

**Джулия ЧЕКАРАНИ**

Кандидат экономических наук, факультет

Потребительского права

в Университете Перуджа, Италия

(E-mail: giuliacpgv@yahoo.it)

**ДИРЕКТИВА ПО ИПОТЕЧНОМУ КРЕДИТОВАНИЮ:  
РЕАЛИЗАЦИЯ И ЭФФЕКТИВНОСТЬ ОЦЕНКИ  
КРЕДИТОСПОСОБНОСТИ ПОТРЕБИТЕЛЯ**

**Аннотация**

**Тема.** В статье анализируется Директива 2014/17/ЕС о кредитных договорах для потребителей в отношении жилого недвижимого имущества, целью которой является создание более прозрачного и конкурентоспособного европейского рынка ипотечных кредитов с высоким уровнем защиты потребителей. В работе основное внимание уделяется основным положениям Директивы об ипотечном кредите и, в частности, обязанности кредиторов по оценке кредитоспособности потребителя, которая имеет целью оценить способность потребителя погашать кредит.

В приведенной выше оценке учитываются все соответствующие факторы, которые могут повлиять на способность такого клиента выполнять свои обязательства по кредитному договору, такие как осуществление будущих платежей или платежей, увеличенных в связи с отрицательной амортизацией или отсрочкой платежей по основной сумме долга или процентам, а также регулярными платежами, долгами, доходами, сбережениями и активами; ее конкретная цель - защитить потребителей от безответственного поведения участников рынка и связанных с этим так называемых хищнических методов кредитования, ставших причиной недоверия всех сторон процесса кредитования, особенно потребителей, после начала финансового кризиса 2007-2008 годов.

**Цель** исследования - проанализировать эффективность системы оценки кредитоспособности, предложенной Директивой, учитывая небольшой опыт по ее внедрению в итальянской правовой системе, а также выявить ее недостатки и предложить возможные решения по их устранению.

**Ключевые слова:** *Ипотечная кредитная директива; оценка кредитоспособности потребителей; эффективность и слабые стороны.*

**JEL Classification:** *K Law and Economics.*

**Giulia Ceccarani**

Ph. D Student of Consumer Law

At the University of Perugia, Italia

## **MORTGAGE CREDIT DIRECTIVE: IMPLEMENTATION AND EFFECTIVENESS OF THE CONSUMER'S CREDITWORTHINESS ASSESSMENT**

### **Abstract**

**Subject/Topic** This article Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property which has the purpose of creating a more transparent and competitive European mortgage credit market, with a high level of consumer protection. The paper focuses on the main provisions of mortgage credit Directive and particularly on the lenders' duty to assess the creditworthiness of the consumer, which has the purpose of evaluating the ability of the consumer to repay the credit.

The aforementioned assessment takes into consideration all relevant factors that could influence such consumer's capacity to meet his obligations under the credit agreement like future payments or payments increases due to negative amortisation or deferred payments of principal or interest, as well as regular expenditure, debts, income, savings and assets; its specific aim is to protect the consumers from irresponsible behavior by market participants and the relating so called predatory lending practices, which caused a lack of confidence among all parties, in particular consumers, after outbreak of the 2007-2008 financial crisis.

**Goals/Objectives** The goal of this work is to evaluate the effectiveness of the creditworthiness assessment provided by the Directive, with a short background on its implementation in the Italian legal system, and to highlight its weaknesses and possible solutions.

**Keywords:** *Mortgage Credit Directive; consumers creditworthiness assessment; effectiveness and weaknesses.*

**Table of contents:** 1. Introduction. - 2. The European Mortgage Credit Directive 2017/14/UE: an overview. - 3. Main provisions of mortgage credit Directive. - 4. The assessment of the creditworthiness of the consumer against the irresponsible lending behaviour. - 5. Conclusive remarks.

1. Since the year 1997, European Union Authorities started to realize that in the various Member States there were too many differences in the field of consumer credit law which were not permitting the completion of a competitive market<sup>1</sup>. The Summary of the European Commission report

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<sup>1</sup> Actually, the creation of an efficient and competitive single consumer credit market in which consumers receive adequate protection has been a high-priority goal for the completion of the internal market since 1986 when Council Directive 87/102 was adopted with the aim of promoting a common market for credit throughout the EU. However, the above mentioned Directive, with its minimal-harmonization approach, proved ineffective; see F. FERRETTI, *The Legal Framework of Consumer Credit Bureaus and Credit Scoring in the European Union: Pitfalls and Challenges – Overindebtedness, Responsible*

on consumer credit agreement underlined that the development of the credit market within the EU had to be accompanied by strengthening of consumers' rights; both goals required the introduction of a harmonised regulatory framework in consumer credit sector<sup>1</sup>.

For this reason, in 2008 was approved the Consumer Credit Directive 2008/48/CE, concerning agreements covering credit for consumers, with the scope of harmonising certain aspects of the laws of Members States in this field, especially increasing transparency of agreements. However, according to article 2, the Directive shall not apply to credit agreements secured by a mortgage on immovable property<sup>2</sup>.

