INTRODUCTORY REMARKS TO THE WORKSHOP ON THE IMPACT OF DIRECTIVE 2014/17 IN GREECE, IRELAND, MALTA, THE NETHERLANDS, POLAND, PORTUGAL AND SPAIN

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I. Directive 2014/17 of the European Parliament and of the Council of 4 February 2014 *on credit agreements for consumers relating to residential immovable property* **(**OJ L 60, 28.2.2014, pp. 34–85**)** should be transposed by the Members States no later than 21 March 2016 (art. 42.1). When Miriam Anderson and I began to prepare this workshop approximately one year ago, we knew that despite the time that still remained between March and October –when the workshop should take place–, we would be facing the possibility that not all of the countries represented by our colleagues at the above mentioned workshop may have implemented the Directive in their respective legal systems. In fact, that is what eventually happened. The only countries where Directive 2014/17 have been transposed into –and not always promptly– are Ireland, Malta, The Netherlands, Poland and the United Kingdom –in addition to Germany, Austria, Belgium, France and Italy, none of which are represented in this workshop. Greece, Spain and Portugal show a deficit in transposition –as well as Croatia, Cyprus, Slovenia, Finland, Luxembourg, Romania and Sweden, also countries without representation in this workshop. However, Spain has produced a draft with partial transposition of this Directive and two autonomous communities –Catalonia and Andalusia– try also to achieve its intended effects, although the rules differ from one country to another. Norms concerned will be of different nature (private and public law) and, in particular, of banking regulation (Whereas 80). The Directive expressly admits that certain aspects, such as the evaluation of consumer's creditworthiness, can be implemented through the introduction of prudent regulations (Whereas 83). It is interesting to notice that, in case of civil law countries, the Civil Code is not the best place for the Directive to be implemented, except for The Netherlands.

II. The number of countries taking part in this workshop is limited, but they have not been chosen at random. Different reasons explain why we organizers chose these countries and no others. On the one hand, we wanted to know how the housing crisis had hit some countries with a high level of debt –and not only in southern Europe–, and how, on the contrary, other countries had not even noticed it. This is in particular the case of Malta, where residential home is considered a basic need and banks have been extremely prudent in its practices. On the other hand, it was interesting to know the situation in Eastern Europe countries, where default by borrowers was significantly lower but, as it is the case of Poland, mortgage loans in foreign currency –usually Swiss francs– have been very controversial. The Directive provides for a new regulatory framework on this topic which, in fact, and despite some precautions, affords rather little protection to consumers (Art. 23).

Foreign currency loans are definitely considered as such (Art. 4.28) and not as financial investment instruments, as the Spanish Supreme Court intended. See the Spanish Supreme Court decision [STS, for the Spanish acronym] of 30.6.2015 (RJ 2015), which is important in determining wether the MIFID Directive (Directive 2004/39, of 21 April) applies. With regard to a question referred for a preliminary ruling from Hungary, see also ECJ C-312/14 of 3.12.2015, *Banif Plus Bank Zrt.* vs. *Márton Lantos and Mártonné Lantos* (§§ 55-57, 80). In Spain, see pros and cons in CAZORLA GONZÁLEZ SERRANO, Luis, "Una aproximación a la naturaleza jurídica de la conocida como «hipoteca multidivisa»", *Revista de Derecho Bancario y Bursátil*, 2015, 140, pp. 269-289, and BORRALLO FERNÁNDEZ, Cristina, "La problemática de las hipotecas multidivisas: novedades jurisprudenciales", *Actualidad Civil*, 2016, 10, pp. 1-10.

III. As far as many solutions introduced by the Directive 2014/17 already existed in more than one legal system, in particular through Codes of Conduct (e.g. Ireland, Spain, Greece and The Netherlands), learning about its transposition in different countries was a secondary goal. We were more interested in knowing the triggers or risk factors that activated the mortgage crisis, how the Directive do address the solutions, and which other measures are not considered by the norm which, perhaps, would contribute to mitigate future crisis –the current one cannot be solved with this norm, as far as it does not have a retroactive effect, as well mentioned by the author of the Greek report. For instance, according to the Irish, Dutch and Spanish reports, specific norms on usury or on the loan to value or the loan to income ratios would have been very welcomed. It can also be deduced from the Spanish report that a norm establishing the market value of the property at the time of foreclosure would have helped to bring Spanish legislation into line with that of all other EU countries. Norms on unfair terms in mortgage loans are also missing and just a look at the list offered by the Polish report suffices to realize the need of such specific control. It is difficult to understand why the clause that requires overcollateralization will be usually considered unfair, but not in the banking field (Art. 88.1 of the Consolidated Act on Consumer Protection Law [TR-LGDCU, for the Spanish acronym]). The Directive does not prevent such clauses where, in addition to mortgage, a personal security and an insurance policy are requested in order to cover the risks of default. Whatever the case, as far as the Directive imposes many restrictions on information on fees and commissions, the selling of related products, penalties for early repayment, or foreign currency, just to mention a few examples, it is clear that many unfair clauses will end up or disappear. On another level, the Greek report mentions the need for EU protection measures to borrowers in case of assignment of bank consumer loans, including housing loans, once the debt is no longer held by the bank.

