

# THE IMPACT OF THE MORTGAGE CREDIT DIRECTIVE 2014/17 IN THE NETHERLANDS

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# 1. Introduction

Financing residential property in The Netherlands stands in a tradition which is pretty straightforward within the systematic boundaries of our civil law – the domains of contract law (the sale and the financing) as well as property law (the transfer and the securing). The Mortgage-Directive has in the meantime been implemented, without too much difficulty in legislative, scholarly or general debate. Many aspects had already been regulated – as the providing of information, before and during the contract. But national peculiarities in and outside law's domain provide tensions and perspectives in searching for the balance between the involved parties. Sometimes fundaments and elements of law have taken a particular turn. Case law did take a lead; self-regulation has been the result of participation of many involved parties, and has moved up the ladder of sources of law. Outside law, the Dutch political and social-economic sphere has determined the normative framework of financing ownership of residential property. Taxation has fuelled housing towards ownership.

I will first provide facts, factors and the law as it came to stand in The Netherlands, concerning financing residential property (2); then I will proceed with a sketch and assessment of the impact of our directive (3); many aspects were already provided for in pre-directive law, and needed not to be implemented by legislation; other aspects were implemented, some were not, or could not be addressed (4); all in all it leads to conclude that various requirements and standards for financing residential property are leading to an acceptable result for the consumer – as a joint effort of many players in the field of law – yet we have to realize our transactions on residential property also serve a public goal of far greater importance: a stable and accessible housing market (5).

# 2. An Overview: The Netherlands – acquiring houses on Credit

# 2.1 Facts and factors

The market for residential property is booming again in The Netherlands, after a 7-year period of financial-economic crisis – and Amsterdam leads. Other area's recover more slowly. On the other end areas in the province of Groningen see a reduction in prices due to recent earthquakes, induced by production of natural gas since 1963.<sup>1</sup>

<sup>&</sup>lt;sup>1</sup> <u>https://www.cbs.nl/nl-nl/nieuws/2015/51/woningmarkt-aardbevingsgebied-groningen-blijft-achter</u>

The total population of The Netherlands has surpassed 17 million, encompassing a number of households of 7.7 million. Housing in The Netherlands is constantly monitored by various institutions - more or less linked to the government.<sup>2</sup> The number of households has increased by 1.4% rise compared to a year before;<sup>3</sup> these households live in residential property of various types. Types of dwellings generally considered in our numbers are appartments (appartementen or meergezinswoningen), terraced houses, semi-detached and detached. Appartments make up for 35% of the total - the three lattercategories (eengezinswoningen) 65%. A little less than 20% is built before 1945; more then 25% between 1945 and 1970, and nearly 55% after 1971. 45% is rented, the rest is owned.<sup>4</sup> - the number of sales-transactions in july 2016 is 19.723 - in the first seven months of 2016 a total of 112.935 houses were sold, which amounted to a rise of 20% compared to the same period a year before - according to numbers of the Dutch registry office (Kadaster) and the CBS. Prices have risen with compared with the first quarter of 2016 with nearly 3% - compared with a year ago the rise was nearly 5%, and the Central Bureau of Statistics measured it as the largest price-rise in the last 12 years.<sup>5</sup> Amsterdam takes the lead with 15% - and its price level has reached the level before the start of the financial crisis in 2008. If the numbers of transactions and prices are considered for each type of dwelling individually, the appartments, but particularly terraced houses have seen the biggest raises of prices.<sup>6</sup>

The amount of debts of Dutch households stands at 750 bln – the part related to residential property in The Netherlands is the lion's share: 650 bln.<sup>7</sup> In 2015 – 1.4 mln

https://www.cbs.nl/NR/rdonlyres/20A1F78F-90E1-40F8-B204-

<sup>6</sup> Average salesprice july 2016: 245000:

<sup>&</sup>lt;sup>2</sup> The Central Bureau of Statistics (CBS) is the most important; other private institutions which publish regularly are the Association of Real-Estate Brokers (NVM); the home-owners-association (Vereniging Eigen Huis). The Government of The Netherlands (Rijksoverheid) monitors as well – many information is to be found on <a href="http://cowb.datawonen.nl/index.html">http://cowb.datawonen.nl/index.html</a> - `cowb' stands for `cijfers over wonen en bouwen'- numbers on housing and building. At the height of the crisis in 2012 an extensive research on housing in The Netherlands was published in a report – see:

<sup>468</sup>C7EB8B3AF/0/WoOn2012woneninongewonetijden.pdf

<sup>&</sup>lt;sup>3</sup> <u>https://www.cbs.nl/nl-nl/nieuws/2016/36/toename-huishoudens-vooral-in-en-rond-grote-steden</u>

<sup>&</sup>lt;sup>4</sup> These data are published on the following website – linked to the preceding cowb-site: <u>http://vois.datawonen.nl/quickstep/QSReportAdvanced.aspx?report=cow13\_101&geolevel=nederland</u> <u>&geoitem=1&period=most\_recent\_period</u>

 $<sup>^{5}</sup>$  Numbers are to be found on the website of the cenral bureau of statistics (4,9% rise) -

<sup>&</sup>lt;u>https://www.cbs.nl/en-gb/news/2016/34/largest-house-price-increase-in-almost-twelve-years;</u> also on the website of the Dutch government - <u>https://www.rijksoverheid.nl/onderwerpen/onderzoeken-over-</u> <u>bouwen-wonen-en-leefomgeving/inhoud/onderzoeken-bouwen-en-woningvoorraad</u>

<sup>-</sup> and furthermore on the website of the Dutch real-estate brokers (5,7% rise), de Nederlandse Vereniging van Makelaars, <u>https://www.nvm.nl/marktinformatie/marktinformatie</u>

http://statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=81884NED

<sup>&</sup>lt;sup>7</sup> https://www.cbs.nl/nl-nl/nieuws/2015/28/schulden-huishoudens-nemen-weer-iets-toe

houses are having a value less than the loan provided – but considering the rise in prices, this will become less.<sup>8</sup> There is a call for strengthening debt-forgiveness<sup>9</sup> – which is a formal yet (too) restricted possibility in insolvency situations since 1998.<sup>10</sup> Compared with 2010, the amount of buyers using own money to pay has doubled, from 25% to 50%.<sup>11</sup>

It is not just the numbers on residential property which determines normative qualities of our transactions. The vague aspect of consumer-confidence plays a role in taking the step to selling and buying – it is on the rise, these days.<sup>12</sup> Our transactions are also related to labour conditions as well: as important are the numbers on labour-contracts, as this determines the possibilities of qualifying for a loan. The numbers show that labour is increasingly performed in temporary jobs.<sup>13</sup> Youngsters live longer with their parents in their household, and once living on their own, more often return.<sup>14</sup> These numbers do not necessarily lead to high default, however. Default numbers on mortgage-lending have been concluded exceptionally low.<sup>15</sup>

Seeing these numbers as they stand and have changed over the last decades provides an important perspective to the world to come. A slightly longer perspective shows that housing has in the last one and a half century been an important part of national policies. The Netherlands had to cope with a quickly increasing population since halfway the nineteenth century – which was accompanied by severe housing shortage, a booming of (rental) prices, a consequent massive splitting houses in cities in smaller units, as well as extreme poverty.<sup>16</sup> It is estimated that 2 million of its 5 million population around 1900 were living in one or two room households. The Netherlands was by no means an exception.<sup>17</sup> Consequently housing came to be a topic of primary importance. Particularly in the years after 1945 The Netherlands has seen a large

<sup>&</sup>lt;sup>8</sup> https://www.cbs.nl/nl-nl/nieuws/2015/44/minder-huizen-onder-water

<sup>&</sup>lt;sup>9</sup> See Nick Huls, Vergeef ons vaker onze schulden. Naar een schone lei 2.0 (Den Haag Boom Juridisch 2016) – for various other sources.

<sup>&</sup>lt;sup>10</sup> Wet schuldsanering natuurlijke personen, Stb 1998, 445 – in force since December 1, 1998 as a part of the Act on Insolvency (Faillissementswet).

<sup>&</sup>lt;sup>11</sup> <u>https://www.afm.nl/nl-nl/nieuws/2016/feb/consumentenmonitor-hypotheken</u> - which does not surprise – considering e.g. the low interest on savings; the new rules hypothecary financing and deductability of taks.