The outbreak of the 2007-2008 financial crisis has actually shown the relevance of credit agreements relating to residential immovable property; in fact, it has been brought to light that consumers within the European Union were holding significant levels of debt much of which was concentrated in residential mortgage lendings<sup>3</sup>.

One of the reasons of such a financial crisis has been identified in the irresponsible behaviour by market participants and the relating so called predatory lending practices, which caused a lack of confidence among all parties, in particular consumers<sup>4</sup>. Such bad practices may consist of non-transparent credit fees as much as the behaviour of entering into the transaction well knowing that there are a few chances for the consumer to

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*Lending, Market integration, and Fundamental Rights*, 46 Suffolk U. L. Rev. 791, 2013, p. 898.

<sup>1</sup> Summary report of reactions about Directive 87/102/ECC regarding laws, regulation and administrative provisions concerning consumer credit agreements in the Member States.

<sup>2</sup> About the reasons of the exclusions of this type of credit from the scope of Directive see V. MARK, *Stretching the Borders of Eu Law? – Full harmonization in the Consumer Credit Directive and mortgage credit*, *Journal of European Consumer and Market Law*, 2013, pp. 37-41. Also in the next two decades, despite the fact that the Commission 2005 Green Paper recognised that there was a “huge social and human dimension attached to housing and credit, including aspects such as over-indebtedness”, interventions in this field remained less developed.

<sup>3</sup> Even though the aforementioned financial crisis got started outside the European Union, expecially in United States relating to sub-prime mortgage market, it released negative effects also in Europe due to the phenomenon of securitization; see G. COMPARATO, *The Design of Consumer and Mortgage Credit Law in the European system*, in *Consumer Debt and Social Exclusion in Europe*, London – New York, 2015, p. 11.

<sup>4</sup> Legal scholars define “predatory lendings” those practices aimed at taking advantage of unsophisticated borrowers and their bounded rationality and may include charging excessive fees, the lender's awareness of the inability of the consumer to repay his debt, the speculation on a profitable foreclosure and so forth; on the topic see D. GOLDSTEIN, *Protecting Consumers from Predatory Lenders: Defining the Problem and Moving Toward Workable Solution*, 35 Harvard Law Review, 2000, p. 231.

repay the loan<sup>1</sup>.

As a consequence, borrowers have found their loans increasingly unaffordable, resulting in defaults and forced sales rising, situation that proved the ineffectiveness of the European legislative remedies in this field.

The EU authorities realized that this mechanism was able to undermine the foundations of the entire financial system and it was therefore necessary to define quality standards for credit services and to ensure high level of consumer protection in this area, in order to restore consumer confidence and prevent household over-indebtedness.

In view of the problems brought to light in the financial crisis, the EU launched a process with the aim of containing risks in real estate credit field agreements by ensuring a Union's regulatory framework that had to be robust, consistent with international principles and that would have made appropriate use of the range of tools available, which may include the use of loan-to-value, loan to income, debt-to-income or similar ratios, minimum levels below which no credit would be deemed acceptable<sup>2</sup>.

On 18 December 2007, the Commission adopted a White Paper on the Integration of EU Mortgage Credit Markets which announced its intention to assess the impact of the policy options for pre-contractual information, credit databases, creditworthiness, the annual percentage rate of charge and advice on credit agreements<sup>3</sup>.

This long process ended with Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property with the purpose of creating a more transparent and competitive European mortgage credit market, with a high level of consumer protection<sup>4</sup>.

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<sup>1</sup> About predatory lending and consumers' overindebtedness see R. MONTINARO, *The consumer's over-indebtedness under an Italian contract law perspective: the current status and the way ahead*, in *Europa e Diritto Privato*, 2016, p. 1215.

<sup>2</sup> See Recital n. 3 of the Mortgage Credit Directive.

<sup>3</sup> White paper on the Integration of EU Mortgage Credit Markets, COM (2007) 807 final.

<sup>4</sup> Initial responses to the Proposal for a European Directive of the Parliament and the Council on credit agreements relating to residential property of 2011 from banks were very critical especially concerning the duties with regard to the creditworthiness assessment. For an overview on the Mortgage Credit Directive see C. RIEFA, *Responsible lending on the Horizon? – The New Directive on Credit Agreements Relating to residential property*, in *Journal of European Consumer and Market Law*, 2014, p. 47; T. JOSIPOVIC, *Consumer Protection in EU Residential Mortgage Markets: Common EU rule on mortgage credit in the Mortgage Credit Directive*, *Cambridge Yearbook of European Legal Studies*, 2016, 223-253; E. PELLECCIA, *La direttiva 2014/17/UE sui contratti di credito ai consumatori relativi a beni immobili residenziali*, in *Banca, borsa*, 2016, p. 206; T. RUMI, *Profili privatistici della nuova disciplina sul credito relativo agli immobili residenziali*, in *Contr.*, 2015, pp. 70 ss.; quanto alla tematica del "predatory lending" e "subprime loan" si rinvia a A. LUPOI, *Circolazione e contrabbando del rischio*, in *Riv. Dir. Banc., dirittobancario.it*, 2015.