IV. In some countries, like The Netherlands, the difference in terms of quantity between people who buy and people who lease a residential property is lower than in other countries like Spain, Portugal, Greece or Poland. In these places, there is a widespread thought that the acquisition of a residential property is a common welfare –the shortages of lease legislation has also contributed to this– and, accordingly, the credit granted for that purposes has been generalized.

> For figures in some of those and other countries, see RAMSAY, Iain, "Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Poliy in the EU", in MICKLITZ, HANS W. – DOMURATH, Irina (eds.), *Consumer Debt and Social Exclusion in Europe*, Farham, Ashgate, 2015, [pp. 189-227], pp. 204-205.

The construction industry has been considered a win-win business for all the parties involved: for builders (and the other business around), municipalities (that charged licenses and urban fees), some buyers (that speculated with the value of real property, as shown by bridge contract loans and the buy-to-let schemes) and of course, for banks, which had their business in the granting of credit and the subsequent securitization of mortgages (something that also led the loan-to-value ratios to be inadequate). Furthermore, governments granted tax benefits for the purchase of residential property, the loans interest rates were low, the repayment terms were very long (sometimes beyond the retirement age or the borrower's lifetime) and lack of the analysis of debtor's ability to repay the mortgage loan was common, not only because debtor's expenses were calculated below the adequate margin, but also because of the trust on the continuously increase of the market value of the property used as a collateral of the loan.

On the other hand, only interest mortgages became popular (and very controversial in Ireland) and the cross-border lending and purchase were developed (although in case of Ireland or Spain the available data did not allow the thought that this type of loan was relevant)..New mortgage products were created (like multicurrency loans, reverse mortgages, mortgage securing liabilities up to an overall maximum amount, such as revolving mortgages); and new financial products were offered to consumers, as an integrated part of mortgage loan, without sufficient explanation of potential risks (swaps, for instance). Furthermore, the staff of financial institutions were unaware of the inherent risks of these operations (they had neither knowledge nor any specific training) and there was neither no monitoring nor follow-up supervision. Even rather, in cases where monitoring control was developed, the political power would not allow the public disclosure of results in order not to stop the housing bubble and therefore the economic prosperity. This is something clearly shown by the reports of Ireland and Spain. It should be highlighted that Spanish legislation on credit intermediaries only dates back to 2009, when it became obvious that the bubble had burst. In countries such as Portugal, such legislation does not even exist yet. The Spanish report also points out other system failures, which prevented notaries, land registrars and other professionals such as real estate brokers from providing appropriate information, advice and counselling. Control of unfair terms by notaries and land registrars was one of the major problems faced: they did not carry out properly any control under the assumption that it should be performed by judges. In fact, legislation as well as case-law decisions tend to prove that they were right, and so did the European Court of Justice (ECJ C-32/14 of 1.30.2015, *Attila Sugár*, regarding the role of the notary in the extrajudicial foreclosure). Actually, Spain's Draft Act for the implementation of Directive 2014/17 imposes upon notaries a generic or common duty of monitoring and control the content of mortgage contracts. It also requires them not to authorize the loan when the lender fails to comply with the provisions of the law, which is a superfluous forecast.

> For an explanation on the rol of housing and credit and the debt overhang in Europe, see DOMURATH, Irina, "A map of responsible lending and responsible borrowing in the EU and suggestions for a stronger legal framework to precent over-indebtedness of european consumers", in MICKLITZ, Hans W. – DOMURATH, Irina (eds.), *Consumer Debt and Social Exclusion in Europe*, Farham, Ashgate, 2015, [pp. 155-175], pp. 155 ss. Apart from the Spanish report and the literature quoted there, see AKIN, O. - GARCÍA MONTALVO, J. - GARCÍA VILLAR, J. - PEYDRÓ, J. L. – RAYA, J. M., "The real estate and credit bubble: evidence from Spain", *SERIEs Journal of the Spanish Economic Association*, 2014, 5, pp. 223-243. In particular, on the absence of bancs *fair play*, see NASARRE AZNAR, Sergio, "Malas prácticas bancarias en la actividad hipotecaria", *Revista Crítica de Derecho Inmobiliario*, 2014, 727, pp. 2665-2737.

