA 25 March 2015.²²⁰ At the same time, in Sweden the Committee of Inquiry presented its report 9 April 2015 with suggestions on how to implement the directive in Swedish law. The report was subject to consultation and is going to be followed up by a Legislative Bill that is to be laid before the parliament before a statute can be

Westminster. Some areas of law apply equally in both countries (Zweigert & Kötz (n. 38) 201–204). The area of law discussed in this analysis is one of the areas that apply equally and the FCA is supervisory authority throughout the UK. These above mentioned facts make it justified to, only for the purpose of this simplified explanation, explain the particularities of legislation in the UK by looking at English Common Law in comparison to the continental Civil Law legal systems. When comparing the English Common Law and Civil Law (with which the Swedish law shares common features) a simple way to explain the way of legal reasoning is to describe the English way as realistic and concrete, whereas the Civil Law legal thinking is systematic and abstract (Zweigert & Kötz (n. 38) 181). The difference appears in a comparison between FSMA and MCOB on the one hand and KkrL and the *Finansinspektionen* guidelines on the other. KkrL is, as most Swedish regulatory acts tend to be written as a framework legislation. Complementary to the legislation are the legislative preparatory works that have a high degree of authority and are helpful to specify the intent of the legislator (Carlson (n. 50) 43–45). When considering the comprehensiveness of Swedish regulation an act can therefore not be considered on its own. The authority of preparatory works has no equivalence in English Common Law. The different approaches can be explained by a pronouncement by Lord Reid in *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] House of Lords, [1975] 2 W.L.R. 513, at 613: 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.' Even though the English traditional rule not to seek answers beyond the wording of the statute has become more liberal in recent years, the differences in statutory drafting are still huge in comparison to the continental approach. The characteristics of English statutory drafting are the preciseness, complexity and the way of going into great detail. In comparison, statutes on the continent are shorter and clearer (Zweigert & Kötz (n. 38) 265–268). English regulations may look onerous to a Swedish viewer and the Swedish regulations appear insignificant to a UK viewer although the content of the law might perfectly well be exactly the same.

219 Her Majesty's Treasury; Consultation Outcome – implementation of the EU Mortgage Credit Directive. 26 January 2015 (HMT Consultation Outcome), Section 1(7).

220 Mortgage Credit Directive Instrument 2015. In exercise of its powers given in FSMA 2000 Section 137, 139A, 213 and 214.

adopted. It is quite clear that Sweden in this sense is a few steps behind in the implementation process, which might affect the possibilities for participants in the financial market to adjust their current practices on time.

The UK regulators have chosen to amend the existing mortgage regime rather than to adopt a new one. The Government expresses its scepticism about the value of the MCD to UK lenders and consumers and argues that the new requirements do not offer many benefits since the existing regime is providing a high level of protection. By reason of its scepticism, the UK has tried to influence the MCD negotiations in a way that aligns the new requirements with the existing mortgage regime in the UK.²²¹ When implementing the directive the regulators have tried to minimise the impact of the MCD.²²² To cause the least possible disruption to the market the FCA suggested, when necessary, to insert the directive text in MCOB.²²³

As the Swedish implementation is not finalised (as of spring 2015) it is not possible to analyse the regulatory consequences following the choice of the legislator. However, some conclusions can be made regarding what requirements are new to Swedish law and what requirements are already covered by existing rules. The Committee proposes a new commercial law act containing a requirement for authorisation for mortgage lending.²²⁴ It is also proposed to regulate remuneration systems within enterprises, the competence of staff and standards for valuation of residential property that is being mortgaged.

Further, the Committee suggests changes in KkrL. One starting point has been that KkrL should remain applicable to most consumer credit agreements and that the commercial rules shall be kept in separate legislation as today.²²⁵ The Swedish government has expressed, though not as frankly as the UK government, the wish that the future legislation should as far as possible 'be in line with existing principles and applicable law.'²²⁶

The required revisions in Sweden include new pre-contractual information, more rules on information in marketing, rules on advice and advance information on the conditions applying thereto and requirements on the documentation for completed consultation. Further, a time period for reflection and a limitation on tying practices need to be introduced. It is also suggested that

221 HMT Consultation Outcome (n. 219), Section 1(5).

222 Ibid, Section 1(6).

223 Ps15/9 (n. 157) 5–6.

224 A summary of the committee's proposals is found at pages 22–25 in the SOU 2015:40 (n. 35).

225 SOU 2015:40 (n. 35) 116 and Dir. 2014:13, p. 5–6.

226 Dir. 2014:13, p. 5.

Finansinspektionens general guidelines, which in practice are already being followed by lenders, are to be codified to some extent.²²⁷

The UK government recognises the biggest impact of the MCD being the changes when it comes to second charge mortgages.²²⁸ Other provisions in the MCD that are going to have an impact are: the obligation to provide information free of charge, the obligation to keep general mortgage information available, a ban on tying of products, standards for property valuation, rules on adequate explanations, rules that consumers must be told the information needed to assess creditworthiness, a binding offer and a seven day reflection period.

9.1 *Scope*

a) Article 3 Scope

The MCD applies to any consumer credit agreement secured by a mortgage or by another comparable security commonly used in a Member State on residential immovable property or secured by a right related to such property (e.g. *bostadsrätt*).

In the UK, the difference between CCA loans and RMCS creates two different regimes for consumer lending. The new MCD definitions widen the scope of RMCS, which has a consequence foremost for second charge mortgages. Second charge mortgages in the UK are regulated under the CCA but in consequence of the MCD equal rules will apply to first as well as second charge mortgages. To cover the gap, second charge mortgages have been moved into the mortgage regime, making them similar to first charge mortgages and adding wider protection to consumers in the second charge market.²²⁹ The CCA was amended by HMT, explicitly excluding any agreement covered by the MCD from its application.²³⁰ This will have the effect that lenders dealing with second charge mortgages will have to apply for authorisation under the mortgage regime.²³¹ In the future, the same requirements will apply to lenders selling second as well as first charge mortgages.²³²

The scope of KkrL is even broader than the MCD and is restricted foremost by the definition of consumer, which corresponds to the MCD definition. The wide scope, covering all credit to consumers, implies that the act can continue

²²⁷ SOU 2015:40 (n. 35) 24.

²²⁸ HMT Consultation Outcome (n. 219), Section 1(6).

²²⁹ Ps15/9 (n. 157) 6.

²³⁰ The Mortgage Credit Directive Order 2015, SI 2015/910, Sch 1 pt 1, Section 2(2).

²³¹ Ps15/9 (n. 157) 20.

²³² Ps15/9 (n. 157) 17.

to apply as before. Neither is the application of other acts affected, which means that other aspects of consumer lending, such as financial promotions, can continue to be regulated under different regimes. This is a difference to the regulations in the UK, where all aspects of RMCs are regulated within one single regime.

In the UK, the mortgage regime is restricted to property that is mainly residential, as is the MCD. This restriction is not the same in Sweden where the concept of RMC has no equivalent. It appears that RMCs apply to individuals, which is a broader definition than the MCD (and Swedish) definition of consumer. The Swedish way of restricting the KkrL scope to consumers corresponds to the MCD. In the UK, the division is made not only between individuals and non-individuals, but also between RMCs and CCA loans, which seem to correspond to the MCD way of focusing only on residential property.