All member states were obliged to transpose the Directive in national law by March 2016. Italy approved the MCD by Council of Ministers Legislative Decree n. 72 on 21st April, 2016 and has transposed its provisions in national law on 20th May, 2016 by adding several provisions to the Italian Consolidated Banking Act, in particular Articles from 120-*quinquies* to 120-*noviesdecies*, which are the literal transposition of the wording of the implemented Directive<sup>1</sup>.

In addition, according to MCD Article 5, which requires all Member States to designate the national authorities qualified to ensure the application and enforcement of the Directive - public authorities or bodies recognised by national law- Italy has designated Bankitalia as the competent national authority.

2. The Directive has the purpose to create a genuine internal market by promoting the responsible behavior of real estate market participants, taking into account the specificity of this field and providing new forms of consumer protection.

In fact, on the one hand MCD sets several duties on lenders with regard to transparency and information to be given to consumers, paying regard to the principle of “responsible borrowing”<sup>2</sup>. In fact, thanks to the obtained information, the consumer should be able to self-evaluate the sustainability of the financial contract. In order to reach this goal, the creditor must provide adequate assistance in relation to the credit products offered to the consumer by explaining the relevant information in a personalized manner, taking into account the circumstances in which the credit is offered, the consumer’s needs, knowledge and experience.

On the other hand, the lender, has to verify before a credit agreement is concluded the ability of the consumer to repay the credit, considering

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<sup>1</sup> About the implementation in Italy of the aforementioned Directive see R. MONTINARO, *The consumer’s over-indebtedness under an italian contract law perspective: the current status and the way ahead*, in *Europa e Diritto Privato*, 2016, p. 1215; G. VISCONTI, *La disciplina del credito immobiliare ai consumatori introdotta nel TUB dal d.lgs. n-72/2016*, in *Immobili e proprietà*, 2016, p. 489 ss; G. FALCONE, “*Prestito responsabile*” e *valutazione del merito creditizio*, in *Giurisprudenza Commerciale*, 2017, p. 147; F. CAPRIGLIONE, *Commento sub art. 120-quinquies TUB, Codice dei contratti commentato*, a cura di G. Alpa e V. Mariconda, Vicenza, 2017, p. 3492 ss.

<sup>2</sup> By the label “responsible borrowing and responsible lending”, EU Documents make reference to the need to establish a reliable credit market in which consumer confidence is restored and where lenders act in a fair manner, providng the consumers with complete information on the credit products in order to make their decision in full knowledge but also a market in which credit products are provided where they are consistent with borrower’ capability of repayment; about the distinction between responsible borrowing and responsible lending see R. MONTINARO, *The consumer’s over-indebtedness under an italian contract law perspective: the current status and the way ahead*, in *Europa e Diritto Privato*, 2016, p. 1217.

all factors that could influence such ability. In other words, the Directive obliges creditors to assess the consumer creditworthiness, according to the principle of “responsible lending”, with the aim of finding efficient sanctions to the phenomenon of Predatory lending<sup>1</sup>.

The Directive applies only to the consumers defined as natural persons who are acting outside their trade, business or profession, stating rules in order to guarantee their rights which cannot be derogated from by contract<sup>2</sup>. The Directive also specifies that in the case of dual purpose contracts, concluded for purposes partly within and partly outside the person’s trade, business or profession and the trade, business or professional purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer<sup>3</sup>.

On the other hand, the creditor or credit intermediary can be a legal person or a natural person, in conformity with the existing laws of the various Member States with regard of creditors’ subjective requirements<sup>4</sup>.

Consequently, the Directive does not apply to credit agreements between enterprises and intermediaries. The reason of a similar choice is the belief that consumers and enterprises do not need the same level of protection and it appeared reasonable to allow the second to enter into other agreements<sup>5</sup>.

Moreover, the provisions apply to “*credit agreements which are secured either 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 residential immovable property*” and to “*credit agreements the purpose of which is to acquire or retain property*”

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<sup>1</sup> For a overview on the problem of predatory lendings see GOLDSTEIN, *Protecting Consumers from Predatory Lenders: Defining the Problem and Moving Toward Workable Solutions*, in 35 Harvard L.R., 2000, p. 225; AUSTIN, *Predatory Lending and the Democratization of credit: Preserving the social Safety Net of Informality in Small-Loan Transactions*, 2004, 53 Am. U.L.R., p. 1217.

<sup>2</sup> See recital 11.

<sup>3</sup> Recital 12 sets this rule on the so-called mixed transactions in which a person concludes for both a personal and professional purpose, an area that has always been particularly controversial within the consumer law. Mixed transactions occur especially in the case of self-employed persons who buy dual-use objects such as a car, a mobile phone or a laptop; on this topic see L. MEZZASOMA, *Il consumatore e il professionista*, in G. RECINTO – L. MEZZASOMA – S. CHERTI (a cura di), *Diritti e tutele dei consumatori*, Naples, 2014, p. 23 ss.; E. GABRIELLI, *Sulla nozione di consumatore*, in Riv. Trim., 2003, p. 1169; E. FAZIO, *La tutela consumeristica e l’acquisto per fini promiscui*, in Eur. dir. priv., 2007, p. 179.