V. Things went well until the housing bubble burst. At that moment, the stock of properties was huge and the industry was unable to sell all the buildings for years. The industry of construction began to fall down. This situation led to unemployment and to a lower average income —if not a lack of it— for many families that had their houses mortgaged. Subsequently, those families began to default on their loans. This situation forced banks to made larger provisions to cover any risk of default. But since the provisions had not always been appropriate, banks began to enter in crisis and had to be rescued. Structural measures were settled in Ireland, Greece, and Portugal and also in Spain (although it is not said in that way in the latter case). Many families lost their homes and in some countries, such as Spain, there was no adequate legislation on insolvency for consumers.

> See GÓMEZ POMAR, F. – CELENTANI, M., "Tarea Urgente: el concurso personal" (2012), *InDret* (www.indret.com). Under the pressure of the International

Monetary Fonds, the norm was finally adopted. See Spain-IMF Country Report (August 2013) nº 13/245, pp. 23 ss., esp. p. 29; idem, Spain-IMF Country Report (June 2014) nº 14/193, pp. 23-24. (https://www.imf.org/external/pubs/ft/scr/2013/cr13245.pdf; https://www.imf.org/external/pubs/ft/scr/2014/cr14193.pdf).

It is interesting to note that the judgment of the Provincial Court of Navarre of 4 January 2012 had an impact on the Court of Portalegre (and other subsequent judgments in Portugal): it concerned the existence of unjust enrichment or abuse of rights by banks in case they claimed the collection of the remaining debt after foreclosure by the 70% out of the appraised value of the property. Such arguments had been rejected by the Supreme Court of Spain, considering that unjust enrichment could not be applied to cases regulated by the law because of the law authorizing this right. The Court also considered that there might not be an abuse of right by creditors when they requested and collected the deficiency amount in cases when they had not received the total amount of debt in the foreclosure process (Art. 1911 CC and Art. 105 LH). Sometimes even the estoppel doctrine (*actos propios*) has been brought up in order to remark an odd situation: how could it be that if banks valued the mortgaged property at a certain amount they eventually would not incorporate foreclosed property as their own good at the same formerly value set by them? The question was based on the misbelief that the appraisal value of the property (at the time to make up the mortgage) is the fair market value at the time the public auction takes place. Needless to say, the value may not be the same because property could depreciate, and even if this were not the case, creditors to whom the property has been awarded may incur other maintenance costs before the purchase takes place. Hence the law only has in consideration certain percentage of the appraisal value at auction. The problem is that if the percentage is very low (and initially it was: the 50%) the debt decreases in a very little amount and the debtor loses a property that in the market may have a value that goes far beyond the arbitrary price of the public auction. It would be logical that the award value corresponds to the real market value, although that market value could certainly have been very low during the crisis (average prices of housing fell down in Spain 25%). Recently, the Supreme Court of Spain has admitted that unjust enrichment can exist only if the creditor would have received a very significant surplus in a period of time relatively short after the public auction. This indicates that the credit should have been satisfied to a greater amount (see STS of 13.1.2015). This is the doctrine regarding the allocation of housing established under Art. 579.2 (b) of the Spanish Civil Procedure Law (LEC, for the Spanish acronym) after the reform carried out by the Act 1/2013.

> For a critical assessment of this judgement, see GUILARTE MARTÍN-CALERO, Vicente, “Enriquecimiento sin causa y ejecución hipotecaria (Comentario a la STS de 13 de enero de 2015)”, *Revista de Derecho Bancario y Bursátil*, 2015, 34, pp. 277-293.

While in Spain the property value of the first public auction fluctuates between 60 and 70% (in case of family home, Art. 671.1 LEC), in Greece, the debtor may request to the judge the correction of the foreclosed property value for the first auction, which shall not be less than 2/3 out of the market value of the property.

