IF MOHAMMED AZIZ WAS CHILEAN: THE ROLE OF LAW IN FINANCIAL INCLUSION AND PROTECTION OF MORTGAGORS FROM EUROPE TO CHILE

Irina Domurath*

Abstract

This article explores the role of law in the expansion of home ownership and the protection from over-indebtedness through mortgage loans. We will see that the access-dimension of law, which deals with broadening financial inclusion of consumers into financial markets, is more developed than its protective dimension, which is to protect those consumers from over-indebtedness. A case in point is the seminal *Aziz* case of the Court of Justice of the European Union (CJEU). It shows that financial inclusion is a fallacious concept, if not accompanied by means to protect from inherent risks. In the end, the goal of financial and social inclusion and the democratization of credit is not achieved and home ownership is put at risk. While emphasis of this article lies on the EU legal framework, it concludes with a few comparative remarks on Chilean law in order to answer the question: what would have happened to Mohammed Aziz if he was Chilean?

Keywords: *financial inclusion; over-indebtedness; mortgage law; consumer protection; EU Law; Chile*

I. INTRODUCTION

In July 2007, Mohammed Aziz concluded a loan agreement secured by a mortgage with a Spanish bank. It concerned an amount of EUR 138.000 to be reimbursed in close to 400 instalments for a period of more than 30 years. Mr Aziz had a fixed monthly income of EUR 1.341 and the monthly instalments amounted to more than half of his monthly salary.[1] Mr. Aziz paid off the loan for ten months, until he lost his job. After trying unsuccessfully to make Mr. Aziz continue to repay, the bank instituted enforcement proceedings. In a judicial auction in July 2010, no bid was made. The court consented to the vesting of that property at 50 per cent of its value. Mr Aziz was evicted from his home and, a particularity in Spanish law, remained liable for the payment of the outstanding credit amount.

* University of Amsterdam, The Netherlands (irina.domurath@posteo.de). Article received on April 18, 2019 and accepted for publication on May 31, 2019.

1 CJEU, 14/03/2013, C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (2013), ECLI:EU:C:2013:164; facts of the case in paras 18 – 31, and Opinion of AG Kokott in C-415/11 (*Aziz*).

This case, which has led to one of the most seminal judgments of the European Court of Justice (CJEU) since the financial crisis of 2008, illustrates two connected phenomena of our times: home ownership and financial inclusion. Nowadays, private home ownership is probably one of the most widespread social institutions of modern life. Since the ascent of human and political rights with the French Revolution, private ownership of real property has been considered a pillar of individual freedom.[2] Supported by the rise of finance, which enables increasing investment into real property, taking on private debt for the acquisition of a home has become commonplace. At the same time, the financial crisis of 2008 and cases such as the one of Mr. Aziz have reminded us that private home ownership cannot be taken for granted and is more often than not premised upon the repayment of mortgage credit. The social repercussions of 'failed home ownership' can be hardly underrated.

This article explores the role of law in this development, with an emphasis of the development in the last decades. It is based on the assumption that law affects the expansion of mortgage credit. Similarly, against the backdrop of the financial crisis of 2008, it is claimed that it must also provide for tools to protect mortgage borrowers from over-indebtedness. I argue that the legal framework currently in place emphasizes access to mortgage credit at the expense of protection from over-indebtedness.

The argument proceeds in two main steps. First, the article describes the development of the political economy of home ownership and expansion of mortgage credit and explains the fallacy of its basic assumptions (II). Second, it examines in more detail the role of law in this development with a focus on the rules in place in EU law (III), both regulatory and contract law (3.1). Here, we will see that, while the EU legal framework clearly emphasizes the supply-side driven access to mortgage credit for consumers (3.2), it neglects the protective elements necessary to protect mortgage borrowers from over-indebtedness (3.3). The most prominent causes for over-indebtedness – the lack of financial means and unforeseen adverse events – are not taken into account in the design of the main legal provisions concerning the supervision of financial markets, creditworthiness assessments (CWAs), and the control of standard contracts. As a result, they cannot guarantee private homeownership. This article ends with a few remarks comparing the EU legal framework with the most pertinent Chilean rules, painting a differentiated picture of mortgagor protection in Chile (IV).