<sup>4</sup> About this specific topic, the Directive states that it should not affect the right of Member States to limit, in conformity with Union law, the role of creditor or credit intermediary to legal persons only or to certain types of legal persons (Recital n.10).

<sup>5</sup> Recital n. 11 of MCD.

*rights in land or in an existing of projected building*”<sup>1</sup>.

In addition, it is specified that “credit agreement”, for the purposes of the Directive, means “*an agreement whereby a creditor grants or promises to grant to a consumer a credit falling within the scope of the Directive in the form of a deferred payment, loan or other similar financial accomodation*”<sup>2</sup>.

With the aim to guarantee a high and equivalent level of consumer protection within the Union, the European lawmaker decided to lay down provisions subject to maximum harmonisation, but only concerning the matters of standard pre-contractual information (through the so called European Standardised Information Sheet –ESIS-) and calculation of the APRC (Annual Percentage rate of charge). On the other hand, Member States are allowed to maintain or introduce more stringent provisions in all other areas, taking into account the differences in market conditions in the various States<sup>3</sup>.

This minimum-harmonisation approach, which characterises most of the MCD provisions, has been heavily criticised because of the concern that it may cause ineffectiveness of all measures provided since it lets the Member States free to make different choices<sup>4</sup>. Nevertheless, it is clear that the European legislator with this Directive has set on lenders several duties relating the single various phases of the process leading to the conclusion of the credit agreement, by provisions which are definitely more stringent than those contained in the previous Consumer Credit Directive 2008/48/CE and that are very interesting to evaluate.

3. About its content, a crucial part of the Directive concerns the information which must be provided to consumers at the pre-contractual

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<sup>1</sup> Article 3 of MCD literally transposed into Article 120-*quinquies* of Italian Consolidated Banking Act.

<sup>2</sup> Article 4 of MCD literally transposed into Article 120-*sexies* of Consolidated Banking Act.

<sup>3</sup> For an overview on maximum and minimum harmonization see C. GERNER-BEUERLE, *United in diversity: maximum versus minimum harmonization in EU securities regulation*, in *Capital Markets Law Journal*, 2012, pp. 317-342; for an overview on the harmonization of MCD see T. JOSIPOVIC, *Consumer Protection in EU Residential Mortgage Markets: Common EU rule on mortgage credit in the Mortgage Credit Directive*, *Cambridge Yearbook of European Legal Studies*, 2016, pp. 223-253.

<sup>4</sup> See R. MONTINARO, *The consumer's over-indebtedness under an italian contract law perspective: the current status and the way ahead*, in *Europa e Diritto Privato*, 2016, p. 1217; the minimum harmonisation approach is also considered the cause of ineffectiveness of the aforementioned Directive 87/102/ECC, for a overview on the problem see F. FERRETTI, *The Legal Framework of Consumer Credit Bureaus and Credit Scoring in the European Union: Pitfalls and Challenges – Overindebtedness, Responsible Lending, Market integration, and Fundamental Rights*, 46 *Suffolk U. L. Rev.* 791, 2013, p. 898.

stage.

The European law-makers, as usual in all consumer regulation, refers both to education of consumers and information<sup>1</sup>. As is well known, these two concepts have to be kept apart and in this case the difference between them is relevant taking account of the MCD aim of responsible borrowing<sup>2</sup>. Indeed, in order to make the most appropriate choice, the consumer has to be aware of his rights and needs as well as the consequences and risks related to credit agreements, especially if he takes out a mortgage credit for the first time.

For these reasons, Article 6 states that “*Member States shall promote measures that support the education of consumers in relation to responsible borrowing and debt management, in particular in relation to mortgage credit agreements*” by providing them clear and general information on the credit granting process, in order to increase the knowledge and financial awareness of consumers.

The Directive, then, sets several provisions about information duties and, first of all, points out that any information given to consumers in compliance with the requirements set out in the MCD has to be provided without charge<sup>3</sup>.

The European Legislator also pays attention to advertising and marketing practices frequently used by creditors to attract consumers to a particular product, in order to protect them against unfair or misleading practices by prohibiting wording that may create false expectation for them regarding the availability or the cost of a credit. In particular, it requires that any advertising concerning credit agreements which indicates an interest rate or any figures relating to the cost of the credit to the consumer has to include a precise standard information, with the aim of making the consumer able to compare different advertisements<sup>4</sup>.

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<sup>1</sup> For a overview on the different concept of education of consumers and information see A. BIZZARRO, *L'educazione e informazione del consumatore*, in G. RECINTO – L. MEZZASOMA – S. CHERTI (a cura di), *Diritti e tutele dei consumatori*, Naples, 2014, p. 33 ss; T. FEBBRAJO, *Informazione ed educazione del consumatore*, in G. VILLANACCI (a cura di), *Manuale di diritto del consumo*, Naples, 2007.