VI. The origins of the Directive on mortgage loan dates back to 1985.

> About the precedents and the process that led to the existing Directive, see LAUROBA, Elena, “La propuesta de directiva del parlamento europeo y del consejo sobre los contratos de crédito relativos a los bienes inmuebles de uso residencial”, in LAUROBA LACASA, Elena (dir.) – TARABAL BOSCH, Jaume (coords.), *Garantías reales en escenarios de crisis: presente y prospectiva*, Barcelona-Madrid *et al.*, Marcial Pons, 2012, [pp. 117-132], esp. pp. 117-124; SCHÄFER, Frank l., “Wohnimmobilienkreditrechtlinie. Geschichte und Umsetzung im Verbraucherdarlehensrecht”, *Verbraucher und Recht*, 2014, [pp. 207-216], pp. 207-212. Recently, ARROYO AMAYUELAS, E., “La Directiva 2014/17 sobre los contratos de crédito con consumidores para bienes inmuebles de uso residencial” (forthcoming).

Originally, the need to open markets and the introduction of new mortgage products were highlighted, but it was not until 2001 that consumer protection was taken into consideration. At that time, this protection was implemented through pre-contractual information rules which adopted the form of a *soft law* Code of Conduct. This Code was widely used in Ireland, but not in Spain and it is fair to say that it did not get the expected success. When the economic crisis triggered in 2007, the emphasis was put on responsible lending because it would supposedly help the stabilization of the financial system. As a consequence, the Directive finally adopted introduces different tools and preventive measures. Some of them deal with a supervisory regime, such as the need to discipline the lenders’ behaviour (credit institutions or not, intermediaries and their representatives) or their level of knowledge and competence, and the transparency in their remuneration, and even the conditions for them to be established (Arts. 7, 9, Chap. 11-13). Other measures have an impact on the contractual relationship between the borrower and the lender, mainly through the duty of information (Arts. 11-16, 27) and counselling (Art. 22), the preliminary analysis of the lenders’ solvency (Arts. 18-21) and early repayment (Art. 25). On the contrary, the Directive has just little impact on ’*proprietary rights’*, in particular on the effects of mortgage in case of default. As much, Art. 26.1 recommends the Members States to ensure that the claim against the security is enforceable by or on behalf of creditors and Art. 28.1 suggests that the Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated as well as other measures intended to soften its effects.

VII. As already mentioned, the crisis emerged in 2007 (in Greece, as of 2010); but the Directive which regulates the process of granting credit for mortgage loans or other security interest on residential property, or the purpose of which is to acquire / maintain a residential property (Art. 3.1), only could be enacted seven years later —despite the fact that it is a minimum harmonization Directive (Art. 2.1) (with the exception of Article 14.2 Annex II Part A and Articles 17.1-5, 7 and 8 and Annex I) with a number of exclusions and policy options for the Member States. The Directive applies to consumer credits on immovables (predominantly, but not only, the residential property) which are granted or not with a mortgage, but do not refer to the personal security (or to whom grants the mortgage without being a debtor). It is perfectly possible to extend the protection to these third parties, as suggested by the Portuguese report. Also, nothing prevents that the Member States apply national rules to entrepreneurs to whom the loan has been granted in order to start their own business.

The Directive shall not apply to certain credit agreements. Some of these exclusions (Art. 3.2) have to do with the mortgage as a means of saving for retirement and the non-application of the Directive —at least partially— might make sense. However, as pointed out by the Spanish report, the exclusion of mortgage loans granted by an employer to his employees is less reasonable because the fact that they are employees shall not prevent them from being considered as consumers. Some options offered by Art. 3.3 to the Member States are also difficult to understand. So it would make sense not to grant special protection to borrowers when the immovable property acquired by the loan is to be occupied as a house or apartment on the basis of a rental agreement, as long as the borrower's regular business is to provide flats for rent. But the fact is that they are always consumers who, according to the Directive, apply for a loan —that is, natural persons who act outside their trade, business or profession (Art. 4.1 (a), and Whereas 12 Dir. 2017/14; Art. 3.1 (a) Dir. 2008/48). It is difficult to see how they could loose this condition when the loan contract is concluded for purposes that fall beyond their usual professional activity. On the other hand, the exclusion of credits granted in special conditions to a restricted public, by social banks, cooperative or local authorities, with a general interest purpose (Art. 3.3 c) is considered a risky option by the Irish report, while the Maltese report puts the emphasis on the effects that this decision can lead to in terms of social exclusion.

> For a more comprehensive analysis of the exclusions, see ANDERSON, Miriam, "La Directiva 2014/17, sobre créditos hipotecarios y su previsible impacto en el Derecho español, en ARROYO AMAYUELAS, Esther – SERRANO DE NICOLÁS, Ángel (dirs.), *La europeización del Derecho privado: Cuestiones actuales*, Marcial Pons, Madrid-Barcelona *et al.*, 2016 (forthcoming); ARROYO AMAYUELAS, Esther, "La Directiva 2014/17 sobre los contratos de crédito con consumidores para bienes inmuebles de uso residencial (forthcoming).