9.2 *Communication*

Form and content of financial promotions are regulated by detailed rules in the UK whereas the Swedish regulation appears to be principles based to a greater extent. The Swedish financial promotions law is based on moderation, good lending practices and good marketing practice. Instead, the UK regulator requires authorisation to communicate financial promotions and record keeping of communications.

a) Article 10 General provisions applicable to advertising and marketing

Article 11 Standard information to be included in advertising

Any advertising and marketing communications concerning credit agreements shall be fair, clear and not misleading, according to the provisions of art. 10. Further, wording that may create false expectations regarding availability or charges shall be prohibited. Art. 11 prescribes that any advertising indicating interest rate or charges shall specify in a clear, concise and prominent way the identity of the lender, information on the borrowing rate, total amount of credit and the APRC. If applicable, it shall also include that the agreement will be secured by a mortgage, the duration of the credit agreement, the amount and number of instalments, the total amount payable by the consumer and a warning regarding possible fluctuations of the exchange rate. Additionally, most advertising shall be specified by means of a representative example.

The MCD requirements on fair, clear and not misleading communications are similar to the requirements in MCOB3 and are in Sweden covered by the 5 § and 10 § MFL and good lending practices. The Committee of Inquiry argues

that no action is needed in this regard.²³³ In the UK, a new provision was added clarifying that financial promotions may not contain a wording that could create false expectations for a consumer.²³⁴ In practice the new provision is less likely to have any material impact since the current regulation contains detailed provisions on how financial promotions are being made, so that they are fair, clear, not misleading and balanced with appropriate warnings.

The current requirements in MCOB3 will be simplified as a result of the MCD and several provisions will be removed.²³⁵ Even though it is argued in both states that art. 10 is not going to add any substance to existing rules on advertisement, the UK regulator has decided to act. By adding further details to the existing rules as well as removing some, the regulator acts differently to what is suggested in Sweden, to leave the existing provisions untouched.

To lenders in the UK providing RMCS the new rules mean additional information requirements in marketing because of the demand of a representative example.²³⁶ Adverts will require larger space and as a consequence, higher costs.²³⁷ A representative example and APRC were implemented in 7 § KkrL applying to all consumer credit offers as a result of the CCD.²³⁸ Swedish legislation does to a large extent comply with art. 11 apart from a few requirements. The number of instalments have to appear from the marketing, the identity of the creditor, information that the loan is secured by a mortgage and a warning about fluctuations of the exchange rate.²³⁹

An existing requirement in both states is the demand on APRC in communications. Following art. 11, the APRC has to appear at least as prominently as any interest rate. Despite this existing demand in Swedish law, the Committee suggests clarification.²⁴⁰

b) Article 13 General Information

General information must be available for consumers, it should be clear and comprehensible and art. 13 specifies a long list of information requirements.

233 SOU 2015:40 (n. 35) 136.

234 MCOB3A, s 3A(2)(4), (n. 36).

235 Ps15/9 (n. 157) 28.

236 Ps15/9 (n. 157) 28.

237 Consultation Paper Cp14/20, Implementation of the Mortgage Credit Directive and the new regime for second charge mortgages. September 2014, p. 103 (Cp14/20). The Consumer Credit (Advertisements) Regulations 2010, SI 2010/1970, has similar requirements but do not apply to credit agreements secured on land. See Section 11 (5).

238 Prop. 2009/10:242 (n. 88) 93.

239 SOU 2015:40 (n. 35) 135–139.

240 Ibid., pp. 137–138.

Foremost it requires a representative example and a general warning concerning possible consequences of non-compliance with the commitments linked to the credit agreement. Further, information is required on the total cost of the credit, the total amount payable by the consumer, the APRC, conditions directly relating to early repayment and whether a valuation of the property is necessary.

To comply with the provisions the FCA has copied out art. 13 but, in accordance with the discretion, chosen not to oblige creditors to include any additional types of warnings. The new rules have been implemented together with the statement that the information may be provided on the lender's website.²⁴¹ In Sweden the provision on general information introduces a new requirement on lenders. It is suggested that the implementation should be made in wording close to the directive, only with a few editorial changes made for clarification purposes and to adjust the wording to Swedish circumstances.²⁴²

The MCD requirements on general information appear to be similar to existing as well as prospective rules on financial promotions. Because of the similarities, although it is a new requirement in both states, the consequences on lenders are not likely to be big in terms of what kind of information needs to be collected and provided.

9.3 *Advice and Information*

a) Article 8 Obligation to Provide Information Free of Charge to Consumers

Information should be provided to consumers without charge, according to art. 8. In the UK, there is a lack of an equivalent rule.²⁴³ Also the Swedish regulation lacks a similar rule, even though it is likely that information is already provided without charge. It is suggested that the provision is added in 6 § KkrL, applying to all consumer credit.²⁴⁴ Whether the new rules on information free of charge are going to have a material impact remains to be discovered.

b) Article 15 Information Requirements Concerning Credit Intermediaries and Appointed Representatives

Art. 15 lists information requirements concerning credit intermediaries, requiring them to provide a range of information before carrying out credit

241 Financial Conduct Authority, the Mortgage Credit Directive Instrument 2015, FCA 2015/18, Section 3B (FCA 2015/18).

242 SOU 2015:40 (n. 35) 140–141.

243 A new rule has been introduced in MCOB2A Section 2A (6)(1R). Cp14/20 (n. 237) 21.

244 SOU 2015:40 (n. 35) 139.

intermediation activities. The information includes e.g. whether the intermediary is tied to or works exclusively for one or more creditors, whether he offers advisory services and the fees payable by the consumer.

In the UK art. 15 has caused amendments to MCOB4, adding that a credit intermediary may only claim to be independent if its consideration of the mortgage lending market is unlimited.²⁴⁵ In Sweden 48 § KkrL provides an obligation, when marketing, to inform the consumer whether the intermediary is independent or not. This requirement will have to be expanded slightly.²⁴⁶

The MCD requirements to present fees and remuneration policies are similar to the current regulation in MCOB4.4A as well as 48 § KkrL and will not cause any significant changes. Art. 15 is going to cause other minor changes in both states such as that the intermediary needs to name the lenders to which he has ties and must also be prepared to tell the consumer about commissions paid by different lenders.²⁴⁷ There seems to be a similarity in this regard as to how the two states are going to be affected.

c) Article 16 Adequate explanations

The documents that are created by the lender during the lending process in the UK are heavy and precise. The documents are created for each and every case, based on the specific circumstances. As the consumer is asked to read, confirm and sign documents that can easily reach a hundred pages in total, consumers are recommended to seek independent legal advice, something that does not occur in Sweden. The documentation that is signed by the Swedish consumer contains fewer than ten pages including terms and conditions and the debt instrument. The differences between the amounts of paperwork may be seen in the regulations on adequate explanations.

According to art. 16, Member States must ensure that consumers are provided with adequate explanations before entering into the agreement. This contains in particular the ESIS, the essential characteristics of the products proposed and the specific effects the products proposed may have on the consumer.²⁴⁸ On advised sales, which comprise the bulk of mortgage sales in the UK, the new rule will not have any significant impact because of the existing comprehensive requirements on explanations. The new requirement will instead be relevant foremost in relation to execution only (non-advised) sales

²⁴⁵ FCA 2015/18 (n. 241), Section 4(4A)(4R).

²⁴⁶ SOU 2015:40 (n. 35) 87 and 158.

²⁴⁷ Cp14/20 (n. 237) 16; SOU 2015:40 (n. 35) 86–88.