<sup>&</sup>lt;sup>12</sup> <u>https://www.cbs.nl/en-gb/news/2016/33/dutch-consumer-confidence-improves-slightly</u>

<sup>&</sup>lt;sup>13</sup> <u>https://www.cbs.nl/en-gb/news/2016/35/number-of-hours-worked-in-temp-jobs-up-again</u>

<sup>&</sup>lt;sup>14</sup> <u>https://www.cbs.nl/nl-nl/nieuws/2016/27/jongeren-blijven-langer-bij-ouders-thuis</u>

<sup>&</sup>lt;sup>15</sup> Vanessa Mak, What is responsible lending?, See K. Scanlon and M. Elsinga, Policy changes affecting housing and mortgage markets: How Governments in the UK and the Netherlands reponded to the GFC, Journal of Housing and the Built Environment 29, p. 335-360.

<sup>&</sup>lt;sup>16</sup> Van der Woud, Koninkrijk vol Sloppen (2010), p. 49-52.

<sup>&</sup>lt;sup>17</sup> Van der Woud, Koninkrijk vol Sloppen (2010), p. 161-163.

increase in its building houses;<sup>18</sup> its social housing schemes were strongly present since the first act on residential property – the Woningwet 1901 – entered into force.<sup>19</sup> A large part of the population thus came to live in those residences – it still is an important part of Dutch politics.<sup>20</sup> One of the political aims is to keep those houses available for the lower incomes.<sup>21</sup> However, a rise in income and the possibility to move out is not always given effect by the inhabitants by moving to the so-called free sector, either by renting or buying.<sup>22</sup> Home-ownership is publicly encouraged especially since the 1970's – and the percentage of houses in ownership has increased from under 30% in 1970 to nearing 60%.<sup>23</sup>

Various measures have been taken to that effect: subsidies (*premiekoopwoningen*), taxation (*hypotheekrenteaftrek*), suretyship (*nationale hypotheekgarantie*),<sup>24</sup> and the sale of social housing. Measures to stimulate the market in the years of the crisis were also taken through other ad hoc adaptations of taxation. Transferring immovables was standardly at 6%, has temporarily even been at 0%, but now is set at 2%;<sup>25</sup> inheritance taxation has been adapted temporarily – freedom from taxation if used for housing was temporarily raised from 52000 to 100.000.<sup>26</sup> The first measure – the subsidies - has been used particularly in the 70's and 80's. The second one – the *hypotheekrenteaftrek* - is the possibility to deduct the payment of interest from income tax – this has been most influential, is still in force, but as a highly political topic only recently dared to put on the legislative agenda of national politics, yet in the latest years slowly curtailed – ending in 2031.<sup>27</sup> The third measure is the government suretyship for loans to acquire housing under a certain value: €245.000 in 2016 – including all costs. The sale of social housing to the private sector – already since the

<sup>&</sup>lt;sup>18</sup> Housing shortage being qualified as `people's enemy no 1' (Woningnood volksvijand nr. 1) – minister Bogaers.

<sup>&</sup>lt;sup>19</sup> Stb (Staatsblad) 1901, 158.

<sup>&</sup>lt;sup>20</sup> <u>https://www.rijksoverheid.nl/onderwerpen/huurwoning</u>

<sup>&</sup>lt;sup>21</sup> 80% of the social-houses needs to be distributed to those lower incomes, under €35.739, 10% to those with an income up to 39.874 and 10% to those above that (level 2016).

<sup>&</sup>lt;sup>22</sup> It is the concept of `scheefwonen' – lopsided living.

<sup>&</sup>lt;sup>23</sup> <u>http://vois.datawonen.nl/report/cow13\_407.html</u>

<sup>&</sup>lt;sup>24</sup> With an own website: <u>https://www.nhg.nl/</u>

<sup>&</sup>lt;sup>25</sup><u>http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/prive/woning/overdr</u> achtsbelasting/tarieven\_overdrachtsbelasting/het\_tarief\_van\_de\_overdrachtbelasting

<sup>&</sup>lt;sup>26</sup><u>http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/prive/relatie\_familie\_en\_gezondheid/schenken/schenking\_krijgen/vrijstelling\_voor\_de\_schenkbelasting/voorwaarden\_tijdelij ke\_schenkvrijstelling\_eigen\_woning\_2013\_2014</u>

<sup>&</sup>lt;sup>27</sup><u>http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/prive/inkomstenbelas</u> <u>ting/aftrekposten/hypotheekrenteaftrek/</u>. At the same time, it was a highly strange construction: the higher the income and taxation, the higher the option of deductability - up to 51%. It has been qualified as a reversed solidarity of poor with rich.

80's on the agenda - is constantly drawing some attention, as it is feared that this `privatization' might undermine availability and conditions of social housing.

Underlying all these developments were social forces - the emancipation of the lower classes in particular, the appearance of the consumer, formal regulations to control the buying on credit by consumers, as well as the shaping of various informal and formal institutions playing in the field of buying houses on credit. Seller and transferor, buyer and transferee – both regularly consumers, financier – generally banks, but since recent the market is getting more diverse - as individual key players are accompanied by the Vereniging Eigen Huis,<sup>28</sup> by the Nederlandse Vereniging van Banken,<sup>29</sup> by the NIBUD to guide in financing household – since the late 70's,<sup>30</sup> the BKR to register debt since the 60's;<sup>31</sup> and a couple of institutions more.

Not all transactions ended in harmoniously – not meeting obligations and effectuating performance or compensation from the debtors and owners has manifested itself not as severely as elsewhere - e.g. in Spain, but it has appeared front page – in practice more than in academia.<sup>32</sup> Before the European Union entered this market addressing the topic of financing residential property, much already has been in place.<sup>33</sup>

## 2.2. The Dutch Civilian Framework

The starting point is the civilian tradition, in which Dutch law stands.<sup>34</sup> Its civil law has furthermore been codified, since 1809 – with profound changes in 1811 (the French civil code), 1838 (the Dutch civil code) and the new civil code – a piecemeal change since 1970 onwards with the law of property and obligations being introduced in 1992. In its development it has undergone various influences from French, German and European law in particular. It has furthermore seen various relevant changes to

<sup>&</sup>lt;sup>28</sup> The Dutch Home-Owners Association; see <u>https://www.eigenhuis.nl/huis-kopen</u>

<sup>&</sup>lt;sup>29</sup> <u>https://www.nvb.nl/publicaties-standpunten/publicaties/1671/gedragscode-hypothecaire-financieringen-code-of-conduct-for-mortgage-loans.html</u>

<sup>&</sup>lt;sup>30</sup> <u>https://www.nibud.nl/consumenten/het-nibud/organisatie/nibud/;</u> but with far older precursors.

<sup>&</sup>lt;sup>31</sup> Not all debts: taxation, rent, energy, insurance, study is not regsistered – but the rst is; <u>https://www.bkr.nl/</u>

<sup>&</sup>lt;sup>32</sup> Particularly in combination with the financial institution as focused primarily on private in stead of public interests it has drawn a continuing attention. The play *De Verleiders* draws full audiences all evenings, since a couple of years. <u>http://www.de-verleiders.nl/doordebankgenomen/</u>

<sup>&</sup>lt;sup>33</sup> For an economic-historic-legal analysis of consumer-financing in the 20th century see Joost Jonker, Michael Milo and Johan Vannerom, (2016) – to be published in Low Countries Historical Review 2016/2017.

<sup>&</sup>lt;sup>34</sup> See J.M.J. Chorus in chapter 1 to Jeroen Chorus, Ewoud Hondius and Wim Voermans, Introduction to Dutch Law (Kluwer Law Inernational 2016); more in detail J.M. Milo, J.H.A. Lokin and J.M. Smits (eds.), Tradition, Codification and Unification (Intersentia 2014).

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sources (and institutions) of law, legal arguments, methodology, as well as substantive and procedural law. The changes in substance have been accommodated in the civilian framework, of which elements and systematics, grounded in its fundaments are still intact. Property and obligation are systematically taken apart – property in books 3 and 5, obligations in books 6 and 7; owning houses is thereby regulated differently (property) than renting houses (obligations); financing houses is regulated in the law of obligations, while the securing of the loan follows the line of property – security rights.<sup>35</sup> However – this civilian heritage is present only implicit, as arguments neither in case law nor in literature are often explicitly linked to the ius commune Europaeum.