II. THE POLITICAL ECONOMY OF HOME OWNERSHIP AND MORTGAGE CREDIT

2.1 Retreat of the welfare states: the case of housing

In the last decades, states all over the world have retreated from the direct provision of welfare to their citizens. Older populations and high unemployment rates put pressure on public health and pension systems as well as social security

2 For a forceful rebuttal of this assumption, see Mattei (2014).

budgets. With spreading neo-liberal ideas, states attempted to cut public budgets for social policy retrenchment. Now we live in a political economy with underdeveloped welfare states, in which governments rely more and more on means-tested benefits, major transfers of responsibilities to the private sector, and changes in eligibility rules.[3] Policies increasingly emphasize individual agency, for example with regard to employment and job search as qualifications for unemployment benefits.

Broadly in line with the German-Austrian *ordoliberal* school of thought, the state role in this privatization process lies in putting into place institutional and legal regulations that free the market from distortions.[4] In this tradition, the Chicago School advocates for minimal state interventions in markets.[5] In this view, state intervention into markets must be reduced and former public-sector industries privatised and subjected to market forces.[6] In order to legitimize the retrenchment of social policies, governments persuade their voters that the losses inflicted on some of them can still appear as an electorally attractive proposition.[7] To this end, they use economic theory as a kind of 'prop' that helps them to convince voters that retrenchment in the present will lead to future pay-offs.[8]

Finance is the "driver" of privatisation efforts.[9] Relying on financial markets, governments provide financial resources to beneficiaries on the top of the social pyramid and then sell them public assets in exchange for these resources, thus turning public welfare into private wealth.[10] The narrative is that accumulation of private assets then creates pressure to find investment opportunities, offering relief for public budgets while providing opportunities for private asset owners. The expansion of credit is the major factor in the financialization of citizens.[11]

Home ownership is a particular point in case. The developments of housing sectors, varying in their details between states, have followed the same trend of increasing privatization and commodification worldwide. While the US housing sector was largely dominated by private home ownership, large-scale social housing

3 Castles *et al*. (2010).

4 Rose (1999).

5 Most prominently advocated by Friedman (2002). The connection between the tightly connected Austrian and Freiburg Schools is brought about by, not only but most prominently, Friedrich Hayek who worked not only in Freiburg and Vienna, but also Chicago. He later also met Chilean dictator Augusto Pinochet.

6 Fulcher (2004), pp. 49-50.

7 Pierson (1996), p. 242.

8 Classical economic choice theory and principal-agent theory are the most used, which both claim that private companies operate more efficiently than publicly run companies, Parker (1998), pp. 30-31. In this sense, economic theory is a powerful means to support the establishment of "fictional expectations" with regard to a narrative of an imagined future, Beckert (2016), Beckert (2019).

9 Huffschmid (2009).

10 Huffschmid (2009), pp. 49, 53-54.

11 Comparato (2018).

programmes coexisted alongside private home ownership in Europe.[12] Especially after World War II, more welfare-oriented public housing sectors developed in many countries in Europe. In the 1970s, however, a converging trend started to unfold. Notwithstanding national differences, European states incrementally reduced involvement in their housing sectors, increasingly relying on market developments led by financial institutions.[13] In order to promote private home ownership, states adopted manifold measures encouraging access to financial resources from subsidies to easier access to mortgage credit. Together with ownership subsidies, such as tax deductions, interest-rate subsidies and low interest rates, easy access to mortgage credit enabled individuals to access housing on privatised markets, thus not having to rely on the government to provide them with (affordable) housing.

Now, private home ownership is considered a welfare goal[14] and a substitute for other state-provided welfare.[15] Arguably, pensioners who own their own dwelling need lower levels of state-provided pensions – as a consequence, states can decrease their expenditure on old-age welfare.[16] Moreover, home ownership plays a pivotal role in income redistribution within the lifecycle of individuals,[17] reducing the gap between the average incomes of retired people and the average income of the total population.[18] Thus, private wealth is considered a tool of social protection where governmental activity to mitigate inequality (provision of welfare) is scarce.[19]

The legal framework that enables the financialization of housing sectors must focus on establishing a market environment in which financial innovation can thrive. This means that it needs to allow for competition in order to allow the market entry of new actors. Moreover, deregulation is needed for competitive actors to seek ever-new financial products in order to attract customers. In the next section, we will see how the market entry of new financial institutions and the development of new financial vehicles, such as securitization, were crucial to allow the expansion of mortgage credit both in the U.S. and Europe. At the same time, cases such as the one of Mr. Aziz show that financial inclusion and the expansion of credit do not necessarily lead to the fulfilment of individual social welfare.