²⁴⁸ ESIS: European Standardised Information Sheet, is a pre-contractual information form. Regarding the ESIS, see below under art. 14.

where similar rules do not exist today.²⁴⁹ The new provision is also going to have an impact on second charge mortgages, as they are now going to be covered by the same rules. To second charge mortgage lenders this new provision is going to add a new contact point with the consumer.²⁵⁰ The requirement on an adequate explanation as such is new to the MCOB.²⁵¹ Following the new rule the lender will be obliged to provide adequate explanations to the consumer before any binding offer is issued.²⁵²

In Sweden, it is considered good credit lending practice to make sure the consumer understands the agreement. To clarify this, as a result of the CCD, the provision was added in 6 § KkrL that the lender should provide all the information the consumer needs. The Committee of Inquiry suggests adding a provision stating that good lending practices should be considered also by independent credit intermediaries, instead of only by lenders and intermediaries acting on behalf of a lender.²⁵³

It is clear that both states have been concerned by what information is provided to the consumer pre contract. This article, as well as several others, is going to have an impact on second charge mortgages, an issue that will not arise in Sweden since there is only one regime for consumer lending.

When it comes to the meaning of “adequate explanations” it seems like both states have to a great extent fulfilled this obligation, but in different ways. The UK in the form of regulating advised sales to a great extent, Sweden by using the principle of good lending practices and by applying the CCD equally to all credits. Instead of listing what information is to be provided and when, as in MCOB4, the principle of good lending practices requires the lender to always adjust and make sure the consumer understands all important information.

Execution only sales do not exist in Sweden (since there is no advised sales) but instead some intermediaries are going to be affected. Art.16 will likely have only a small impact in both states and the impact is going to affect different areas as a result of the different concepts of explanations and advised sales.

d) Article 17 Calculation of the APRC

Art. 17 introduces a calculation formula of the APRC which is to be used on several occasions when communicating with consumers. The calculation

²⁴⁹ Cp14/20 (n. 237) 106.

²⁵⁰ Cp14/20 (n. 237) 28.

²⁵¹ Ibid, p. 10.

²⁵² FCA 2015/18 (n. 241), s 4A(2).

²⁵³ SOU 2015:40 (n. 35) 149–151.

formula of the APRC is maximum harmonisation that leaves no discretion to the Member States. A standardised method for calculating APRC is an existing mortgage requirement in the UK.²⁵⁴ Even if the MCD introduces a slightly different formula, the APRC is to a large extent similar to the APRC under MCOB.²⁵⁵ The situation in Sweden is similar since a method for calculating APRC has been in place for all forms of credits since the CCD.²⁵⁶ Therefore, in both states, the impact is merely a new mathematical formula.

e) Article 22 Standards for Advisory Services

Member States are obliged, under art. 22, to ensure that consumers are informed on whether advisory services are being or can be provided (i.e. there is no obligation to provide advisory services). Advisory services must only be provided by creditors, credit intermediaries or appointed representatives and the advice must contain information, via a durable medium, on e.g. whether the recommendation is based only on one lender's products or products of a wide range of lenders. Member States may prohibit the use of the term "advice" or similar terms, but are obliged to at least restrict the use of the term "independent advice" and "independent advisor".

In the UK advisory standards as such are considered by the FCA to be in line with the directive, and therefore no changes have been made in this regard.²⁵⁷ The FCA has chosen not to ban the use of the term "advice".²⁵⁸ Neither is any other ban required since there is already a ban on the use of the wording "independent mortgage advisor". Two new rules have been introduced adding that an advisor must explicitly inform the consumer whether advisory services are being or can be provided and extending the requirement to provide a record of the recommendation.²⁵⁹

The discretion allows Member States to introduce an obligation to warn the consumer about risks related to the credit. This is not necessary in Swedish law according to the Committee, since good lending practices already include the obligation to inform the consumer about the possible consequences of a mortgage loan. Neither does it suggest a prohibition of the term 'advice', but

254 MCOB10 (n. 36); Cp14/20 (n. 237) 10.

255 Cp14/20 (n. 237) 14. The changes have resulted in the introduction of MCOB10A. FCA 2015/18 (n. 241), s 10A.

256 SOU 2015:40 (n. 35) 146.

257 Cp14/20 (n. 237) 112.

258 Cp14/20 (n. 237) 113.

259 MCOB4A, FCA 2015/18 (n. 241), Section 4A; Ps15/9 (n. 157) 55.

the restrictions on terms like 'independent adviser' are new requirements that need to be regulated.²⁶⁰

The FCA has made a similar decision and has chosen not to introduce an obligation to warn the consumer or prohibit the use of the term 'advice'.²⁶¹ In the UK, the use of 'independent mortgage adviser' is already restricted and the FCA has considered that there is no need to restrict it even more.²⁶²

The introduction of the term 'advice' in Swedish consumer credit law will require a new definition. Within good lending practices there is no requirement to provide advice. Since advisory services as such are new, to inform on whether advisory services are provided or not is a new requirement, as is the documentation and information. Authorisation and regular control of competence is an existing requirement in the UK, but in Sweden the MCD requirements on the quality of advice need to be implemented and likely require some authorisation for staff offering mortgage advice.²⁶³

On the one hand, the clearest similarity between the states when it comes to advice and advisory services is the obligation for lenders always to act in the consumer's best interests. On the other hand, the differences are vast. The UK already has a detailed regulation on advisory standards and only exceptionally accepts non-advised sales, whereas the situation in Sweden is quite the opposite. Although to give advice in some situations is considered good lending practice, advice is not the main rule, but an exception, and there is no explicit regulation in this regard. The UK restrictions on non-advised sales and requirements to retain a record in this regard do not have a Swedish equivalent.

Art. 22 is going to affect the two states differently, only slightly extending the already existing rules in the UK but adding a whole new concept in Sweden. In both states it has been considered unnecessary to ban the use of the word 'advice' and to inform the consumer about the risks is already a part of the consumer credit regulations in both states.

f) Article 24 Variable Rate Credits

If the credit agreement is a variable rate credit any indexes of reference rates used to calculate the borrowing rate must be presented in a clear, accessible and objective way according to art. 24. To comply with this requirement the FCA has copied out the provision and given no further comment in this

²⁶⁰ SOU 2015:40 (n. 35) 188–189.

²⁶¹ Cp14/20 (n. 237) 113.

²⁶² Ibid.

²⁶³ SOU 2015:40 (n. 35) 181–187.

regard.²⁶⁴ Neither is there in *konsumentkreditlagen* today any provision specifying the accessibility of a reference rate.²⁶⁵ Art. 24 will therefore influence the two states in a similar way.

9.4 Disclosure

a) Article 14 Pre-contractual Information and Reflection Period

Art. 14 requires certain pre-contractual information taking the form of the ESIS. The ESIS may not be modified in terms of form or language though in certain cases some changes in language are allowed as long as they do not change the material content but make it clearer to the consumer.²⁶⁶ Information required under national law should be given to the consumer in a separate document. Additionally, art. 14 introduces a reflection period of at least seven days after a binding offer from the lender. Alternatively, a seven-day right of withdrawal after the agreement is concluded.

Pre-contractual information is regulated in both states to ensure consumer protection. Pre-application disclosures have in both states the aim of ensuring a certain degree of knowledge and understanding before the consumer enters into a binding agreement, and also to enable a comparison with other offers. To allow this, it is required in both states to give the information in written form and to allow a reasonable time of reflection. In the UK it has been chosen to define 'initial contact' and regulate what information should be provided at that time in a prescribed form of wording. In Sweden, less information is required by law and certain issues are left to the lender to determine, such as 'a reasonable time'. The concept of good lending practices has an important function in Sweden in this regard whereas pre-contractual disclosure in the UK is regulated in a way more similar to a given template called the KFI.