Furthermore there is an explicit presence of human rights – since their birth in natural law and canon law to their presence in (international) constitutions. It is not so much the Dutch constitution which has taken the lead in shaping the law as it stands, but far more the international constitutions – particularly the ECHR.<sup>36</sup> A further aspect of interest is last century's coming out of the consumer. This is visible in legislation on financing through pawnshops which protected the consumer avant-la-lettre since 1910,<sup>37</sup> but also in various decisions by the Hoge Raad on financing,<sup>38</sup> and particularly in the last half century in Europe's free market. The European directives have strongly carved out all individuals as consumers. These directives have been implemented – e.g. in our civil code, and our directive needs to be fitted in this larger scheme of consumer financing within the age-old yet dynamic tradition of property and obligation. It is dynamic: the appearance of the consumer and the need for a level playing field in any free market had already manifested itself before the European Union appeared frontstage. Various legislative as well as judicial adaptations had already rooted into Dutch law, always as a result of debate in the legal-political arena – also under influence of developments of foreign jurisdictions. Our transactions have to be understood in this legal amalgam.

<sup>&</sup>lt;sup>35</sup> Introductions to the Dutch legal system and its various constituent parts may be found in Jeroen Chorus, Ewoud Hondius and Wim Voermans (eds.) Introduction to Dutch Law (Deventer, Kluwer Law International, 2016).

<sup>&</sup>lt;sup>36</sup> Our constitution still prevents constitutional review of legislation (art. 120 GW (Grondwet), thus as a consequence of the force of international law (artt. 93 and 94 GW) courts may review legislation against international human rights standards, and they do.

<sup>&</sup>lt;sup>37</sup> Stb 1910, 321; replaced by the addition to the civil code since July 1, 2014 – Stb 2013, 350; on this see Oldeheuvel in NJB 2013; A.F. Salomons in WPNR 2013.

<sup>&</sup>lt;sup>38</sup> HR 19-05-1967, NJ 1967, 261 (Saladin/HBU) – the general condistions of the bank excluded liability – this clause could on the basis of reasonableness and fairness not be invoked by the Hollandse Bank Unie – it had on its own initiative made client Saladin buy shares, had in its conversation with Saladin been very positive on the conditions, and in these and many other relevant circumstances it needed to compensate the resulting damage.

### 2.3 Selling and transferring residential property

The sale of residential property follows general contractual lines, holding also for financing contracts.<sup>39</sup> Creditor and debtor are demanded to be guided by the groundnorm of reasonableness and fairness - in their relationship from their first contact to the end of their relationship. Our Civil code makes this explicit in article 6:2 BW,<sup>40</sup> but it was incorporated in 1992 after having been stated already in case law and scholarly work long before.<sup>41</sup> Precontractual stages have been recognized in Dutch law to bring about obligations – under conditions – and with some restraint.<sup>42</sup> The precontractual stage is of larger importance, as the information exchanged shapes offer and acceptance, and therefore also the binding force of the contract, furthermore its possible avoidance e.g. by mistake (dwaling), its obligations, and its (non-) performance and possibly the resulting compensation. Offer and acceptance each need to be understood by both parties in order to be bound.<sup>43</sup> Duorum vel plurium in idem placitum consensus – refers our primary treatise on the law of contract to Ulpian.<sup>44</sup> The provisions in the civil code are of a dispositive nature, yet consumertransactions concerning residential property have seen more mandatory invasions on party-, or the bank's autonomy.

Legal argumentation anchors in the – a German heritage – juridical act as the nucleus of all individuals generating obligations, which has been accepted in scholarly literature as well as case law, long before it in 1992 appeared fully fledged in our civil code – in the general part of the law of property and obligations, book 3, article 3:33 BW. It is not just each individual's will, nor his declaration, which makes the obligation, but rather the interplay between both contracting individuals in being bound only to what they reasonably could infer from the other parties declarations. Reasonableness and fairness has played a key role in shaping the parties obligations, on the basis the

<sup>&</sup>lt;sup>39</sup> The regular pattern – offer and acceptance (6:217), seen as a mutual legal act (art.3:33 and 3:35), in which parties have as principle the freedom to contract as they please – art. 6:248. In our case, much of the freedom has been taken away, setting the standard higher to protect the consumer's interest – particularly by EU-law, implementing various directives.

<sup>&</sup>lt;sup>40</sup> Art. 6:2 BW - An obligee and obligor must, as between themselves, act in accordance with the requirements of reasonableness and fairness.

<sup>&</sup>lt;sup>41</sup> HR 15 november 1957, NJ 1958/67 (Baris/Riezenkamp)

<sup>&</sup>lt;sup>42</sup> HR 18 juni 1982, NJ 1983, 723 (Plas/Valburg). This decision was rather lenient; in later cases it was stressed that the freedom to negotiate was only to be restricted on the basis of the criterion of *onaanvaardbaarheid* (unacceptable consequences). Asser/Hartkamp & Sieburgh 6-III (2014), nr. 191.

<sup>&</sup>lt;sup>43</sup> HR 15 april 1983, NJ 1983, 458 (Hajjout/IJmah) – `Yes, that's fine' needs check and double-check if the interests at stake and thus the consequences are high, the person not highly educated, not very well acquainted in the language, being an immigrant-worker. In this case it was meant to end an employment-contract.

<sup>&</sup>lt;sup>44</sup> Asser/Hartkamp & Sieburgh 6-III (2014), nr.9 – D.2.14.1.2 (Ulpian).

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Civil code since the previously mentioned decision of the Hoge Raad in 1957.<sup>45</sup> This became implemented in the civil code on January 1, 1992. The obligations of the contracting parties – are determined by the offer and acceptance as a mutual legal act, which are subject to – age-old – guidelines of interpretation. Next to that, legislation, custom as well as reasonableness and fairness provide the building blocks from which the obligations are derived – as is made explicit by art. 6:248 BW.

The sale has been standardized, filled largely in by standardized sales-contracts – developed by the consumerorganization, the real estate agents and the home-owners association.<sup>46</sup> The contract needs to be in writing since the early 2000's – when in the booming market for residential property protective measures for buyers were considered a necessity. The written contract of sale needs to be handed to the buyer; from this moment on there is a term of three days to rescind the contract.<sup>47</sup> The sale-contract of the residential property is closely related to the loan-contract – see below. Standardly the contract of sale is made under the condition that finance will be arranged. If all goes well – the sales-contract will be performed by a quid pro quo construction, where the notary public supervises the exchange of performances – payment of the price against the registration of the deed of transfer and the registration of the mortgage-deed.

To further protect the buyer a German *Vormerkung* has been imported as well at the same time. The deed of sale may be registered and thus provides protection to the seller, as it is arranged that e.g. second transfers, burdens by later property rights, hire-contracts, attachments, do not interfere with the buyer's right to delivery.<sup>48</sup>

Often used is a standardised contract – which has been negotiated upon by various parties.<sup>49</sup> But transfer needs more. *Traditionibus non nudis pactis dominia rerum transferuntur* <sup>50</sup> holds true for Dutch law – an act of delivery is needed, which is in case of immovables the registration of a notarial deed of transfer, based on an underlying –

<sup>&</sup>lt;sup>45</sup> HR 15-11-1957, NJ 1958, 67 (Baris/Riezenkamp)

 <sup>&</sup>lt;sup>46</sup> Consumentenbond, Nederlandse Vereniging van Makelaars and the vereniging Eigen Huis; see <a href="https://www.eigenhuis.nl/huis-kopen/bestaande-bouw/koopovereenkomst/voorlopig-koopcontract">https://www.eigenhuis.nl/huis-kopen/bestaande-bouw/koopovereenkomst/voorlopig-koopcontract</a>
 <sup>47</sup> Art. 7:2 BW.

<sup>&</sup>lt;sup>48</sup> Art. 7:3 BW.