VIII. In order to preserve the foundations of the financial system, the Directive focuses on responsible lending and borrowing. It includes the following aspects:

1. Specific provisions on the advertising of credit agreements and a list of items to be included in advertisements directed at consumers, general information on credit products available and personalised pre-contractual information in good time —prior to the conclusion of the credit agreement in order to enable consumers to compare and make an informed decision (Arts. 11, 13, 14). The Commission relies on the European Standard Information Sheet (ESIS), which is subject to maximum harmonization, in order to ensure that this information is clear, understandable and that contains all relevant information for consumers. The Polish report regrets that the information provided in this sheet is so abundant and that the language is so complicated too. At a more general level, this would raise the question as to whether the consumer protection through information duties upon credit providers is an appropriate mechanism.

> On that issue, see RAMSAY, Iain, "From Truth in Lending to Responsible Lending", in HOWELLS, Geraint – JANSSEN, André – SCHULZE, Reiner (eds.), *Information Rights and Obligations*, Aldershot, Ashgate, 2005, [pp. 47-65], pp. 52 ss.; ATAMER, Yeşim M., "Duty of Responsible Lending: Should the European Union Take Action", in GRUNDMANN, Stefan - ATAMER, Yeşim M. (dirs.), *Financial Services, Financial Crisis and General European Contract Law*, The Netherlands, Kluwer, 2011, [pp. 179-202], pp. 184-185.

Anyway, it seems that the directive will not change too much the existing situation in the legal systems analysed in the workshop, without prejudice to the need to make adjustments on some specific terms, or in relation to the order in which they are presented, or regarding the clarity of explanations provided to consumers. In some countries where the norm has already been transposed, such as The Netherlands, it is regrettable that the description of the advertising content is missed except for the reference to the European rules. In other countries, like Spain, the way that information on the borrowing rate (in variable interest rates) is offered is not homogeneous because sometimes the percentage to be added to the euribor is already reduced (provided that certain conditions are met) and sometimes, on the contrary, the rate of variable interests can still be reduced if the conditions offered are accepted. Unfortunately, the Directive does not provide clarity on this point and therefore, as pointed out by the Spanish report, the effectiveness of the ESIS will be weakened.

2. The Directive admits that creditors can offer credit to consumers under certain conditions; that is, only if they purchase some products or services together with the credit agreement. Both tying and bundling practices are intended to reduce costs and make more profitable the lending activity. Art. 12 refers to the manner in which these practices shall be allowed. As a general rule, bundling practices are always permitted, because the components of the package can also be bought separately. On the contrary, tying practices, which consist in offering linked products or services that cannot be separated from the credit agreement, are not allowed in order to prevent consumers from entering into credit agreements which are not in their best interests). However, typical linked services are frequent —such as the opening of a current account or an insurance agreement to cover property damages or default risks—, and that may be the reason why Art. 12.4 admits that the creditor would expressly request one of those insurance contracts as a condition for the granting of credit. Even so, the norm also highlights that creditors cannot impose one of their suppliers on consumers. All in all, the Directive leaves enough space to the Member States to continue prohibiting such tying practices or to accept them in particular cases and on particular conditions therein specified. For instance, tying sales —such as opening a current account or savings account to make loan repayment or for the purpose of paying interests— can be allowed, but not other linked products or services that have nothing to do with the credit agreement (e.g. credit card). Despite the banning of tying practices in some consumer credits, The Netherlands has incorporated the exceptions provided in this Directive, but has not made use of Art. 12.3. The Greek Draft is much more restrictive and has only allowed the exception provided in Art. 12.1 (tying the credit to a bank account).

3. Advice on credit agreements in the best interest of consumer, if necessary, is another element inherent to the concept of responsible lending. It shall be a separate service with regard to the granting of credit and may be remunerated. Entities responsible for this kind of service shall handle a significantly large number of credits so that they can recommend the ultimate and better product for consumers, according to their personal need and financial situation (Art. 22). These entities must also provide an adequate explanation to the consumer on both the proposed credit agreements and any ancillary services as well as on the effects of the proposed

products (Art. 16). Under one or another hypothesis a loyal behaviour, an adequate training and a high level of expertise are required (Art. 7, 9).