<sup>2</sup> It seems usefull to remind that the European Union has made consumer education part of the general objectives of consumer protection (Article 153, Treaty of Amsterdam, 1997); later, with the Treaty of Lisbon in 2007, article 169 states that “*the Union shall contribute to protecting health, safety and economic interests of consumers; to promoting consumers right to information, education and the right to organise consumers in order to safeguard their interest.*”

<sup>3</sup> See Article 8 of MCD.

<sup>4</sup> According to Article 11 of MCD the standard information shall specify, among other things, the identity of the creditor or the credit intermediary or appointed representative; the possible circumstance that the credit agreement will be secured by a mortgage or another comparable security commonly used in a Member State on residential immovable property or by a right related to residential immovable property; the borrowing rate,



In addition, several information must be provided to consumers at the pre-contractual stage including specific risk warnings. If needed, the creditor has to explain the relevant information about the credit products offered in a personalized manner, taking into account the circumstances in which the credit is offered as well as consumer's need for assistance.

As above mentioned, within this area of information the Directive sets its first maximum-harmonisation rule stating at Article 14 that the consumer must be given personalized information needed to compare the credits available on the market, assess their implications and make an informed decision on whether to conclude a credit agreement. Information must be provided without undue delay after the consumer has given the necessary information on his needs, preferences and financial situation and in good time before he is bound by the credit agreement.

The Directive requires that the mentioned information has to be given in a prescribed form, through the so-called European Standardised Information Sheet (ESIS)<sup>1</sup>. The structure of the ESIS and the order of the information items should make the document clear, understandable and complete of all relevant data for consumers; the wording should be user-friendly since consumer research has underlined the importance of using simple and understandable language in disclosures provided to consumer<sup>2</sup>.

Additional information might be given in a separate document which may be annexed to the ESIS by the creditor or intermediary.

The information received by consumers by means of the ESIS, in the prescribed form just quoted, enable them to reflect on the characteristics of credit products and obtain third party advice if necessary.

The same Article includes another crucial provision at number 6, requiring Member States to specify a time period of at least seven days during which the consumer will have sufficient time to compare offers, consider the implications of the agreement he is being asked to enter into and make an informed decision. About this profile, the Directive gives flexibility to Member States which may choose between a reflection period before the entire credit agreement is concluded or a period of

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indicating whether this is fixed or variable or a combination of both, together with particulars of any charges included in the total cost of the credit to the consumer; the total amount of credit; the APRC which shall be included in the advertisement at least as prominently as any interest rate; the duration of the credit agreement and the amount and number of the instalments, where applicable; a warning regarding the fact that possible fluctuations of the exchange rate could affect the amount payable by the consumer.

<sup>1</sup> The ESIS content is set out in Annex II of MCD.

<sup>2</sup> For a overview on this topic see O. RADLEY-GARDNER, H. BEALE, R. ZIMMERMANN and R. SCHULZE, *Fundamental texts on European Private Law*, London, 2016.

withdrawal after the conclusion of the credit agreement itself<sup>1</sup>.

In the event that the Member State chooses to specify a reflection period before the conclusion of the agreement during this “cooling-off period” the offer is binding on the lender and the consumer may accept or not it any time, without detrimental consequences on him.

The latter one is the solution chosen by Italy<sup>2</sup>.

In addition, the European legislator lets the Member States to provide that consumer cannot accept the offer for a period of time not exceeding the first 10 days of the reflection period<sup>3</sup>.

The second rule subject to maximum-harmonisation set by the Directive concerns the Standardised Calculation of Annual Percentage Rate of Charge (APRC), which enable the consumers to be aware of the total cost of credit throughout its duration. This is a particularly important measure for the prevention of irresponsible borrowing since it lets the consumer to be fully informed about the total amount of his debt ahead of time and consists of a mathematical formula for the calculation of APRC<sup>4</sup>.

Because of its nature of maximum harmonisation provision, Member States are not allowed to provide a different method of calculation of the interest rate and the total cost of credit in order to establish in credit agreements relating to residential immovable property legal security, certainty and product comparability in each State<sup>5</sup>.

Another important provision for consumer protection laid down in the Mortgage Credit Directive is the recognition of the consumer’s right to early repayment of the loan, reducing interest and costs for the remaining duration of the contract. This right must not be subject to any sanctions but the regulation of all other conditions has been left to Member States which may provide that creditor is entitled to fair and objective compensation which must not exceed the financial loss caused by early

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<sup>1</sup> See Article 14, number 6 of MCD which allow a third option that consist of a combination of the aforementioned solutions.

<sup>2</sup> This is the case under Article 120-*novies* of Italian Consolidated Banking Act.

<sup>3</sup> Articles L 312-7, L 321-10 of French code de la Consommation state that a reflection period of at least ten days is to be given to the consumer after he receives the offer of the creditor. Non-compliance of such rule renders the agreement void.

<sup>4</sup> Annex I of the Directive laus down the mathematical formula for the calculation of APRC; in addition, article 17 of the Directive expressly prescribed that the calculation must be based on the assumption that the credit agreement is to remain valid for the period agreed and indicates also the specific costs that must be included in the total cost of credit.