<sup>&</sup>lt;sup>49</sup> Real estate brokers, the consumer-organisation (Consumentenbond) and the Vereniging Eigen Huis – the contract can be downloaded at:

https://www.eigenhuis.nl/huis-kopen/bestaande-bouw/koopovereenkomst/voorlopig-koopcontract. <sup>50</sup> C.2.3.20.

written, but not necessarily notarial, valid contract. Dutch transfer follows lines of causal transfer-systems.<sup>51</sup>

### 2.4 Financing residential property: the obligational side

Remarkably, the basis of the loan-contract is still one of the few literal relics of the 1838-text of our Civil code, which in the line of Roman law gualifies a loan-contract as a contractus re, mutuum.<sup>52</sup> Hopelessly outdated, it was already declared in 1915.<sup>53</sup> New proposed legislation leads towards the loan-contract as a consensual contract – as does at least for commercial loan-contracts the majority in literature.<sup>54</sup> Such is also the case in consumer-financing. In financing residential property the varieties of loancontracts which occur are also standardized, some of which have been made redundant by the recent changes in tax-deductability of interest-payments for mortgage-loans. Main mortgage-loan types today are the loans which require not just payment of interest, but also repayments of the loan. Level-payment-mortgages (annuiteitenhypotheek), level repayment mortgage (lineaire hypotheek), endowmentmortgage (spaarhypotheek), investmentmortgage (beleggingshypotheek), interest-only mortgage (aflossingsvrije hypotheek), mortgages with credit facility (krediethypotheek) are or were among the most frequent.<sup>55</sup> In the economic high tide of the 90's and with the liberalization of the financial market various financial 'products' were sold, also in combination with residential financing which already have led to a curtailing by courts and legislation of the negative consequences for consumers. The problems concerning (bundling of) sub-prime mortgages did not occur to a large extent however. Main type in the last decades was in particular the endowment mortgage (spaarhypotheek) - as this constructions would allow a continuing deductability of all interest-payments.

<sup>&</sup>lt;sup>51</sup> The sequence of articles: art. 3:84 (the general article on transfer of property) jo 3:89 (public registration of registered property, particularly immovables)

<sup>&</sup>lt;sup>52</sup> Art. 7A:1791 - Verbruikleening is eene overeenkomst, waarbij de eene partij aan de andere eene zekere hoeveelheid van verbruikbare goederen afgeeft, onder voorwaarde dat de laatstgemelde haar even zoo veel, van gelijke soort en hoedanigheid, terug geve. In the ranslation of Wahrendorf et. al this becomes: A loan of consumables is a contract whereby one of the parties delivers to the other a certain quantity of consumables which perish in use, on condition that the latter will return to him a quantity of the same kind and quality.

<sup>&</sup>lt;sup>53</sup> Land/Losecaat Vermeer/Star Busmann, Verklaring van het Burgerlijk Wetboek V (2e dr.), 1915, p. 538, voetnoot 4, as cited by Van Schaick, Asser/Van Schaick, 7-VIII, nr. 216 – referring to Gaius Institutes 3:14, but that cannot be correct; 3:90 it should be.

<sup>&</sup>lt;sup>54</sup> Asser/Van Schaick, 7-VIII, nr. 216.

<sup>&</sup>lt;sup>55</sup>And mentioned among a few more on the website of Eigen Huis: <u>https://www.eigenhuis.nl/hypotheken/hypotheekvormen</u>

By the above mentioned standard of reasonableness and fairness specific institutions in our society were held over the years to be subject to higher standards.<sup>56</sup> In the case of consumer-financing in particularly duties to take care on this basis have already since the 90's proven to be of strong normative guidance. In the economic high tide of the 90's, the growth of the financial markets, various `innovative' financial products were sold which led to enormous debts after collapse of the underlying value. These obligations to pay these debts have often in various ways been curtailed, through various legal techniques by the courts. Through a sequence of Hoge Raad decisions these cases have resulted in the acceptance of specific duties to inform, to warn, to protect, and the duty even not to agree on a financial service.<sup>57</sup> These duties have in the meantime been crystallized in legislation - particularly in the act on financial supervision (Wft),<sup>58</sup> in the general code of conduct for mortgage financing,<sup>59</sup> as well as in the general banking conditions.<sup>60</sup> Thus the general concept of reasonableness and fairness has acquired a more specific and concrete meaning - by specific duties to inform, warn and even to not agree on financing. Responsible financing is part of the obligations - in the act on financial supervision made concrete,<sup>61</sup> and even more concrete in a subsequent decree,<sup>62</sup> which requires criteria by the creditors for assessing creditworthiness.<sup>63</sup> These are then contained in the Code of Conduct.<sup>64</sup>

<sup>&</sup>lt;sup>56</sup> E.g a Notary public (HR 20 January 1989, NJ 1989, 766); a solicitor (HR 14 May 1993, NJ 1993, 457).

<sup>&</sup>lt;sup>57</sup> Among more in HR 23 May 1997, NJ 1998, 192 (Rabobank/Everaars) - build further on in the decisions on the `effectenlease' products by various banks: HR 5 June 2009,ECLI:NL:HR 2009 BH2811; BH2815; BH2822; Asser/Hartkamp & Sieburgh 6-III (2014), nr.165.

 $<sup>^{58}</sup>$  E.g. art. 25 - The article makes it possible that by regulation of the government rules will be issued – AmvB's on duties to take care.

<sup>&</sup>lt;sup>59</sup> The *Gedragscode Hypothecaire Financieringen* (GHF). Published on the website of the Dutch society of banks (NVB): <u>https://www.nvb.nl/publicaties-standpunten/publicaties/1671/gedragscode-hypothecaire-financieringen-code-of-conduct-for-mortgage-loans.html</u>

<sup>&</sup>lt;sup>60</sup> In article 2 – of the conditions of the Dutch society of banks (NVB) –see at:

https://www.nvb.nl/publicaties-standpunten/publicaties/619/algemene-bankvoorwaarden-generalbanking-conditions.html

<sup>&</sup>lt;sup>61</sup> Art. 4:34- 1. Voor de totstandkoming van een overeenkomst inzake krediet, of een belangrijke verhoging van de kredietlimiet, dan wel de som van de bedragen die op grond van een bestaande overeenkomst inzake krediet aan de consument ter beschikking zijn gesteld, wint een aanbieder van krediet in het belang van de consument informatie in over diens financiële positie en beoordeelt hij, ter voorkoming van overkreditering van de consument, of het aangaan van de overeenkomst onderscheidenlijk de belangrijke verhoging verantwoord is.

<sup>&</sup>lt;sup>62</sup> Art. 115 Bgfo wft - Ter voorkoming van overkreditering legt een aanbieder van krediet de criteria vast die hij ten grondslag legt aan de beoordeling van een kredietaanvraag van een consument en past hij deze criteria toe bij de beoordeling van een kredietaanvraag. Loan to Value and Loan to Income are mentioned as the key elements. Loan to Value is now by legislation set at 104%, but will be lowered the years to come.

<sup>&</sup>lt;sup>63</sup> On this see particularly Vanessa Mak, 'What is responsible lending? The EU Consumer Mortgage Credit Directive in the UK and the Netherlands', *Journal of Consumer Policy 2015*/4, p.411-430.

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Deviation is possible, but needs to be explained – these deviations by explanations have substantially decreased over the last decade.<sup>65</sup> Formal rules by the Minister of Finances took partially over for the income criteria for mortgage credit and the maximum loan.<sup>66</sup> The temporary regulation on hypothecary credit (*tijdelijke regeling hypothecair krediet*) curtailed the maximum loan to value ratio since 2012 - reaching 100% on january 2018. The authority on financial markets (AFM - Autoriteit Financiele Markten) found that 60% of the consumers buying residential property made use of private financial advice – on average against a cost of €1900.<sup>67</sup> The prohibition on provision for financial intermediaries is well complied with, according to the public supervision-authority AFM on the basis of a research.<sup>68</sup>

In the contract of sale, advancements or suretyship clauses are standardly part of the contract. A percentage of 10% is seen as customary.<sup>69</sup> The boundaries of clauses concerning interests are set by contractual freedom on the one hand. Has no interest been agreed upon, the official interest standard will apply.<sup>70</sup> The level of interest may be set by the parties – but it will be limited by the above mentioned criteria of art. 6:248 BW. An interest may be qualified as contra bonos mores;<sup>71</sup> consumercredit knows a maximized interest rate;<sup>72</sup> anatocism is allowed – yet is less transparently

<sup>&</sup>lt;sup>64</sup> The criteria are mentioned in determining the borrowing limit – Loan to Income and Loan to Value Ratio's are the start. But the article continues with a lot more e.g. reference to normative criteria by NIBUD for living expenses; I cite the first section. Art. 6. The mortgage lender shall assess individually every application by a borrower for a mortgage loan on the basis of the borrower's financial position and credit status and the value of the offered collateral, including the residence that is to serve as collateral for the repayment of the mortgage loan. In assessing an application for a mortgage loan the mortgage lender shall not discriminate on the basis of religion, belief, political opinion, race, nationality, sex, marital status or sexual orientation. In addition, the mere fact that the dwelling to be mortgaged is situated in a given neighbourhood or postcode area shall not be a ground for refusing an application.