4. Perhaps the most appealing and effective initiative on responsible lending and borrowing lies on the consumer creditworthiness assessment (Art. 18). This rule already exists in most countries, but it is rather vague and generic in some of them, such as Spain and Portugal. In fact, the European standard is not less diffused: for instance, it does not establish limits or guidelines about both the loan-to-value and the loan-to-income ratios, as mentioned in the Irish report. To fulfil this duty, the collaboration of borrowers is needed. They must provide the requested data by the financial entity, although Art. 18 does not indicate what those data are; the rule only expressly refers to the appraised value of the property in order to specify that it should not be taken into account primarily. Obviously, these data will have to refer to the predictable revenue (salary, future rental income) and expenditure but other financial or economic factors, such as retirement, may be taken into account (Art. 20, Whereas 55-58). Admittedly, consumer's income and expenses will provide reliable information only if the consumer has a financial history showing that he or she has kept a stable situation in the past. Art. 20 does not require entities to check the information provided by consumers but nothing prevents them from doing it (on this topic, in the context of the Directive on consumer credit, see ECJ C-449/13, of 18.12.2014, *Consumer Finance*).

Creditors may also obtain additional information through consultation of relevant data base; some files used to check solvency inform about arrears and default and others about the level of debt. The Directive encourages the Member States to ensure that creditor only grants credit if the evaluation of consumer solvency shows that the consumer is able to fulfil the conditions of the agreement (Art. 18.5). This results in a ban on granting credit if the evaluation reflects that the consumer would not be able to repay, as pointed out in the Spanish, Irish and Polish reports.

> See also, ZUNZUNEGUI, Fernando, "La evaluación de la solvencia en los créditos hipotecarios", *Teoría y Derecho. Revista de Pensamiento Jurídico*, 2014, 16, [pp. 141-160], p. 146; COMPARATO, Guido, "The Design of Consumer and Mortgage Credit Law in the European System", en MICKLITZ, – DOMURATH (eds.), *Consumer Debt…, op. cit.*, [pp. 9-26], p. 19. Another view, SCHÄFER, "Wohnimmobilienkreditrechtlinie", *op. cit.*, p. 210; CUENA CASAS, Matilde, "El sobreendeudamiento privado como causa de la crisis financiera y su necesario enfoque multidisciplinar", en PRATS ALBENTOSA, Lorenzo –CUENA CASAS, Matilde (coords.), *Préstamo responsable y ficheros de solvencia*, Cizur Menor, Thomson Reuters–Aranzadi, 2014, [pp. 27-89], p. 77.

This would require an adjustment of the current Spanish legislation, where freedom of contract is still the rule notwithstanding the negative creditworthiness assessment. For the time being, freedom of contract would only mean that a positive creditworthiness assessment shall not constitute an obligation for the creditor to provide credit.

> But see, in Catalonia, Art. 263-2.4 Consumer Code, which nevertheless has been challenged before the Constitutional Court.

Interesting enough, the Directive only provides the remedies available to creditors when consumers provide misleading information about their solvency. But what happens if (a) the creditor grants credit without having checked the consumer solvency out; (b) the assessment is negative; (c) the assessment is positive but only because the entity did not adequately assess the solvency and it was not the consumer's fault —all of these three scenarios can be included in Art. 18.4? Under those situations the Directive is restricted to prohibiting the creditor to modify or declare void (or rescind, according to Whereas 58) the contract. In other words, despite the creditor's mistake or negligence, the consumer is not prevented from enjoying the assets. But, what if he or she no longer has the ability to repay? Clearly, the creditor's misconduct must be sanctioned (on the burden of proof and again in the context of consumer credit, ECJ C-449/13, of 18.12.2014, *Consumer Finance*). Criminal or administrative sanctions, as they exist in most Members States, are not enough. They certainly force unfair competitors out of the market, but they do not provide any additional benefits for the adversely affected consumer.

In the process that led to the approval of Directive 2008/48 on consumer credit, one of the most disputed issues was the duty to assess creditworthiness and the sanctions for the breach of this lender's duty. It was originally provided that the creditor would lose the right to charge interests and collect expenses, with the advantage for consumers of keeping the benefit of payment by instalments (Art. 31.2), but finally the Parliament rejected that measure on the grounds that the establishment of effective, proportionate and dissuasive sanctions requires that terms to be implemented in national law are precisely defined in order to avoid legal uncertainty. The ECJ C-565/12, of 27.3.2014, *Crédit Lyonnais*, decided on the requirements of the Directive regarding sanctions and, in particular, with regard to the dissuasive effect which results from depriving the creditor of ordinary interests, but not for late payments.