<sup>5</sup> See H.J. DÜBEL - M. ROTHMUND, *A new mortgage Credit Regime for Europe-Setting the Rights Priorities*, 2011, Center for European Policy Studies/European Credit Research Institute, EPS Special Report, [www.ceps.eu/book/new-mortgage-credit-regime-europe-setting-right-priorities](http://www.ceps.eu/book/new-mortgage-credit-regime-europe-setting-right-priorities)), pp. 37-41.

repayment of the loan<sup>1</sup>.

Finally, an important aspect of Directive concerns arrears and foreclosure. About this topic, article 28 states that Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before the initiation of arrears and foreclosure proceedings. The purpose of the provision is to encourage creditors to make reasonable attempts to resolve the situation through other means before the initiation of foreclosure proceedings, dealing proactively with emerging credit risk. However, this Article contains an innovative provision that has been initially criticised in many Member States: the right to agree on the transfer of charged residential immovable property to repay the credit<sup>2</sup>. This provision appears to be incompatible with the Directive's aim of consumers protection, taking into consideration that one of the oldest traditional measures of debtor protection is the prohibition of a clause according to which the charged real property will be transferred to the creditor if the debtor does not pay the debt in due time. However, as a result of the financial crisis, the approach to the problem of the repayment of loans by transferring ownership of the charged immovable has become more liberal, believing that regulation of the right to free a debtor of his credit obligations by a similar way may be more beneficial for the consumer than enforcement proceeding conducted against him<sup>3</sup>.

4. As shown above, the Directive aims to the consumers protection from the phenomenon of irresponsible and Predatory lending and in order to reach this goal it obliges Member States to establish rules by which they bind creditors to assess the consumer creditworthiness before concluding a credit agreement<sup>4</sup>.

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<sup>1</sup> The regulation of the right to early repayment at the national level leads to large differences since Member State may provides restrictions, special conditions and time limitations under which the mentioned right may be exercised; see T. JOSIPOVIC, *Consumer Protection in EU Residential Mortgage Markets: Common EU rule on mortgage credit in the Mortgage Credit Directive*, *Cambridge Yearbook of European Legal Studies*, 2016, p. 248; In Italy, since 2007, no penalty clauses or compensation for early repayment may be charged to a consumer according to Bersani's Decree, Law no. 40, of 2 April 2007.

<sup>2</sup> Article 28 (4) states that "Member States shall not prevent the parties to a credit agreement from expressly agreeing that return or tranfer to the creditor of the security of proceeds from the sale of the security is sufficient to repay the credit."

<sup>3</sup> See T. JOSIPOVIC, *Consumer Protection in EU Residential Mortgage Markets: Common EU rule on mortgage credit in the Mortgage Credit Directive*, *Cambridge Yearbook of European Legal Studies*, 2016, p. 250.

<sup>4</sup> In order to understand the relevance of the creditworthiness assessment appears necessary to remind the banks paradigm shift in lending strategies which in the recent years went from a "originate to hold" to an "originate to distribute" business model; this phenomenon consists of the practice to reduce the credit risk faced by creditors through

The purpose of creditworthiness assessment is to evaluate the ability of the consumer to repay the credit, considering all relevant factors that could influence such ability, according to an impartial, objective, and independent criterion. In particular, the consumer ability to meet his obligations under the credit agreement should be assessed considering various factors such as future payments or payments increases due to negative amortisation or deferred payments of principal or interest, as well as regular expenditure, debts, income, savings and assets<sup>1</sup>. Whether the credit term lasts into retirement, the creditworthiness assessment has to take into consideration the reduction in income that will occur<sup>2</sup>.

Once all information are collected, it is also stated that procedures and information on which the assessment is based are established, documented and maintained during the entire term of the contract.

The European legislator expressly provides, then, that the assessment shall not rely predominantly on the value of the residential immovable property exceeding the amount of the credit or the assumption that the property will increase in value unless the purpose of the credit agreement is to construct or renovate the residential immovable property.

Article 19 also pays also attention to property valuation, requiring the Member States to ensure the development of reliable standards for mortgage lending purposes within their territory. In addition, it provides that the appraisers conducting property valuations are professionally competent and sufficiently independent from the credit under-writing process so that they can provide an impartial and objective valuation

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the so called “securitisation”, thanks to which the traditionally interconnected aspects of credit and risk are separate; in this context, in which the lenders can transfer their credits and earn from it, the solvency of the debtor loses its central role and becomes almost irrelevant. For an overview on the topic see V. TROIANO, *Le operazioni di cartolarizzazione. Profili generali (The Securitisation Transactions. General outline)*, Padua, 2003; GUIDO COMPARATO, *The Design of Consumer and Mortgage Credit Law in the European system*, in *Consumer Debt and Social Exclusion in Europe*, London – New York, 2015, 11.

<sup>1</sup> For an overview see O. RADLEY-GARDNER, H. BEALE, R. ZIMMERMANN and R. SCHULZE, *Fundamental texts on European Private Law*, London, 2016.