<sup>&</sup>lt;sup>65</sup> See Vanessa Mak, What is Responsible Lending? The EU Consumer Mortgage Credit Directive in the UK and the Netherlands', *Journal of Consumer Policy 2015/*4, p.412, referring to Kerste et al.(2011), Publieke belangen en hypoteekregulering; to be downloaded from:

http://www.seo.nl/pagina/article/publieke-belangen-en-hypotheekregulering/.

<sup>&</sup>lt;sup>66</sup> Tijdelijke regeling hypothecair krediet, to be found on:

http://wetten.overheid.nl/BWBR0032503/2016-01-01

<sup>&</sup>lt;sup>67</sup> <u>https://www.afm.nl/nl-nl/nieuws/2016/feb/consumentenmonitor-hypotheken</u> - the prohibition on provision has not influenced this at all.

<sup>&</sup>lt;sup>68</sup> <u>https://www.afm.nl/nl-nl/nieuws/2015/juli/rapport-provisieverbod</u>

 <sup>&</sup>lt;sup>69</sup> See the standard contract of sale by NVM, Eigen Huis and Consumentenbond art. 5 and explanation.
 <sup>70</sup> Art. 6:119 BW.

<sup>&</sup>lt;sup>71</sup> Goede zeden as mentioned in art. 3:40 BW, providing a basis for declaring such a clause void. Examples are e.g. a decision by the Court of Appeal Leeuwarden 5 July 2011, ECLI:NL:GHLEE:2011:BR0354, with a couple of other cases on excessive interest clauses.

<sup>&</sup>lt;sup>72</sup> Art. 35 Wck – based on the Consumercredit Directive. The maximum rate is 12% - points over the level of legal interest – which stand at 2%.

leading to higher costs, and therefore concluded to be sooner susceptible for voidability.<sup>73</sup> The interest agreed upon has led to some interesting decisions. Among more that an agreement containing a variable rate without an external reference the reference should be to the 3-month LIBOR rate, favoring the consumer;<sup>74</sup> in case of a calculation of interest which objectively led to the payment of (*negative*) interest, the Bank was held to act accordingly.<sup>75</sup> Repayment has (again) become the standard, and clauses like that are standard – obviously, since the criteria for tax-deduction thus demands.<sup>76</sup>

Penaltyclauses<sup>77</sup> have led to much discussion and legal procedures. The penalties are now maximized to the costs the financier has made – yet it is held that these penalties have been far too high. See e.g the Home Owner's association, with such a statement as well as an interest check.<sup>78</sup> The private foundation (stichting) Oversluitclaim has undertaken a research on a 12000 contracts and concluded to a 15% too high penalty; furthermore consumers may have decided on the basis of this penalty not to switch financiers – which also caused damages. The foundation will start a procedure against banks.<sup>79</sup> The AFM starts a research on banking practices.

# 2.5 The Mortgage

The mortgage (*hypotheek*, hereafter hypothec) is the security right (a limited property right) with which registered property like an immovable may be burdened.<sup>80</sup> The creation of a hypothec follows the lines of transfer:<sup>81</sup> it needs a contractual foundation – which will often be present in the loan-contract which obliges to create a hypothec.

<sup>&</sup>lt;sup>73</sup> Asser/Van Schaick, 7-VIII, nr. 258.

<sup>&</sup>lt;sup>74</sup> <u>https://www.kifid.nl/fileupload/jurisprudentie/GeschillenCommissie/2013/Uitspraak\_2013-146\_Bindend.pdf</u>

<sup>&</sup>lt;sup>75</sup> https://www.kifid.nl/fileupload/jurisprudentie/GeschillenCommissie/2016/Uitspraak 2016-143 Bindend.pdf

<sup>&</sup>lt;sup>76</sup> These clauses, or the absence thereof will be governed – as all clauses – by art. 6:248, legislation, custom and reasonableness and fairness - Asser/Van Schaick, 7-VIII, nr. 232.

<sup>&</sup>lt;sup>77</sup> In general and detail on penaltyclauses see H.N. Schelhaas, Het boetebeding in het Europese contractenrecht (Kluwer 2005).

<sup>&</sup>lt;sup>78</sup> See: '<u>https://www.eigenhuis.nl/hypotheken/rentebarometer</u>

<sup>&</sup>lt;sup>79</sup> NRC Handelsblad 13 September 2016, p. E2. <u>https://www.oversluitclaim.nl/</u>. The three main banks are the ING, Rabo and ABN/AMRO.

<sup>&</sup>lt;sup>80</sup> There is a `numerus clausus' in Dutch law – only by the property rights made available by legislation property may be burdened. There are two types of security rights: the right of hypothec for registered property, and the right of pledge for all other types of property – see art. 3:227 BW.

<sup>&</sup>lt;sup>81</sup> According to art. 3:84 BW for transfer as well as creation of a limited property right as a hypotheek – the requirements are a valid legal ground (a causa, as a salescontract), on the basis of which a formal act of delivery (for transfer) of creation is made; power to dispose is the third requirement. The transfer rule of art. 3:84 is made applicable by the rule of article 3:98 BW.

The creation needs a notarial deed of the creation followed by its registration. De object of the hypothec, the residential property, needs to mention the amount of the secured claim, and at least the maximum amount;<sup>82</sup> the hypothec is accessory to the claim; the object needs furthermore to be specifically described in the deed.<sup>83</sup> The powers of the holder of the hypothec are primarily and mandatorily shaped by the civil code. The most important being the power to transfer, in case the consumer does not meet his obligations and is in *mora*.<sup>84</sup> This power is the so-called power of `parate executie,' and the holder of the hypothec may proceed on the basis of the deed of hypothec - no judicial interference is required. Cases concerning eviction, however, are subject to the fundamental standards of a due procedure (art. 6 ECHR) as well as the protection of one's home (art. 8 ECHR). There needs to be at least the option to have access to a judicial check before an eviction takes place.<sup>85</sup>

# 3. The Directive and its Implementation in Dutch Law

# **3.1 The Directive**

Agreements covering credit for consumers secured by a mortgage, or otherwise related to residential property (art. 1) are harmonized on a certain level (art. 2), covering a specific scope (art. 3), knows definitions (art.4), demands from member states competent authorities to ensure application and enforcement (art.5), demands from Member States financial education of consumers (art. 6), prescribes conditions to be fulfilled by creditors and intermediaries, specifically good business conduct (art. 7), providing of information to consumers (art. 8), and having knowledgeable staff (art. 9). Preceding the credit-agreement advertisements and marketing should be fair, clear and not misleading (art. 10) while advertising should contain certain information (art. 11), allows bundling but prohibits tying-practices (art. 12), and prescribes general information (art. 13) to be made available to consumers by creditors, pre-contractual information (art. 14), specific information by credit-intermediaries (art. 15), while explanation of the proposed agreement shall be made (art. 16). The annual percentage rate of charge shall be calculated in a prescribed manner (art. 17); the creditworthiness of the consumer will be assessed (art. 18) on the basis of information necessary, sufficient and proportional (art. 20), and the residential property will be valued

<sup>&</sup>lt;sup>82</sup> Art. 3:260 BW.

<sup>&</sup>lt;sup>83</sup> Conform the specificity principle in art. 3:84 and in case of immovable property and the prperty rights thereon art. 20 Kadasterwet (Kw); the Kadaster is the administrative authority keeping the registers.
<sup>84</sup> Art. 3:268 BW.

<sup>&</sup>lt;sup>85</sup> HR 28 oktober 2011, NJ 2013, 153 – based on caselaw of the ECHR, in particular ECtHR 13 may 2008 (McCann v UK), nr. 50; similar considerations in the case ECtHR 16 July 2009 (Zehentner v Austria), nr. 65.

according to reliable standards (art.19). Creditors need to have access to a database I order to monitor consumer- compliance (art. 21). There are furthermore standards for advisory services to the consumer (art. 22). The credit agreement may be in foreign currency (art. 23) and know a variable rate (art. 24). Early repayments (art. 25) need to be possible. The creditors need to have appropriate records of immovables accepted as security as well as the mortgage policies used (art.26). Changes in the borrowing rate need to be communicated (art. 27). In case of arrears and foreclosure, creditors should be guided by reasonable forbearance (art. 28). Requirements for creditintermediaries are dealt with in art. 30-34; non-credit institutions in art. 35; cooperation between the competent authorities in 36 and 37; sanctions on infringements (art. 38), dispute resolution mechanisms (art. 39), the Commission's power to legislate by delegation (art. 40), the imperative nature of the directive (art. 41), its transposition (art. 42), transitional provisions (art. 43), a review clause (art. 44), the publication in 2019 by the Commission of a report assessing wider challenges of private over-indebtedness (art. 45), articles 46-48 amending other directives, and entry into force (art.49) as well as its adressees (art. 50) conclude the directive. Important rights and obligations are scattered all over the directive: there is e.g. no right to end a contract on the basis of (art. 18, paragraph 4) an incorrect creditworthinessassessment; neither can an agreement be ended if the information provided by the consumer is incomplete (art. 20, paragraph 3).<sup>86</sup>

### **3.2 Implementation in The Netherlands**

The directive has been implemented in The Netherlands. On September 23, 2015, the bill<sup>87</sup> was presented to parliament,<sup>88</sup> accompanied by an explanatory memorandum,<sup>89</sup> and was subsequently advised upon by the Council of State,<sup>90</sup> debated in parliament, and outside, in literature.<sup>91</sup> The implementation took place by changes to the Dutch

<sup>&</sup>lt;sup>86</sup> This is to be seriously condensed – but now used for structural reasons.