The ESIS has similarities with the KFI but lacks information on the total borrowing.²⁶⁷ On the other hand, the KFI does not contain information on the potential impact of interest rate changes and the new seven day right of reflection.²⁶⁸ Since the ESIS may not be amended, every lender is obliged to use it in its original form, but lenders in the UK will have the opportunity to give further information detailing the total debt and cost.²⁶⁹ When it comes to mortgage loans the ESIS has no Swedish equivalent, since the information

²⁶⁴ FCA 2015/18 (n. 241), Section 2A (5).

²⁶⁵ SOU 2015:40 (n. 35) 171–172.

²⁶⁶ Ps 15/19 (n. 157) 15.

²⁶⁷ Ibid, p. 11.

²⁶⁸ Cp14/20 (n. 237) 11.

²⁶⁹ Ps15/9 (n. 157) 11.

required today is limited and not given in any specific form. A special form, Standard European Consumer Credit Information (SECCI), is used for credits not secured by mortgage. The information provided in the SECCI must also be given in relation to mortgage credit but not in any specific form. The introduction of the ESIS will extend the usage of standardised forms in Sweden.²⁷⁰ Since the KFI is to a large extent similar to the ESIS, the introduction will cause only a small change to UK lenders. The SECCI, introduced by the CCD, contains significantly less information. The introduction of the ESIS is therefore likely to create an increased administrative burden on Swedish lenders. Until today, pre-contractual information was easier if the loan was secured by mortgage, but the introduction of the ESIS will likely have the opposite result.

As a next step in the lending process the UK consumer will receive an offer document based on the KFI and containing additional information. Also in Sweden there are requirements as to what kind of information has to be included in the agreement, but the clearest difference is the amount of information and the fact that no KFI forms the basis of the offer document. The offer document in the UK is wider than the contract itself, in the sense that it contains explanations and illustrations whose content is specified by MCOB, whereas the Swedish offers are concentrated basically on terms and conditions that are to a large part standardised. Both states require the offer to be in a durable medium and the wording to be clear and accessible.

The binding offer required by art. 14 does not preclude lenders from continuing also to provide non-binding indicative offers, which is common in the UK.²⁷¹ The reflection period extends the sales process but since it currently normally exceeds at least seven days in the UK the FCA does not consider the new requirement to have any material impact in this regard.²⁷² Also in Sweden conditional offers are common, taking the form of loan commitments. This should not be affected by the obligation to provide a binding offer. The seven days of reflection is a new requirement also in Swedish mortgage lending. The Committee points out the possibility for consumers to accept the offer before the end of the seven-day period in case the loan is needed quickly. Out of this reason the Committee suggests not using the discretionary possibility to require at least a certain number of days of reflection, since this might be a disadvantage to the consumer. If the legislator chooses this approach the Swedish sales process can continue to be significantly shorter than the UK sales process.

²⁷⁰ SOU 2015:40 (n. 35) 142–145.

²⁷¹ Ps 15/9 (n. 157) 12–13.

²⁷² Cp14/20 (n. 237) 105.

b) Article 27 Information Concerning Changes in the Borrowing Rate
Member States are obliged under art. 27 to ensure that creditors inform consumers of changes in the borrowing rate before the change takes effect. This information shall include the amount of the payments to be made after the new rate takes effect and, if applicable, information on changes in the number or frequency of the payment.

After the sale is completed UK lenders have to provide information enabling consumers to check the accuracy of the agreement and the sales process, which is not required in Sweden. Both states require information to be provided during the contractual period. Ongoing information on interest rate changes is an existing consumer right in the UK.²⁷³ Therefore art. 27 has not resulted in any significant changes, other than the specification that the information has to include the amount of payments and changes in the number or frequency of the payments.²⁷⁴ Also in Sweden, ongoing information is required and the Committee of Inquiry argues that art. 27 is completely covered by the KkrL requirements and no changes are therefore needed.²⁷⁵ Since there are restrictions on adjustment of the interest rate in 17 § KkrL and in the advising and selling standards in MCOB4, art. 27 appears to have an insignificant impact on both states.

9.5 *Responsible Lending*

In both states the authorities have recently introduced restrictions on lending to prevent mis-selling and household indebtedness. In the UK it has been chosen to apply a loan to income ratio, whereas in Sweden a loan to value ratio is applied. In the UK, the restriction is foremost on the lender, restricting a percentage of the loans that are granted. In Sweden, the consumer is restricted since only a percentage of the value of the property may be granted as credit. In this way, all borrowers are affected. The aim and goal is the same in both states, although the ratio is differently calculated and has a direct effect on different parties.

a) Article 7 Conduct of Business Obligations when Providing Credit to Consumers

Member States are obliged to make sure creditors are acting honestly, fairly, transparently, professionally and take the consumer's best interests into account.

²⁷³ MCOB7 (n. 36); Cp14/20 (n. 237) 10.

²⁷⁴ MCOB7A, Section 7A (2), (n. 36).

²⁷⁵ SOU 2015:40 (n. 35) 169–171.

To act in the consumer's best interests is an existing requirement in the UK, with wording almost identical to the MCD, requiring the lender to act honestly, fairly and professionally in accordance with the best interests of the consumer.²⁷⁶ In Sweden, to take the consumer's best interests into account is a part of good lending practices and is explicitly expressed in 6 § KkrL. Also, the general statement in LBF, requiring firms on the financial market to be run in a healthy way, includes a requirement to act honestly. There is however a need to specify this provision to make sure that all lenders are covered.²⁷⁷ The provision does not appear to have a great impact on either of the two states. The clarification needed in Sweden seems to be of marginal significance.

According to art. 7(3), when establishing and applying remuneration policies for staff responsible for the assessment of creditworthiness, Member States must ensure that creditors follow certain principles. The remuneration policy must be consistent with effective risk management, may not encourage risk-taking that exceeds the level of tolerated risk of the creditor, and it must in particular not depend on the number of applications accepted. The remuneration policy must not prejudice the ability of staff to act in the consumer's best interests and may not be related to sales targets.

The new chapter in MCOB is initiated by the statement that a lender or credit intermediary may not remunerate its staff in a way that impedes the lender from complying with the rules.²⁷⁸ The requirements introduced by the MCD in this regard means a small change resulting in a more specified and detailed provision. To supplement the existing rules, the FCA has more or less copied out the directive.²⁷⁹ The main impact of the MCD is the prohibition on the use of sales targets.²⁸⁰

In Sweden, consistency with effective risk management and a ban on encouragement of risk-taking are today regulated in other areas of the financial market.²⁸¹ The MCD introduces new remuneration policy requirements in the field of mortgage lending. The Committee of Inquiry proposes provisions

²⁷⁶ MCOB2, Section 2(5A) (1), (n. 36).

²⁷⁷ SOU 2015:40 (n. 35) 227.

²⁷⁸ MCOB2A, Section 2A (1) (n. 36); FCA 2015/18 (n. 241), Annex D, Section 2A (1).

²⁷⁹ Cp14/20 (n. 237) 20.

²⁸⁰ Cp14/20 (n. 237) 107.