<sup>2</sup> The European Banking Authority (EBA) published *Guidelines on creditworthiness assessment* in order to support the national implementation by Member States of the MCD. The Guidelines provide further detail on requirements set out in Article 18 of Mortgage Credit Directive, aiming to a creditworthiness assessment which takes into consideration every possible scenario, see *Guidelines on creditworthiness assessment*, 19.08.2015, EBA/GL/2015/11. In Italy Bankitalia requires that the creditworthiness assessment must respect the aforementioned Guidelines; about EBA functions see F. CAPRIGLIONE, *L'Unione Bancaria Europea. Una sfida per un'Europa più unita*, Torino, 2013; V. TROIANO, *L'architettura di vertice dell'ordinamento finanziario europeo*, AA. VV., *Elementi di diritto pubblico dell'economia*, Padova, 2012, p. 541 ss; ID. The New Institutional Structure of EBA, in *Law and Economics Yearly Review*, 2013/1.

which shall be documented in a durable medium and of which a record shall be kept by the creditor.

The Directive only provides that the creditor's decision as to whether granting credit should be consistent with the outcome of the creditworthiness assessment but, on the other hand, a positive assessment does not constitute an obligation for the creditor to provide credit<sup>1</sup>. Consequently, Member States were allowed by the European Legislator to choose their own policies in case of a negative assessment creditworthiness, as long as the sanctions provided prove to be effective, proportionate and dissuasive<sup>2</sup>.

The solutions adopted by Member States were quite different. A few States introduced a real interdiction to lend<sup>3</sup> while other States opted for other legal consequences to the breach of the procedural duties.

In Italy no duty to refuse to grant the loan has been enacted in case of a negative creditworthiness assessment which does not give sufficient comfort that the consumer will be able to repay it. However, in implementing the aforementioned Directive, Article 144 of Italian Consolidated Banking Act has been amended by introducing financial penalties whether the procedural duties of the creditworthiness assessment are not observed<sup>4</sup>.

Even though the Mortgage Credit Directive does not expressly provide a specific sanction in the event of the breach of the procedural duties related to creditworthiness assessment, some scholars believe that it is possible to find an unspoken rule in the principle stated at Article 7

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<sup>1</sup> See Article 18 of Directive 2014/17/UE.

<sup>2</sup> Article 38 of MCD states that “Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted on the basis of this Directive... Those sanctions shall be effective, proportionate and dissuasive”. For an overview on the topic see GUIDO COMPARATO, *The Design of Consumer and Mortgage Credit Law in the European system, in Consumer Debt and Social Exclusion in Europe*, London – New York, 2015, 11.

<sup>3</sup> See Article 362-364 of the French Code de la Consommation, as amended in implementing Mortgage Credit Directive, and the UK's Mortgage Conduct of Business Rules (MCOB 11.6.2) according to which the creditor must not enter into transaction unless he can demonstrate that the credit contract is affordable for the borrower; in addition, the behavior of a lender which provides credit even though the assessment gives reason to suspect that the consumer will not be able to repay it, is qualified as a irresponsible banking practice under the rules issued by the Financial Conduct Authority.

<sup>4</sup> Article 144 of Italian Consolidated Banking Act now expressly provides financial sanctions in the event of a breach of the aforementioned procedural duties about credit agreements relating to residential property while the same provision does not provide a similar sanction if occurs a breach of the rules relating to creditworthiness assessment on credit consumer not relating to residential property. About this topic see G. FALCONE, “*Prestito responsabile*” e valutazione del merito creditizio, in *Giurisprudenza Commerciale*, 2017, p. 147; F. CAPRIGLIONE, *Commento sub art. 120-undecies TUB, Codice dei contratti commentato*, a cura di G. Alpa e V. Mariconda, Vicenza, 2017, p. 3516 ss.

of the Directive itself<sup>1</sup>. In fact, according to the latter provision the Member States shall require that creditors act “*honestly, transparently and professionally*” when providing credit to consumers, “*taking account of the rights and interest of them*”. In addition, “*the activities shall be based on information about the consumer’s circumstances and any specific requirement made known by a consumer and on reasonable assumption about risks to the consumer’s situation over the term of the credit agreement*”. The aforementioned scholars believe that this provision constitutes a tacit interdiction to lend.

Another interesting aspect of the Directive is the circumstance that the European legislator requires a duty to warn the consumer only in the case in which the credit application is rejected and the confirmation that the decision is based on automated processing of data, but does not provide a similar duty in the event of a negative assessment.

In the Italian jurisdiction, however, some scholars believe that a duty to inform or even a duty to care about the possible risks related to a credit agreement could derive from Article 1337 c.c. of the Italian Civil Code, the principle of good faith in negotiations<sup>2</sup>. Those scholars assume that from the latter principle arises a duty to disclose all relevant circumstances related to the terms of contracts and its convenience, among which could be included the duty to warn in the event of a negative creditworthiness assessment<sup>3</sup>.

Such unwillingness to offer a contract law remedy, like the nullity of the contract, is further proved by the same Directive which provides that once a credit agreement is concluded, the creditor shall not subsequently cancel or alter the latter to the detriment of the consumer on the grounds that the assessment of creditworthiness was incorrectly conducted<sup>4</sup>.