<sup>&</sup>lt;sup>87</sup> Kamerstuk 34292 nr. 2.

<sup>&</sup>lt;sup>88</sup> As usual by Royal Decree: Kamerstuk 34292 nr. 1.

<sup>&</sup>lt;sup>89</sup> Kamerstuk 34292 nr. 3 – hereafter: Explanatory Memorandum.

<sup>&</sup>lt;sup>90</sup> Kamerstuk 34292 nr.4. The council of state or Raad van State standardly advises in the formal legislative procedure.

<sup>&</sup>lt;sup>91</sup> J.M. van Poelgeest & Q.A.G. Masius, 'De nieuwe hypotheekmarkt', O&F 2016/24; M. Kuilman, 'Impact implementatie Hypothekenrichtlijn voor aanbieders van hypothecair krediet', FRP 2015/4; J.J.A. Braspenning & V. Mak, 'Nieuwe regels voor hypothecaire kredietverstrekking aan consumenten: over leren en bezweren', TvC 2015, afl. 2, p. 73-81. Also in English Dutch law has been dealt with – particularly in the publications of Vanessa Mak: see V. Mak, 'What is responsible lending? The EU Consumer Mortgage Credit Directive in the UK and the Netherlands', *Journal of Consumer Policy 2015*, afl. 4. V. Mak & J. Braspenning, 'Errare humanum est. Financial Literacy in European Consumer Credit Law', *Journal of Consumer Policy 2012*, afl. 3. V. Mak, 'The Myth of the Empowered Consumer. Lessons

civil code,<sup>92</sup> the Act on Financial Supervision,<sup>93</sup> and the Consumer Protection (enforcement) Act.<sup>94</sup> Many aspects were left unchanged, some were adapted, others had to be adapted. Dutch civil law, provides the mainframe. The transposition to place systematically in title 2b of book 7 of the Dutch civil code, on specific contracts, in the articles 118-128b, entitled consumercreditcontracts concerning residential immovables – the *woningkredietovereenkomst*.<sup>95</sup> The placement in book 7 makes these contracts explicitly subject to the general rules on property law (books 3 and 5) as well as the law of obligations, which encompasses general rules on contract law (book 6). This implementation took place while consumer credit on the whole is subject to national legislative change, aiming at adjusting rules and bringing all civil law rules concerning creditcontracts together in the civil code – somewhere in the years ahead.<sup>96</sup>

Consumer (consumentenkredietovereenkomsten), credit sales-credit (goederenkrediet), loan-credit (geldlening) and pledge-agreements (pandbelening) will make up the subsequent titles on consumer-financing. It is preceded by financial collateral agreements (financielezekerheidsovereenkomsten)- title 7.2, which explains the title 2b. `Articulating' a normative framework in continuous reconstruction proves again to be a difficult issue - where publicity or transparency may be easily lost. Does European law demolish our civil code? was rhetorically asked only a few years after introducing the new civil code, after Directive 1993/7 on the Return of Cultural Objects.<sup>97</sup> Though the answer leaned towards the positive back then – it illustrates a perspective, which certainly has changed after those decades since 1992. Foreign elements will keep appearing in law, and need to be given meaning within the civilian framework, which has grown more complicated. Other institutions next to the Dutch legislator playing a role in creating the law as it stands have acquired weight: courts, scholars as well, but particularly institutions in practice have shown to be actively contributing to keeping the practice of financing residential property up to certain standards - e.g concerning the contracting on the sale and the financing; on the

from Financial Literacy Studies' (2012), Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht, p. 254-63.

<sup>&</sup>lt;sup>92</sup> Burgerlijk Wetboek - BW.

<sup>&</sup>lt;sup>93</sup> Wet financieel toezicht – Wft.

<sup>&</sup>lt;sup>94</sup>Wet handhaving consumentenbescherming – Whc.

<sup>&</sup>lt;sup>95</sup> Stb 2016, 265.

<sup>&</sup>lt;sup>96</sup> A proposal for a bill has been subject to public electronic consultation:

https://www.internetconsultatie.nl/consumentenkrediet/reacties

<sup>&</sup>lt;sup>97</sup> Carlos Bollen, Gerard-René de Groot, Verknoeit het Europese recht ons Burgerlijk Wetboek? NTBR 1995/1.

creditworthiness-check, on the education of the consumer, on the duty to take care of the customer.  $^{\rm 98}$ 

# 3.3 Implementation in the Civil code

### a. In general

What is implemented in the civil code? Title 7:2b BW is further systematized in five sections - *afdelingen*. The first section contains general provisions, on definitions (art. 7:118 BW) and the scope (art. 7:119); the second section contains provisions on advertisements, bundling and tying practices, and pre-contractual information to be provided (art. 7:120-123); the third section (art.7:124) is on the annual percentage rate – *jaarlijks kostenpercentage*; the fourth section is on information and consumer-rights: the right not to have the contract ended by the creditor on the basis of an incorrect assessment (7:125 BW); the right to convert to alternative currency (art. 7:126 BW); the consumer's right to early repayment (art. 7:127 BW); timely information on changes in borrowing rate (art. 7:128 BW); on arrears and foreclosure (art. 7:128a BW). Often the implementation is by explicitly referring to parts of the directive.

### b. On general provisions and scope

It is made explicit (art. 7:118 under t BW) that not just the sale of immovables falls under the definition, but also the property rights in immovables – like the long-lease (*erfpacht*) and usufruct (*vruchtgebruik*).

The scope of the directive encompasses also credit agreements using comparable security (art.3.1 (a) Directive) – in The Netherlands the *huurkoop* construction<sup>99</sup> is explicitly brought by the explanatory memorandum under the new normative framework in art. 7:119 section 1 under a with the wording: *vergelijkbare zekerheid*. The Dutch legislator did decide not to exclude from the scope the under a, b and d article 3 section 3 of the Directive. Therefore credit-agreements with mortgage without purpose to acquire residential property, with a goal of rental agreement, and bridging loans are included.<sup>100</sup> Some credit-agreements are excluded from its scope,

<sup>&</sup>lt;sup>98</sup> Takes place through various channels of consumerorganizations – also mentioned in the explanatory memorandum - platform Wijzer in geldzaken, with the Honorary Chair Princess Maxima of The (https://www.wijzeringeldzaken.nl/english/) Netherlands ; the Consumentenbond (https://www.consumentenbond.nl/hypotheek/); the NIBUD (https://www.nibud.nl/); the Vereniging (https://www.eigenhuis.nl/huis-kopen/); Eigen Huis supervision Authority AFM (https://www.afm.nl/en); the Nederlandse Vereniging van Banken - NVB; the Bureau Kredietregistratie -BKR; the Nederlandse Vereniging van Makelaars – NVM.

<sup>&</sup>lt;sup>99</sup> From the Tijdelijke Wet Huurkoop Onroerende Zaken (TWHOZ).

<sup>&</sup>lt;sup>100</sup> See TK 34 292, nr. 3, p. 49-50.

like the equity release credit-agreements.<sup>101</sup> Nevertheless, such an agreement might be encompassed by the rules on consumercredit.<sup>102</sup>

### c. On advertisements

Article 7:120 BW deals with advertisements – and the explanatory memorandum brings in immediately the directive on unfair commercial practices.<sup>103</sup> Article 10 of the directive is literally translated into article 7:120 section 1 BW. Section 2 explcitly makes clear that the standard information is always required in advertisements – there is no exception made for the case mentioned in the second sentence of article 11 section 1 second sentence.<sup>104</sup> This information could very well be of value to the consumer, even though the advertisement refers to the APRC – explains the legislator, and thus it follows the same line as in the implementation of the consumer-financing.<sup>105</sup> In the prescription of what needs to be in the advertisement, Dutch law refers to the in the directive mentioned standard information – which is efficiency-proof, but vulnerable from a perspective of clarity for consumers consulting the law.