²⁸¹ Remuneration policies are today regulated in, for example: Föreskrifter om ändring i Finansinspektionens föreskrifter (FFFS 2011:1) om ersättningssystem i kreditinstitut, värdepappersbolag och fondbolag med tillstånd för diskretionär portföljförvaltning. (FFFS 2014:22).

in the new act with wording similar to the MCD, but with a focus on the parts directly addressing consumer protection.²⁸²

Even though remuneration policies are regulated in both states, the regulation in Sweden has so far addressed capital requirements in the securities and investments markets.²⁸³ The MCD introduces a whole new concept of consumer protection in remuneration policies among mortgage lenders, instead of the previous focus on risk management. Without statistical data, it is hard to make any conclusion on whether lenders in Sweden are today acting in line with the requirements of the MCD or if the introduction of new rules is going to have an impact on the behaviour of lenders. The limited use of third parties such as intermediaries on the Swedish mortgage market might indicate a lower risk of inducements conflicting with the interests of the consumer, in comparison with the UK where third parties are more often involved.

From a regulatory perspective, art. 7(3) is going to have a bigger impact in Sweden than in the UK, where remuneration policies on the mortgage market are already regulated. Swedish banks should recognise the new rules from other areas of the financial market and the general principle of good lending practices. In the UK the result is mainly a new provision that clarifies already existing requirements.

b) Article 9 Knowledge and Competence Requirements for Staff

The mortgage lending process in the UK involves documents and processes that do not exist in Sweden, which gives the lender the opportunity to deal with many tasks themselves. Because of the tasks involved as a result of a reduced number of parties, an account manager in Sweden needs to have a broader knowledge than an account manager in the UK. Instead of relying on an independent valuer, the Swedish account manager would often rely on his own valuation together with the valuation made by the estate agent. The account manager would also do the conveyance himself, instead of relying on a solicitor doing the legal work. It appears that the parties in the UK are specialists and have a deeper knowledge, which is likely to be needed on the highly regulated market in the UK.

Art. 9 introduces new EU requirements on knowledge and competence for staff. A creditor's staff should possess and maintain an appropriate level of knowledge and competence when carrying out advisory services or manufacturing, offering or granting loans secured by mortgage. Minimum appropriate knowledge, set out in Annex III of the MCD, is knowledge of credit products

²⁸² SOU 2015:40 (n. 35) 231–233.

²⁸³ SOU 2015:40 (n. 35) 232.

related to residential property, laws related to credit agreements for consumers and consumer protection, the property purchase process, valuation, land registers, the market, business ethical standards, creditworthiness assessment process and financial and economic competency.

In the UK there are currently requirements on knowledge and competence, but as a result of the MCD, the requirements will have to be expanded. A broader set of staff and areas of knowledge are covered by the new regulation. Even if employees today are competent, the new demands will require lenders to demonstrate it.²⁸⁴ This means that all employees involved in the mortgage lending process will have to have appropriate qualifications. Since second charge mortgages in the future will be covered by the same regime, the new regulations will also have an impact on the competence of staff dealing with second charge mortgages. The FCA has given discretion to lenders to identify which employees are affected and how their competence shall be ensured.²⁸⁵

The FCA has copied out the MCD requirements, adding that a lender must take into account an employee's relevant professional qualifications when ensuring his competence, which is also a requirement under Annex III of the MCD.²⁸⁶ According to existing rules, a lender must review competence on a regular basis and ensure that employees remain competent.²⁸⁷ This is in line with the requirements in art. 9 and no changes have therefore been made.²⁸⁸

In Sweden today there is, unlike in the UK, no licensing process when it comes to mortgage lending. Following the MCD such process will have to be developed and applied in order to ensure a certain level of knowledge and competence among lenders. Licensing to carry out financial services as such is not unfamiliar to Swedish lenders, since requirements of a certain level of knowledge are already in place in other fields of the financial market.²⁸⁹ It is still unknown whether the license will have the effect of higher knowledge among staff or only create a way of proving the knowledge. Either way, it will give supervisory authorities a new tool to control competence.

The UK mortgage market is already accustomed to a high level of regulation in the field of knowledge and competence, and is using a licensing process. Even though this process will be expanded in the UK following the MCD, the impacts are likely to be bigger in Sweden. In Sweden the licensing process itself

²⁸⁴ Cp14/20 (n. 237) 104.

²⁸⁵ Ps15/9 (n. 157) 31–32.

²⁸⁶ TC s 2(1) (5BR), FCA 2015/18 (n. 241), Annex B, Section 2(1).

²⁸⁷ TC s 2(1) (12R).

²⁸⁸ FCA 2015/18 (n. 241), Annex B, Section 2(1).

²⁸⁹ SOU 2015:40 (n. 35) 228–230.

has to be developed and all staff involved in mortgage lending will have to go through it.

c) Article 12 Tying and Bundling Practices

A tying practice is the offering or selling of a credit agreement only as a package deal with other financial products or services.²⁹⁰ Such practices are as a main rule prohibited under art. 12(1), unless the lender can demonstrate that the result of the practice is a clear benefit to the consumer.²⁹¹ Member States may adopt certain exemptions and allow creditors to require from consumers: a payment or savings account with the only purpose of allowing the credit to be repaid or serve as a security for the lender, a pension or investment product to enable repayment or serve as security, to conclude a separate credit agreement when dealing with a shared-equity loan or an insurance policy.

The general ban on tying products is a new MCD requirement in the UK.²⁹² The FCA and the Swedish Committee of Inquiry have both interpreted the rules as excluding occasions when a 'loyalty discount' is offered as a second product after the first has been taken out, and also excluding financial products that are a fully integrated part of the mortgage which cannot be offered separately, such as a secured overdraft.²⁹³ This interpretation is in line with the general remarks on tying practices pointed out in Section 25 of the MCD preamble.

Also in Sweden a general ban has to be introduced to comply with art. 12.²⁹⁴ In this regard, both states will be affected in a similar way by art. 12.

d) Article 18 Obligation to Assess Creditworthiness of the Consumer

Article 20 Disclosure and verification of consumer information Under art. 18, Member States are obliged to make sure that an assessment of creditworthiness is done before concluding a credit agreement. When assessing the creditworthiness the lender should not rely on the value or increase in value of the property. If a database is to be consulted, the consumer needs to be informed in advance. The consumer needs to be informed without delay about a rejection of the application.

Art. 20 specifies the way the creditworthiness assessment should be carried out, including that it should be based on information on income and expenditure obtained from relevant sources. The information should be appropriately

²⁹⁰ MCD (n. 4) art. 4(26).

²⁹¹ MCD (n. 4) art. 12(3).

²⁹² Cp14/20 (n. 237) 10. The new rules are introduced in MCOB2 Section 2A (2), (n. 36).

²⁹³ Ps15/9 (n. 157) 32; SOU 2015:40 (n. 35) 369.

²⁹⁴ SOU 2015:40 (n. 35) 151–154.

verified, proportionate, limited to what is necessary and kept on record. The request for information should be made in a clear way in the pre-contractual phase. Further, the consumer should be warned that if correct information is not provided, the credit cannot be granted.

As such, the creditworthiness assessment is an existing requirement in the UK and the way of carrying it out is regulated in a way that is in line with the requirements of art. 20. Although the assessment is highly regulated, in consequence of art. 18 and 20 some rules need to be changed. The current exception as regards re-mortgaging will not apply anymore, which means that an assessment needs to be made in every case of re-mortgaging.²⁹⁵ This includes if a lender takes on existing borrowing from other lenders or agrees to advance additional borrowing to existing consumers to fund repairs to the property.²⁹⁶

In Swedish law the creditworthiness assessment is regulated to the extent that no changes are needed regarding the obligation to carry out an assessment and the basis of it. However, KkrL lacks a requirement to verify information submitted by the consumer – a requirement that has to be introduced to comply with art. 20. Since the creditworthiness assessment is already regulated by guidelines, the Committee of Inquiry does not identify any material impact in this regard.²⁹⁷ Further, the basis of creditworthiness assessments and the documentation thereof are requirements that are similar in both states. The UK requirement on every lender's written policy of creditworthiness assessments is, however, unfamiliar to Sweden as well as to the MCD.