Throughout the proceeding of Directive 2014/17, the Economic and Social Committee noted that "[I]n case of default, the lender shall take the responsibility if its decision based on a poor quality assessment of borrower's creditworthiness" and that "[T]he costs of such irresponsible lending shall be assume by the lender." That sanction is highlighted as something natural by the Polish report (in the field of tort law), but the

Spanish report, which performs an exhaustive valuation of what sanctions and remedies could meet the requirements of '*effective, proportionate and dissuasive'* (Art. 38), does not pay too much attention to the creditor's liability. It is said that it would be difficult to find situations where the damages would be high enough as to compensate for the obligation to repay the assets. However, I wonder if it wouldn't be right to understand that damages (contractual damages, I think) are the very conclusion of the contract. And then, probably, damage would equate to the difference between the granted credit and the credit that actually should have been granted. For example, if the creditor granted 3,000 Euro to be paid in one year with interests at 12%, but in such conditions the consumer could only afford a loan up to the amount of 1,000 Euro. Even if this is not possible because the consumer has actually no ability to repay, it would be probably fair to say that he or she shall be released from the debt. I don't believe that this could be considered as a disproportionate measure. Furthermore, the economic capacity of the banks can cope with that amount, which in many cases will be lower than the amount of sanctions for infringement of public and economic order.

IX. In the Directive 2014/17 other norms deal with the value of the property for mortgage lending purposes. Appraisers have to be professionally competent, independent from the credit process, and they have to provide an impartial and objective valuation. It does not seem that this will mean big changes neither in Ireland, where self-imposed objective criteria govern the sector according to European standards (self-regulation is expressly recognized in Whereas 26), nor in The Netherlands, where the appraisal is annually made by the municipality, and in Poland, where the profession concerned are strictly regulated. On the contrary, Spain, Greece and Portugal adopted measures to prevent conflicts of interests only when the crisis had already started. The Directive gives a fundamental value to appraisal, referred to in different places. Direct references are to be seen in Art. 18.3 (to exclude, as a general rule, that the appraised value of the property is the only criterion to be met when checking out the borrower's creditworthiness, in particular when the credit granted is lower than the appraisal value); and in Art. 19 (to ensure reliable valuation standards). An implicit reference to the appraisal value can also be deduced from Art. 26.2, if it is accepted that the development of specific price indices and on the real estate aims to highlight the importance of that price in the granting of credit. However, the rule does not go so far and does not impose a specific loan-to-value ratio.

X. After the provision of the loan, it is still possible for the consumer to exercise a right of withdrawal. Alternatively, Member States may choose to establish a period of reflection before the conclusion of the loan agreement takes place. The Directive requires setting a term in which the offer will be available —that enables the consumer to compare with other offers. However, the norm does not prevent the Member States from allowing consumers to give it up. The Portuguese report does not recommend this and the Greek Proposal for the transposition of the Directive establishes that this is not possible for the first 5 days out of 10 of the period of reflection on. Indeed, the effectiveness of such a period of reflection could only be seen if the waiver was prohibited. But even in this case nothing would impede the conclusion of the contract of sale in the meanwhile. Then this contract should be concluded on the condition (precedent or subsequent) to get (or not) funding, as explained in the Dutch report. Prepaid payments (‘*arras’*), which are frequent in Spain, should deserve the same treatment. Opting for a right of withdrawal of the loan is not the right way if the assets are not anymore available because they have been invested in the property, as usual in Spain. In addition, this option would entail the cancellation of the mortgage in the Land Registry, the expenses of which, to be sure, would have to be paid by the consumer. The Directive does not set that the right of withdrawal is free of charge for the consumer.

XI. Early repayment is one of the practices expanded and used in most of the legal systems under examination. Currently, in Spain the mortgage loan is granted on average with an approximate duration of 20 or 25 years and the repayment period do not exceed 10 or 15 years (2016 EMF Hypostat, p. 92). The Directive aims at ensuring the consumer a right to discharge fully or partially his obligations under a credit agreement prior to the expiry of that agreement, but, at the same time, enables the Member States to restrict the exercise of this right granting compensation to the creditor (Art. 25). If this compensation exists, it shall never be considered as a penalty. Even if consumers have to be informed about the amount they should have to pay or how it should be calculated, probably it will be very difficult for them to understand such information. The Greek Draft only allows charging compensation with stable interest rate. The Spanish Proposal does not require that compensation from the 3rd or the 5th-year duration on of the loan term; if it is repaid before such terms, quantitative limits apply (0.25 or 0.50% out of the amount paid in advance). But it is certainly difficult to determine how much it should be paid when it comes to the repayment during the first three year-duration (because the forecasts overlap).

XII. Foreclosure proceedings have had a serious impact among a large number of people and the consequences could not have been worse. This scenario occurred despite the efforts of judges, who have constantly referred questions to the Court of Justice for preliminary rulings on the interpretation of Directive 93/13, on unfair terms.