### d. Tying and bundling practices

Tying (*koppelverkoop*) and bundling (*gebundelde verkoop*) practices are implemented in article 7:121 BW. These practices have partially been dealt with already. In consumer credit-loans up to  $\leq 40.000$ ,<sup>106</sup> and in the arrangement of general conditions,<sup>107</sup> these tying practices are leading to respectively voidness or a presumption that it is possibly unreasonably onerous for the consumer and thus to be avoided. However, the limitations and therefore applicability to our credit-agreements are clear. Therefore implementation followed – and tying practices are forbidden – bundling practices allowed. Exceptions to the prohibition of tying practices are offered by the directive (art. 12 section 2 and nr. 25 preamble) and have been taken over in the Dutch implementation. Some products may be considered essential part of the credit agreement (bankaccounts, savingsaccount, investments or pensions and insurances are mentioned<sup>108</sup>) – and as such they have already been recognized in

<sup>&</sup>lt;sup>101</sup> Art. 7:119 section 1 under a, 1 BW: *opeethypotheken* in dutch.

<sup>&</sup>lt;sup>102</sup> As implemented in art. 7:58 ff.BW. See TK 34 292, nr. 3, p. 46-47.

<sup>&</sup>lt;sup>103</sup> Directive 2005/29/EG, as implemented in articles 6:193 a-j BW.

<sup>&</sup>lt;sup>104</sup> Member States may provide that the first subparagraph shall not apply where national law requires the indication of the APRC in advertising concerning credit agreements which does not indicate an interest rate or any figures relating to any cost of credit to the consumer within the meaning of the first subparagraph.

<sup>&</sup>lt;sup>105</sup> Directive 2008/48/EC – see 32 339 nr.3, p. 2.

<sup>&</sup>lt;sup>106</sup> Art. 33 under b Act on Consumercredit (Wck).

<sup>&</sup>lt;sup>107</sup> Check Unfair contract terms directive 93/13/EEC

<sup>&</sup>lt;sup>108</sup> IN the explanatory memorandum 34292 nr. 3, p. 53-54.

Dutch legislation – in consumer credit<sup>109</sup> as well as in the arrangement on general contract terms.<sup>110</sup> The option of art. 12 section 3 is explicitly not included in Dutch law: too unworkable for the AFM.<sup>111</sup>

### e. On Information Before the Contract

Our acceptance of precontractual obligations in the fabric of the general norm of reasonableness and fairness provides a setting for advertisements a well as for the provision of information. Article 7:122 imports article 14, and thus the European standardized information sheet (ESIS) - so the consumer can compare. At the same time the consumer needs to provide information from his side, so the creditor can assess his creditworthiness. The Netherlands has opted for a reflection period before the conclusion of the contract – a period of reflection afterwards was quickly declined - referring to the earlier directive on distance marketing of consumer financial services to consumers,<sup>112</sup> as well as the Consumer rights directive,<sup>113</sup> which led to this exclusion in our legislation.<sup>114</sup> Why? It does not fit well with the provision of hypothecary credit. The term provided is 14 days, which is conform other arrangements in law,<sup>115</sup> as well as in practice, where a resolutive condition is standardly included in sales contracts for residential property concerning the finances.<sup>116</sup> The option of an prohibition to accept an offer during a maximum period of 10 days during the reflection period is not chosen - too restrictive for the consumer.<sup>117</sup> The creditworthiness check (art. 18 section 4 and 20 section 3 Directive) happens before the conclusion of the contract, and is implemented in art. 7:125 BW. It is a routine developed since the 60's, in which the private-public institution of the BKR is involved.<sup>118</sup> The contract is concluded the moment the offer - an irrevocable offer in the sense of art. 6:219 BW - is accepted (art. 6:217 BW).

<sup>&</sup>lt;sup>109</sup> Art. 33 under b Wck.

<sup>&</sup>lt;sup>110</sup> Art.6:237 under j BW

<sup>&</sup>lt;sup>111</sup> Authority for the Financial Markets – supervision authority.

<sup>&</sup>lt;sup>112</sup> Directive 2002/65/EC.

<sup>&</sup>lt;sup>113</sup> Directive 2011/83/EU.

<sup>&</sup>lt;sup>114</sup> First in art. 4:28 Wft, then in art. 6:230x section 4 BW; also impossible in case of *effectenkrediet* in art. 7:66 section 7 BW – directive 2008/48/EU.

<sup>&</sup>lt;sup>115</sup> With terms in art. 7:66 and 6:230 BW.

<sup>&</sup>lt;sup>116</sup> The condition that the sale is concluded under the condition that financing will be found – see the model-contract Eigen Huis/NVM art. 16.1 under b.

<sup>&</sup>lt;sup>117</sup> Explanatory memorandum, 34 292, nr. 3, p. 59.

<sup>&</sup>lt;sup>118</sup> www.bkr.nl

### f. On Contractual Obligations

Article 7: 123 provides for the implementation of article 15, obligations in case an intermediary is involved. The Netherlands knows already of a ban on payments to a credit-intermediary.<sup>119</sup> The annual percentage rate of charge is implemented in art. 7:124 – conform the directive. As section 6 of art. 17 directive is not under maximum-harmonization – it is implemented literally in art. 7:124 section 2 and 3. Article 7:125 BW provides for the consequences of an incorrectly conducted check on creditworthiness. Section 1: the creditor cannot to the detriment of the consumer end or change the contract on the basis of an incorrect check, unless knowingly withheld by the consumer;<sup>120</sup> Section 2 provides that the creditor cannot end the contract on the basis of incomplete information of the consumer, unless it was knowingly withheld.<sup>121</sup> It is expressly added in the explanatory memorandum that the creditor bears a heavy burden of proof – that the consumer did this knowingly - *bewust*.<sup>122</sup> Valuation of the property is in this check only one element. It has over the years been standardized – parallel to developments in legislation on taxation. Nevertheless, a taxation needs to be conducted.<sup>123</sup>

Article 7:126 arranges for implementation of article 23 Directive. In case foreign currency is used – consumers need to be protected against the currency-risk. The consumer has the right to convert from the conclusion of the contract to convert. Conversion will happen against the exchange rate at the moment the conversion is requested.<sup>124</sup>

The consumer has the right to early repayment – thus art. 25 is implemented in art. 7:127 BW. It used already to be part of the standardized loan-contracts – as in the code of conduct  $(GHF)^{125}$  it is already provided for. The new legislation now closely

<sup>&</sup>lt;sup>119</sup> Art. 4:25a Wft, art. 86c Bgfo Wft.

<sup>&</sup>lt;sup>120</sup> De kredietgever kan de kredietovereenkomst niet ten nadele van de consument beëindigen of wijzigen op grond van een onjuist uitgevoerde beoordeling van de kredietwaardigheid, tenzij de consument bewust informatie in de zin van artikel 4:34, derde lid, van de Wet op het financieel toezicht heeft achtergehouden of onjuist heeft weergegeven.

<sup>&</sup>lt;sup>121</sup> De kredietgever kan de kredietovereenkomst niet beëindigen op grond van door de consument onvolledig verstrekte informatie voor het sluiten van de kredietovereenkomst, tenzij de consument bewust informatie heeft achtergehouden of onjuist heeft weergegeven.

<sup>&</sup>lt;sup>122</sup> 34 292 nr. 3, p. 62.

 $<sup>^{123}</sup>$  The so-called WOZ – waardering onroerende zaken – the valuation of immovable property as is yearly carried out by the municipalities.

 $<sup>^{124}</sup>$  In the articles 6:121-126 the use of foreign currency in obligations is dealt with – there are some small discrepancies, but not sufficiently serious to change those general rules.

<sup>&</sup>lt;sup>125</sup> Art. 9 of the *Gedragscode Hypothecaire Financieringen* (GHF): <u>https://www.nvb.nl/publicaties-standpunten/publicaties/1671/gedragscode-hypothecaire-financieringen-code-of-conduct-for-mortgage-loans.html</u>

follows the code of conduct here.<sup>126</sup> Only the creditor's costs should be charged, and no penalty,<sup>127</sup> – which because of its vague nature remains a topic of discussion. Changes in interest need to be communicated to the consumer – art. 7:128.