The Swedish and the UK lenders will both rely on an external CRA when assessing creditworthiness. However, the Swedish lender will obtain more information, the most significant being the information on income and property owned by the consumer. The lack of independent information on salary in the UK creates a burden of proof on the consumer, in contrast to the Swedish consumer who often provides no documentation at all.²⁹⁸ Despite the limited number of documents provided by Swedish consumers, the general

²⁹⁵ Ps15/9 (n. 157) 6.

²⁹⁶ Ps15/9 (n. 157) 11–12.

²⁹⁷ SOU 2015:40 (n. 35) 161.

²⁹⁸ To be granted a mortgage loan in the UK, consumers would have to provide: payslips, bank statements (proving that the salary has been paid into the consumer's account), a document issued by the employer to detail annual taxable income and deductions (P60), a document proving the consumer's current UK address, proof of any other income including bank statements, details of current credit commitments, property details, solicitor and estate agent details and current life, critical illness and home insurance policy details. Documents required by Barclays, www.barclays.co.uk.

requirements in Sweden to use different sources that provides an up-to-date picture and the performance of a housing cost calculation is likely to cause a similar result. The Swedish account manager would also in most cases access all relevant information from the CRA and the civil register (*folkbokföringsregistret*). Since a solicitor is not involved, the Swedish account manager would not need to ask for this information and the estate agent has direct contact with the bank, and therefore, the consumer does not need to provide such information either.

When it comes to information provided by the consumer, the obligation to explain and warn about the importance of providing correct information is not corresponded explicitly in Swedish law. To some extent the principle of good lending practices requires adequate explanations and is also likely to include the different steps in the credit granting process. Nevertheless, the Committee of Inquiry suggests an explicit regulation in this regard to comply with art. 20.²⁹⁹

It is expressed in the KkrL legislative preparatory works that the value of the property should not normally affect the credit rating. Also, the Swedish Bankers' Association points out that the credit rating is in practice based on the repayment ability rather than the value of the property.³⁰⁰ Since art. 18 is unconditional, however, this requirement has to be explicitly regulated.³⁰¹ An explicit regulation is already in place in the UK where no change is therefore needed. However, it seems like the current practices are similar and in line with the directive in this matter.

Swedish law does not contain a requirement to inform the consumer in advance when gathering information from a database. Therefore, following art. 18, such an obligation needs to be introduced.³⁰² Also, it has to be specified that the consumer should be informed about a rejection 'without delay'.³⁰³ The requirement to document and maintain the procedures and information on which the assessment is based is not unfamiliar to Swedish lenders, but does not apply to all of them. Therefore, to make sure that sufficient documentation is produced by all creditors, the Committee of Inquiry suggests a general requirement on documentation.³⁰⁴ In practice, however, most

299 SOU 2015:40 (n. 35) 162.

300 Swedish Bankers' Association, *Bankföreningens policy om bolån*, February 2013, p. 1 (Bankföreningens policy om bolån).

301 SOU 2015:40 (n. 35) 164.

302 SOU 2015:40 (n. 35) 163.

303 Ibid, pp. 165–166.

304 Ibid, pp. 162; 239.

mortgage lenders are banks that are already obliged to document and maintain information.³⁰⁵

Both states have requirements on creditworthiness assessments and how they are carried out. Even if verification is not required in Sweden today, the introduction of such a demand is not likely to cause any significant changes to the present process since information is mostly collected from external sources. Also, guidelines are in place that are in practice followed carefully by lenders.

The consequences of arts. 18 and 20 on Swedish law appear to be significantly larger than the consequences in the UK where only re-mortgaging is affected. Very few changes in the UK are viewable whereas at least the wording of Swedish acts can look forward to several changes. Whether new regulation on warnings, credit rating in connection with the value of the property, to inform 'without delay' and to document are going to have any effects in practice in Sweden remains to be seen.

e) Article 19 Property Valuation

Reliable standards for valuation shall be ensured by the Member States according to art. 19. Valuers should be professionally competent and sufficiently independent from the mortgage underwriting to enable an impartial and objective valuation. Valuation standards should take into account internationally recognised valuation standards developed by, for example, Royal Institution of Chartered Surveyors (RICS).³⁰⁶ RICS issues valuation qualifications and standards and is established in the UK as well as in Sweden. In both Member States the standards are regulated by the market.³⁰⁷

The art. 19 requirements on a recognised standard for valuation are new in the UK.³⁰⁸ To comply with art. 19, the FCA has introduced new provisions more or less by copying out the directive.³⁰⁹ The FCA points out that the MCD does not demand a physical valuation in every case.³¹⁰ Also in Sweden the requirements are new, since there is no legislation in force today regulating valuers

305 The requirement on documentation is stated in 8:3 LBF and is limited to "credit institutions" which is defined in 1:5 as a bank, firm or association with the permission to act on the financial market.

306 Recital 26 MCD (n. 4).

307 RICS is an organisation established across the world, see the webpage www.rics.org.

308 Cp14/20, p. 10.

309 FCA 2015/18 (n. 241), Annex C, Section 1(3); Financial Conduct Authority, the Prudential Sourcebook for Mortgage and Home Finance Firms, and Insurance Intermediaries, MIPRU1, Section 1(3).

310 Ps15/9 (n. 157), p. 32.

or valuations of residential property.³¹¹ Several enterprises are selling statistical valuations and the valuation methods vary across the country.³¹² However, valuation is a mandatory part of the estate agent education and their responsibilities throughout the selling process should ensure a certain level of accuracy.³¹³ The Committee of Inquiry interprets the directive similar to the FCA, stating that a statistical valuation (i.e. no physical valuation) should be enough to be in line with the directive. This means that the different kinds of valuation processes in Sweden continue as before.³¹⁴

The MCD requirement on sufficient independence from the mortgage underwriting may cause, if not problems, at least some changes in the Swedish process. Even though the directive allows the valuation to be made internally by the lender, it does not allow the valuation and the underwriting to be made by the same individual. Since valuation is already made externally in the UK, the new provision is not going to have an impact in this sense.

9.6 *Repayment*

According to art. 25, consumers shall have the right to discharge their obligations under a credit agreement prior to the expiry date. Member States may provide that lenders are entitled to compensation for costs directly linked to early repayment. However, compensation must be fair, objective and within the limit of the financial loss suffered as a consequence of early repayment, but must not constitute a sanction on the consumer. On request of the consumer, the lender must provide the information necessary to consider the options of early repayment.

Even if a consumer in the UK has the possibility to repay early, this right has not been explicitly regulated in mortgage regulation until the implementation of art. 25.³¹⁵ In Sweden the right to repay early is an unconditional right regulated in 32 § KkrL, as are the conditions under which the lender may charge the consumer. In the UK the gap between existing rules and art. 25 has been covered by the adoption of a new rule stating that any consumer has the right to discharge his obligations prior to its expiry and adding additional disclosure

³¹¹ Dir. 2014/113, p. 8.