> On the topic, see GÓMEZ, Fernando - LYCZKOWSKA, Karolina, “Preliminary References on Consumer Law from Spanish Courts: A Law and Economics Perspective”, in HEIDERHOFF, Bettina – SCHULZE, Reiner (Hrsg.), *Verbraucherrecht*

und Verbraucherverhalten, Nomos, Baden-Baden, 2016, [pp. 151-185], pp. 165 ss.; ARROYO AMAYUELAS, Esther, "No vinculan al consumidor las cláusulas abusivas: del Derecho civil al procesal, entre la prevención y el castigo", en ARROYO – SERRANO (dirs.), *La europeización… op.cit.* (forthcoming). See also, NASARRE AZNAR, Sergio, "«Robinhoodian» Courts' Decisions on mortgage law in Spain", *International Journal of Law in the Built Environment*, 2015, 7, pp. 127-147.

Member States participating in this workshop have already adopted different measures in order to delay the foreclosure process and to soften their effects, in a sort of implementation *avant la lettre* of Article 28. In The Netherlands, the "*duty of care*" governs all financial transactions and it would already lead to the same results. It should be remarked that these measures have been suboptimal in Spain, since the new adopted laws have been highly restrictive and have not benefited a significant number of people. The Directive does not provide remedies for such a situation, since it does not compel but recommends that the Member States enforce new measures. Yet, it seems that the Spanish experience has enabled a more protective content to the Directive. Thanks to the Amendments of the Committee on Economic and Monetary Affairs of the European Parliament, whose reporter was, Mr Antolín Sánchez Presedo, the Directive urges the Member States to be tolerant before starting foreclosure processes, to limit the amount of late payment interest and other expenses, and to obtain the best possible price sale in auction, as well as to facilitate the payment of the residual debt, if any, after the judicial sale.

XIII. It is time now to make a global evaluation of the Directive. To get started, serious doubts raise as to the need of two parallel systems on credit contracts: one for consumer credits (Directive 2008/48) and another one for credits on immovable, which are not supposed to be consumer but investment products (Directive 2014/17). Both directives have adopted similar standards and just one of them would have sufficed if more stringent measures had been adopted from the very beginning. That statement makes even more sense if we notice, on the one hand, that the mortgage can also guarantee consumer loans (art. 3.1 (a) Dir. 2014/17) and, on the other hand, that the proprietary effects of mortgage are not addressed by Directive 2014/17. This Directive fights against consumer's overindebtedness through the implementation of measures on responsible lending, the largest part of which is devoted to information, warnings and advice to be provided to consumers, as well as to its financial education –leaving aside the abundant supervision rules over entities (credit institutions or not) and intermediaries. No doubt, the duty to assess the consumers' creditworthiness and the prohibition of granting credit when reimbursement is not predictable is the measure which best represent the idea of responsible lending and, consequently, which best protects consumers. On this topic, Directive 2017/14 is stricter and more severe than Directive 2008/48, and certainly it is a direct result of the economic crisis taking place when the norm was adopted. Certainly, this would entail the risk that the poorest sectors of society can neither access credit nor the advantages associated with it, but perhaps the solution to that problem must be sought elsewhere, for example, improving social lease, providing protected and social tenancy and public housing, and, where appropriate, encouraging cooperatives or organizations to provide credit under special conditions. It should be remembered that the Directive admits that such loans can be excluded from its scope (hence no prohibition of granting credit if the debtor has no ability to repay would apply).

On the other hand, there are certainly many obstacles (and surely those concerning EU competence are not the less important) to harmonize the system of land registration, foreclosures processes and the balance of interests between creditors, debtors and third parties, not to mention the lack of uniform solutions concerning the insolvency regime of consumer. For all of these reasons, as well as considering that many of the rules of this Directive did already exist in Member States, it follows from a combined reading of both the Directive and the national reports that its scope is very modest and perhaps much more could have been done.

From another perspective, the results that have been achieved should be seen in a very positive light, as suggested by the Greek report. Accordingly, we should be satisfied that the Directive brings a guideline to judges, who may now decide outstanding disputes pursuant to more specific and detailed rules instead of the Civil Code and Consumer Law rules, which are general and uncertain indeed . In that sense, the Maltese report also remarks how important the Directive is in order to strengthen and formalize common practices. After its transposition, local authorities may carry out a much stricter control over the granting of credit. This conclusion is encouraging if one considers that Malta has certainly not been irresponsible granting credit and therefore hardly needed implement such standards.