The duty to take care is also strongly present in our financial transaction. It permeates all obligations previously dealt with and all others in the relationship. But it particularly appears to the creditor being aware that his powers of a mortgagee do strongly interfere with the consumer's position as owner-and often factual possessor of a residence. Article 28 of the directive on arrears and foreclosure demands a `reasonable forbearance' before initiating a foreclosure. It stresses the importance of taking the consumer's interests into account, also in the power of the mortgagee to foreclose as in art. 3:268 BW.<sup>128</sup> Financing has become – it probably has always been there much more than is realized - an important fundament of societies' fabric. In combination with acquiring and having residential property it is even of larger importance: to prevent a foreclosure. The way this article is implemented gives a roadmap in which this `reasonable forbearance' parallels the specific duty, and is given a concrete shape. This specific duty has already been carried over from judicial decisions to legislation,<sup>129</sup> and has also found its way in general banking conditions.<sup>130</sup> These leads to an intensified presence of the criteria of non-performance (of the loan-contract), tort law or of abuse of power in the civil code, all leading to compensation for the lender.<sup>131</sup> Necessary is to sufficiently allow the consumer to perform - which may be a temporary impossibility, and it is suggested in the explanatory memorandum that an extra time needs to be given; also is referred to the result of the foreclosure - if it would lead to a debt higher than the value of the residential property, it indicates that more time would be indicated.<sup>132</sup> The code of conduct offers these possibilities, yet not this explicit.<sup>133</sup> Also AFM, the supervision authority, has carried out research and has

<sup>&</sup>lt;sup>126</sup> 34 292, nr 3, p. 65.

<sup>&</sup>lt;sup>127</sup> Art. 10 GHF - Every calendar year, the mortgage lender shall allow the borrower to pay extra instalments without any obligation to pay any penalty, in a non-cumulative manner up to an amount equal to ten percent of the initial capital sum of the mortgage loan. Section 2 and 3 mention a penalty – that certainly needs to be adjusted.

<sup>&</sup>lt;sup>128</sup> If the obligor is in default of performing that for which the mortgage serves as security, the mortgagee is entitled to have the secured property sold in public before a notary with authority to do so.

<sup>&</sup>lt;sup>129</sup> Art. 25 Wft – act on financial supervision – more specifically in the Bgfo Wft art. 81c – in case of nonperformance by the consumer-lender-and occupier of the residential property and the possible foreclosure.

<sup>&</sup>lt;sup>130</sup> Art. 2 General banking conditions.

<sup>&</sup>lt;sup>131</sup> Respectively art. 6:74, 6:162 and art. 3:12 BW.

<sup>&</sup>lt;sup>132</sup> 34 292 nr. 3, p. 69.

<sup>&</sup>lt;sup>133</sup> Art. 15 GHF - Where a borrower fails to meet his obligations under a mortgage on time, in full or at all, or there is a demonstrable risk of this, the mortgage lender will examine together with the borrower whether a reasonable solution acceptable to the mortgage lender and to the borrower for these

produced a roadmap on how to proceed in case of late payment on hypothecary financing.<sup>134</sup> The national guarantee (NHG) for hypothecary loans as well as the *woonlastenfaciliteit* provide extra measures which may aid the consumer-debtor in case of non-performance.

Disputes on any of the topics covered by these transactions are channeled either through the regular judicial procedure, or through the procedure of of the complaints institute *kifid* – depending on consensus of the parties.<sup>135</sup> In 2015 an amount of 1400 complaints - nearly 25% of all financial complaints - dealt with by *kifid* were on hypothecary financing – a fraction leads to a decision which sides completely with the consumer's complaint.<sup>136</sup> Decisions are published. It shows that not all conflicts have disappeared, not all legal problems; neither is our Dutch legal world suddenly filled with solutions. Will we ever get to heaven?

### 4. Relevant Issues the Directive Does not Solve

There are issues which are not easily to be solved. The market of financing was – and is – a highly national market. This directive does contribute to the Europeanization by standardizing the information – but it will require more to get to a European market of financing the acquisition of residential property. Some routes are offered already, though.<sup>137</sup>

Important issues not yet solved are the high level of household debts in mortgageloans. Formal Dutch regulations try to curtail this by demanding practice to apply lower loan to value ratio's – the differences between national markets on these ratios however, are striking. But this is perhaps not necessarily something which need to be levelled out on the short term, as it reflects national institutions at work in their

<sup>135</sup> https://www.kifid.nl/

difficulties can be found. When looking for a solution, even a temporary solution, the mortgage lender shall not be bound by the provisions of Article 6, where this is in the consumer's interest. The mortgage lender shall not proceed to a public sale of the residence under mortgage except after the said consultation has taken place or after an attempt thereto has been made, and in no case not within two months after the period during which the borrower ought to have honoured his obligations unless the mortgage lender cannot reasonably be expected to enter into discussions with the borrower or to observe the said two month time period.

<sup>&</sup>lt;sup>134</sup> The *leidraad betalingsachterstanden by hypotheken.*'

<sup>&</sup>lt;sup>136</sup> See the annual report over 2015: <u>https://www.kifid.nl/fileupload/Jaarverslag\_2015.pdf</u>. Numbers are difficult to qualify.

<sup>&</sup>lt;sup>137</sup> A page for financing residential property by German banks is provided by Eigen Huis – but the difference is there from the start. The German way of financing traditionally requires to bring own money, the Dutch not. <u>https://www.eigenhuis.nl/hypotheken/hypotheek-afsluiten/duitse-hypotheek</u>

autonomy, addressing national policy needs in housing – e.g. the National Guarantee (NHG) as well as taxation.

An important issue is the level of interest charged – may it be held a part of the costs, or does it qualify as a forbidden penalty? On the short term the AFM will carry out a research on the interests levels – particularly those stipulated in case of changing to a different creditor; what qualifies as costs, however, what as a penalty, would be an accounting issue, and for Europe to decide upon.

Financial education is one of the issues that will need constant attention and is not only to be solved by a directive. It is a necessity – if one considers behavioral economics on how decisions are made. Not always by a rational choice, to say the least. Leaving it to the free market is not a good idea – the learning by doing has been offered as an argument by professional creditors against consumer-debtors: by constantly making use of our service the education takes place, knowledge grows – and thereby inversely affects our liability.<sup>138</sup> Luckily the argument did not root.

# 5. Conclusions

The domain of financing residential property is a fine fabric – woven and knitted as well by many players – top down as well as bottom up. This Dutch poldermodel in making law seems to have resulted in not too bad criteria and standards for mortgage financing of residential property – from the start of looking for a home and financing, over to the end in foreclosing.

However, these transactions rest on a basis of accepted large loans – which carry risks of overindebtedness. Had it not been for the turn of the market-tide towards the positive, it remains to be seen whether defaulting and mortgage-enforcement would have remained at their relative low level. One can see advantages of looking a little bit more to our German neighbors in requiring financing with own capital.

That leads to the following. Access to housing needs te be available – in historiography the Netherlands has been qualified as a `Kingdom of Slums' around the turn of the  $19^{th}$  to the  $20^{th}$  century - rightfully so, yet forgotten in our collective memory. Not so is the shortage in housing after the second world war. Extensive social housing policy brought the solution. Social housing has been moving further backstage – and if ownership of residential property is the way forward, its financing is to be monitored on its accessibility for those starting their own independent lives; it also has to stay accessible for those on lower income-levels – and thus will serve the stability of the society to come.

<sup>&</sup>lt;sup>138</sup> HR 23 May 1997, NJ 1998, 192 (Rabobank/Everaars).

Dividing lines between the have's and the have-not's, nationals and foreigners, employed and the unemployed become more and more visible. A mortgage directive cannot address that issue – but it is part of a larger policy, and it needs to be seen in this perspective as well. Just recently, a bank issued a statement on a dismissal of a substantial amount of their employees, particularly in the sectors compliance, legal and risk, sectors which had grown fast during the crisis: 'the notion of taking risks into account has in the meantime been grounded in our culture and there is room for efficiency.'<sup>139</sup> Financing of residential property needs to be not just a product, but a public service as well, decently carried out, by virtuous bankers and other financiers. Because it is about our house.



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<sup>&</sup>lt;sup>139</sup> NRC Handelsblad 13 September 2016, p. E3