³¹² SOU 2015:40 (n. 35), p. 235.

³¹³ 15 § *fastighetsmäklarförordningen* (2011:668) and 6 § *fastighetsmäklarlagen* (n. 211).

³¹⁴ The different kinds of processes are: statistical valuation, valuation by an in-house valuer, valuation by an estate agent or an externally authorised valuer. SOU 2015:40 (n. 35), p. 237–238.

³¹⁵ Cp14/20 (n. 237) 19.

requirements when it comes to early repayment.³¹⁶ In the UK, an early repayment charge must be able to be expressed as a cash value and may not exceed a reasonable pre-estimate of the costs caused by the early repayment. These are rules that are similar in Swedish regulation. The MCOB requirements on transparency, fairness and prohibition on excessive charges are also covered by good lending practices, which are pointed out in 36 § KkrL.

The maximum amount payable as a result of early repayment must in the UK be expressed in illustrations communicated to the consumer.³¹⁷ In Sweden, an obligation to explain the consequences of early repayment follows from good lending practices, which create a functional equivalence. The requirements under art. 25 are similar and introduce merely the explicit right to repay early and slightly wider disclosure obligations. The Swedish Committee of Inquiry suggests that the disclosure requirements are clarified by codification.³¹⁸

When it comes to the opposite situation of payment shortfalls, UK lenders are required to adopt a written policy in contrast with Swedish lenders. MCOB also clarifies how to work with consumers in payment difficulties, which the KkrL does not. The regulations on deductions of claims when the lender receives payment are similar. It appears that both states already have rules and customs in place that are to a large extent in line with art. 25. Most likely, the regulatory changes are only clarifications and will not have any material impact in either of the states.

10 Conclusion

When comparing Sweden and the UK it is clear that the two states have chosen different solutions to protect consumers in mortgage lending, despite previous EU harmonisation in related fields. The nature of mortgage markets is generally considered to be endemically local.³¹⁹ It is verified by the analysis that this general statement also applies in the comparison between Sweden and the UK. The differences between mortgage markets can be explained partly by the different regulatory frameworks, but other factors such as culture, legal traditions and language also contribute to diversity in EU mortgage markets as a whole.³²⁰ Similarities that have appeared through the analysis might be a

316 FCA 2015/18 (n. 241), Section 2A (4) and 7A (3).

317 MCOB12, Section 12(3), (n. 36).

318 SOU 2015:40 (n. 35) 178–180.

319 Brown (n. 67) 565.

320 Brown (n. 67) 570.

result of previous harmonisation, as requirements introduced by previous EU acts may have been applied to mortgage lending voluntarily by Member States.

The UK regulations create a comprehensive system of rules that leaves less discretion for the lender in comparison to Swedish rules. The Swedish regulations appear to have a limited cover, specifically regarding how the lender proceeds in mortgage lending. The MCD is likely to diminish this discretion. For example, the new requirements create a higher administrative burden on Swedish lenders, while the UK lenders are already accustomed to a highly regulated market. In this sense, Swedish lenders have a longer path to fulfil the requirements of the MCD than lenders in the UK.

Although many differences may be found when looking at mortgage regulations in the two states, a conclusion on what solution gives better consumer protection is not possible to make simply out of the number or size of documents provided but must be viewed in a wider context. One aspect is the legal traditions, another is the context in which the regulations operate. As pointed out by the Swedish Bankers' Association, reasons for stability on the mortgage market in Sweden are, for example, the effectiveness of public registers, comprehensive credit information about borrowers and the very limited speculation on the housing market.³²¹ As has been discussed throughout this paper, information and proof provided by the consumer are used to a much greater extent in the UK, since there is a lack of equivalent public registers and the available credit information is less detailed. Further, speculation on the housing market is more common in the UK. 'Buy-to-lets' composed in the fourth quarter of 2014 14.9 percent of the total lending.³²² These facts might create a more urgent need for precise regulation in the UK.

Another fact that separates the customs in mortgage lending is the use of solicitors and the custom of seeking independent legal advice. The complexity of contracts in the UK creates a need for legal advice to a consumer without legal knowledge, legal advice that appears not to be needed in Sweden. Or at least, the regulator and the market have not yet created such a custom.

Lisa Whitehouse argues that UK mortgage consumers prior to the implementation of the MCD did not receive sufficient information, were not able to negotiate their agreements and were subject to onerous terms and conditions. Her suggested solution is the inclusion of mortgagors within the consumer protection regime.³²³ The Swedish KkrL explicitly refers to and defines the status of an individual as a consumer; this is not the case in the UK today where

³²¹ *Bankföreningens policy om bolån* (n. 300) 1.

³²² Bank of England, statistical release (n. 135) 3.

³²³ Whitehouse (n. 6) 162.

MCOB refers to an 'individual'. Whitehouse argues that this might have the consequence that mortgagors receive less protection because of the fact that they are not included in the consumer protection regime. However, one reason for the complexity of the UK lending documents is the requirements from the FCA, created with the specific aim of protecting consumers.

The question arises whether a consumer, without any knowledge in this regard, could have much use in reading complex legal documents. Here, the rules on advice and explanations are important. In the UK, the new MCD rules on adequate explanations will only affect execution-only and second charge mortgage sales, which are not covered by today's rules on advised mortgage sales. The provision is going to have only a small impact on Swedish intermediaries, since good lending practices already demand explanations to a great extent.

The regular use of loan commitments is another fact that distinguishes the Swedish lending process from the process in the UK. Much of the work that an account manager in the UK completes when approached by a consumer has in many cases already been completed by the Swedish account manager before the property was even found. This includes the creditworthiness assessment and collecting information from the CRA. The lending process starts earlier, which means that it can also be completed earlier, allowing a shorter time between the property being found and the mortgage being granted. As such, the assessment is similar and when investigating how long it might take to get to the final stage one must also include the work that has been completed earlier.

The number of parties involved in the process has an impact on its costs and length. In the UK a buyer would pay a solicitor, an external valuer, and is recommended to seek independent legal advice. In contrast, the Swedish buyer saves the cost of a solicitor who is not at all involved in the conveyancing or as legal adviser. Instead, more tasks and responsibilities are carried out by the estate agent and the account manager. Since the valuation is often done by the account manager or the estate agent, this saves the consumer the cost of an external valuer. Recognised standards for valuation following the MCD are new in both states and in Sweden no legislation regulates residential property valuations. The fact that Swedish lenders often use internal valuers may cause some changes that will not be needed in the UK.

The lending process in Sweden is more dependent on the seller and buyer than on the other parties. In the Swedish lending process, there are no built-in time limits and in theory a mortgage loan can be granted within one day. Since the UK regulations require two meetings, third parties and more documentation, the mortgage lending process can take weeks and even months.

If independent legal advice is necessary to understand the documents, the next question is whether all consumers in need of this can afford it. The limited requirements regarding documentation in Sweden, along with the differences in legal culture, create easier and more comprehensible documents. A natural consequence of the differences in legal culture is more complex contracts in the UK than in Sweden.³²⁴ The MCD will cause additional documentation in Sweden as a result of the introduction of the ESIS. The ESIS is new to both states but is recognised in the UK as being similar to the present KFI.