It appears obvious from the above that it may happen that, within the countries which adopted solution similar to the Italian one, the credit agreement is concluded without a prior creditworthiness assessment or in the event of a negative or deficient assessment, without consequences

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<sup>1</sup> See G. FALCONE, “*Prestito responsabile*” e valutazione del merito creditizio, in *Giurisprudenza Commerciale*, 2017, p. 147.

<sup>2</sup> See R. MONTINARO, *The consumer’s over-indebtedness under an Italian contract law perspective: the current status and the way ahead*, in *Europa e Diritto Privato*, 2016, p. 1215 ss.

<sup>3</sup> An aspect which needs to be underlined is the fact that it’s disputable whether the breach of the principle of good faith in negotiation can lead to the invalidity of the contract or can merely result in civil liability; for an overview of the topic see V. MARICONDA, *Commento sub art. 1337 Codice Civile, Codice dei contratti commentato*, a cura di G. Alpa e V. Mariconda, Vicenza, 2017, p. 84 ss.

<sup>4</sup> See Article 18.4 of Directive 2014/17/UE and Article 120-undecies of Italian Consolidated Banking Act, introduced in implementing the Directive.

about the validity of the credit contract.

In the view of certain scholars, such a response provided by the Directive, which does not mandate specific consequences to the breach of the procedural duties, can be regarded as contradictory and ineffective at the same time: on the one hand, the creditor's decision as to whether granting credit should be consistent with the outcome of the creditworthiness assessment but, on the other hand, the lender may provide credit even when there is a negative assessment<sup>1</sup>.

5. Even though the solutions of Directive are to be welcomed, probably the European legislator could have taken up a stronger stance in order to reach the completion of a single European Mortgage credit market and to tackle the phenomenon of irresponsible lending, also by using the law of contract<sup>2</sup>.

Notably, contract law rules can be very useful to reach the European aims of financial market regulation, among which we certainly find the consumer protection. The risk of the invalidity of the contract might be a frightening deterrent for lenders, since it could mean to lose a financial deal; obviously, the only party able to request the declaration of invalidity must be the consumer<sup>3</sup>.

It might also be helpful to follow the lead of several jurisdictions in which there are effective models of rules. For example, according to UK's Mortgage Conduct of Business Rules (MCOB 11.6.2) the amount of credit that can be extended to a consumer may at no time exceed a certain limit expressed as a multiple of the consumer's income<sup>4</sup>.

Other interesting measures adopted by Member States are those related to the duty to warn the consumer in the event of a negative

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<sup>1</sup> See R. MONTINARO, *The consumer's over-indebtedness under an Italian contract law perspective: the current status and the way ahead*, in *Europa e Diritto Privato*, 2016, p. 1215 ss.; G. FALCONE, *"Prestito responsabile" e valutazione del merito creditizio*, in *Giurisprudenza Commerciale*, 2017, p. 147 ss.

<sup>2</sup> For an overview about the use of the law of contract that can be made by the EU legislator in order to reach the aims of financial market regulation and consumer protection, see P. CARTWRIGHT, *Banks, Consumer and regulation*, Oxford, 2004.

<sup>3</sup> About the invalidity of contracts in consumer law and consumer protection in Italy see L. MEZZASOMA, *Novità del diritto contrattuale in Italia e tutela del contraente debole*, in *Le Corti Umbre*, 3/2014, p. 919 ss.; Id., *Las cláusulas abusivas y la consolidación del remedio de la nulidad de protección en el ordinamiento italiano*, in *Universitas*, n. 128, 2014, p. 173 ss.; G. M. Berti De Marinis, *Nullità relativa, protezione del cliente ed interessi meritevoli di tutela*, in *Banca borsa e titoli di credito*, 2016, II, p. 283 ss.

<sup>4</sup> See R. MONTINARO, *The consumer's over-indebtedness under an Italian contract law perspective: the current status and the way ahead*, in *Europa e Diritto Privato*, 2016, p. 1215 ss, who precises that such a rule is not inconsistent with the measures mandating the assessment of the consumer's ability to pay but, on the contrary, it may complement this latter rule.

assessment. In France, Article L 313-12 of the Code de la Consommation provides that lenders shall warn borrowers about the risks related to credit agreement if such a contract appears to be unsustainable<sup>1</sup>.

Following these examples and requiring the Member States to introduce stricter sanctions in the event of the breach of procedural rules, the Directive's goal, to ensure a high level of protection to consumers entering into credit agreements relating to immovable property, will be certainly closer. In fact, the circumstance that the consequences attached to the breach of most of the procedural rules provided by the Mortgage Credit Directive are uncertain, does not help to reach the aim of consumer's protection in the aforementioned field.

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<sup>1</sup> About the relevance of the duty to warn see R. MONTINARO, *The consumer's over-indebtedness under an italian contract law perspective: the current status and the way ahead*, in *Europa e Diritto Privato*, 2016, p. 1215 ss.