The seven-day reflection period is new to both states but is not likely to lengthen the lending process in the UK, whereas this could be the case in Sweden. Of course, the Swedish seller's desire to act fast and maybe sell to the buyer who obtains his finance first may have the result that the reflection period is not used. The desire to act fast cannot be fulfilled to the same extent in the UK. The downside of the Swedish way of working fast is that if the account manager does not know the consumer from the start, the lending process is not likely to give him this opportunity. In the UK, however, the account manager

324 The way of interpreting legislation appears to be mirrored in the way legal contracts are interpreted. Two basic theoretical premises form opposing starting points. The intention theory, where the importance is the intention of the parties, and the expression theory where the importance is what the parties actually express through the contract (Zweigert & Kötz (n. 38) 401). Even though neither of these theories are applied in their pure form, it can still be argued that the fact that in Common Law countries the courts try to adhere to the wording of the document as far as possible is an indication of an expressional approach. Legal certainty is considered more important than the true intention of the parties, with the consequence that parties in Common Law countries should, as a main rule, be bound only by what is written in the contract (Zweigert & Kötz (n. 38) 406–408). This can be opposed to the continental approach expressed in legislation that to find the real intention of the parties is the aim of construction. In this intentional approach what counts is what both parties meant and not what they said (Zweigert & Kötz (n. 38) 403–404). Swedish regulation differs from the continental approach in the way that it lacks general contract law regulation. *Avtalslagen* (1915:218) (The Terms of Contract between Tradesmen Act) has a general scope, but has many gaps that have to be complemented by general contractual principles (J. Ramberg and C. Ramberg, *Allmän avtalsrätt*, 8 edn (Stockholm: Norstedts Juridik AB, 2010) 24–26 (Ramberg)). In Swedish contract law the common intention between the parties has priority above the expression of the contract and should form the basis for construction (Ramberg, pp. 131–132). Different ways of constructing contracts has the natural consequence that contracts are also drafted differently in different legal traditions. As we see in this particular example, the differences between contract law in Sweden and in the UK have the natural consequences that contracts are long, detailed and complex in the UK whereas they are shorter and less detailed in Sweden.

and the consumer will meet several times and discussions and time period will be longer. From a consumer protection perspective, this is an advantage since it makes sure that the account manager knows the consumer. However, since intermediaries are rarely used in Sweden, the account manager will often have the possibility to get to know the consumer even before the lending, which of course is desirable.

The rare use of intermediaries in Sweden could open up a window for unfair contracts, since the lenders may not be compared to the same extent. The ambitious borrower would approach several banks to obtain comparable offers but as this is time consuming the consumer may be encouraged not to. On the other hand, since giving an offer and advice in the UK is far more complex than in Sweden it is likely that the UK consumer going through the same procedure would end up consuming a lot more time. This may create a lucrative market for intermediaries in the UK. Following the MCD, intermediaries will have to provide slightly more information than before, which will have a greater impact in the UK where intermediaries are more common.

Authorisation when dealing with mortgage sales is used to a greater extent in the UK than in Sweden to ensure appropriate knowledge. Authorisation is needed for financial promotions as well as for mortgage sales. Therefore, the new standards for advisory services will only have a minor impact in the UK whereas the standards will introduce a whole new concept in Sweden. A licensing process for mortgage lending will have to be developed in Sweden as a consequence of new requirements whereas in the UK the impact is foremost a broader scope of employees being subject to licensing requirements which will affect the second charge market. Second charge mortgages are going to be added to the definition of RMCs as a consequence of the MCD, which is going to have a material impact on many lenders. This type of problem, caused by a widened scope, does not arise in Sweden because of the KkrL's even broader scope.

The need to act in the consumer's best interests is an existing requirement in both states but they will both have to introduce bans on tying and bundling practices. Remuneration policy regulations are not completely new to either of the states but in Sweden the consequence is also a regulation in the area of mortgage lending, instead of the previous regulation merely in other areas of the financial market. The MCD obligations to carry out a creditworthiness assessment, the basis of it and its documentation are existing requirements in both states. These rules will only have minor impacts. A requirement to inform the consumer in advance when gathering information from a database will have to be introduced in Swedish law, as will expanded rules on documentation, information and warnings.

The MCD contains requirements on information in different aspects. In both states financial promotions will be expanded with more mandatory information, information free of charge will need to be required and the new mathematical formula of the APRC will affect both states equally. The rules on information concerning changes in the borrowing rate are already covered by national rules in the two states to a high level. Regarding early repayment, it appears that both states have rules and customs in place that make the implementation of the MCD in this regard cause foremost regulatory, but not functional, changes.

Many requirements of the MCD are mirrored in the existing law and practice of both states and many changes are technical or of minor influence. It is clear that consumer protection is already considered an important issue and to act in the consumer's best interests in mortgage lending is an emphasised and important principle in both states. In Sweden, the most apparent changes are the requirements regarding advisory services and licensing for staff. In the UK, the inclusion of second charge mortgages in the RMC definition will cause practical changes to lenders.

Being a directive the MCD leaves discretion to the Member States as to how to implement the directive in a way that suits the tradition in that Member State. That being said, the practical mortgage lending process is likely to continue to look significantly different in the two states. It has also been expressed by the Committee of Inquiry as well as by the FCA that the implementation is sought to be carried out in a way that will cause the least possible disruption to existing practices.

Whether the MCD is going to extend consumer protection in practice is hard to foresee. With regard to several provisions, such as, e.g., art. 10 on advertising and marketing, both states have considered that the MCD provides no additional substance to existing rules. Despite this, the states have decided on several matters to add further details to existing domestic rules: this is an example of how the MCD might cause unnecessary bureaucracy, so called 'red-tape'. Another example is the obligation to warn the consumer about the importance of providing correct information. This obligation is not stated explicitly in Swedish law and although the Committee of Inquiry considered it should likely be included in the principle of good lending practices, it suggested an explicit regulation in order to comply with the directive. When it comes to the credit rating, it is underlined by the KkrL legislative preparatory works as well as by banking practices according to the Swedish Bankers' Association, that repayment ability rather than the value of the property should be used as a basis. However, since the requirement in art. 18 is unconditional, it has to be explicitly regulated.

Several of the requirements introduced by the MCD are mirrored in law or practice in the two states. In this sense, some MCD provisions add a layer of control, costs and bureaucracy without providing a deeper protection to consumers. The directive limits the scope of unregulated consumer protective practices and forces the states to bureaucratised the lending process. This might cause a lengthier and more costly lending process. It is possible when it comes to, e.g., licensing in Sweden, that staff already have a high degree of knowledge but are unable to demonstrate it. The directive might be more helpful in other states where consumer protection in mortgage lending is not as regulated. In Sweden, the MCD is likely to diminish the flexibility of the lending process due to additional bureaucracy. The lending process in the UK appears in comparison to be less flexible even pre-implementation.

As pointed out at the outset, to enter into a mortgage lending agreement is, for most consumers, a big commitment for many reasons. The long and complicated process surrounding the purchase of property involves many steps in which consumer protection is crucial. Ensuring consumer protection in the field of mortgage lending is therefore a complex task in which many areas of law need to be taken into consideration. The MCD, which puts its greatest emphasis on disclosure, advice and information in the relation between lender and consumer, does not aim to cover them all. How consumers are or should be better protected in that process as a whole requires its own analysis, which must also take into consideration how other actors behave in relation to the consumer. Particularly interesting is the assessment of how vulnerable consumers are protected. This paper has focused on a few aspects of the MCD, but left others untouched.

Irrespective of whether consumers will be better protected or not, the MCD will have a harmonising effect and enable a higher degree of control of the mortgage market across the EU. But we can only hope that the directive will be a helpful tool to the union to avoid a future financial crisis within its borders similar to the one of 2007.