12 Harloe (1995), p. 211.

13 Edgar *et al.* (2002), p. 2; also: Logemann (2012).

14 Conley & Gifford (2006), p. 58.

15 Conley & Gifford (2006), p. 75, without, however, finding evidence for a conscious decision by the state to promote home ownership over welfare programs.

16 Conley & Gifford (2006), pp. 11ff.

17 Kemeny (2004), p. 2; Castles (1998), p. 12 with further references.

18 Castles (1998), p. 16.

19 Conley & Gifford (2006), pp. 71-72.

2.2 Fallacious expansion of credit

In Europe, the political narrative establishing private homeownership and the expansion of credit as policy goals is framed as social inclusion through financial inclusion.[20] Once a consumer is included financially into the common market, the consumer can purchase the goods and services needed for social inclusion. In the US, it is the 'democratization of credit' that describes the strong growth of indebtedness of low-income families and that it is to be encouraged as it is believed that the ensuing growth of assets that do not only enhance individual welfare (housing, vehicles etc.), but also promulgate the lack of state involvement in personal welfare fulfilment.[21] So on both sides of the Atlantic, states increasingly encouraged reliance on personal credit and consumption for individual welfare. Hand in hand with the financialization of the economy –that is, the accumulation of profits through financial channels rather than trade and commodity production–[22] citizens are now expected to rely on financial products such as insurances, consumer and mortgage credit, and financial investment vehicles in order to make provision for their own welfare.

It is crucial to realize that the logic of the democratization of credit and between financial and social inclusion can be fallacious. The expansion of credit is not a sure path to social inclusion and prosperity, as we have seen in the case of Mohammed Aziz. Mian and Sufi have described how the expansion of credit actually means expansion into segments of society that were previously excluded from credit because of high credit risk.[23] However, through the outsourcing of credit risk, namely through securitization, banks could grant credit to individuals with impaired repayment capacity without being left with the risk of possible default. In this system, the expansion of credit inherently leads to the inclusion of people with impaired repayment capacity into financial markets. This means that the expansion of credit implies an erosion of lending standards.[24] Even though in Europe securitization was less widespread, there is evidence of eroding lending standards especially in the years before the financial crisis.[25] The erosion of lending standards serves the same purpose as securitization: to expand credit to poorer households.

The responsibilization of citizens for their own welfare not only implies that they have to provide for their own welfare, but also that citizens are to shoulder the risks in this self-provided welfare. However, those risks are unevenly distributed in financial

20 See Comparato (2015); Comparato & Domurath (2015);

21 Olson (2003): "one result of the ongoing financial-market changes [including deregulation, low interest rates and increased competition] has been the democratization of credit ... . Notably, the strongest growth in the proportion of families having any debt occurred in the lowest two quintiles of income distribution.", and: "the benefits that the democratization of credit have conveyed can ... be seen by looking at the growth of consumers' holding of non-monetary assets, including homes, automobiles and business."

22 Krippner (2005), p. 174.

23 Mian & Sufi (2014).

24 Acemoglu *et al.* (2015), p. 567 with further references.

25 Domurath *et al.* (2014).

systems. Whereas banks could securitize the credit risk away from the balance sheets, borrowers could not. So, banks can outsource their risk through financial innovation – as happened before the financial crisis through securitization[26] –, borrowers have to endure the enforcement of their mortgage contracts and, oftentimes, are evicted from their homes. Furthermore, many banks have received, often multiple, bailouts, whereas individual borrowers hardly have access to debt forgiveness.[27] In the end, it is the mortgagor, the homeowner, who must absorb the whole loss of a possible drop in housing prices, whereas the mortgagee is protected through remaining claims against the borrower.[28]

The rising aggregate credit risk is evidenced by the high over-indebtedness of consumers and the rising default rates in the last decades,[29] correlating with higher living costs, higher housing costs burdens, and higher rates of risk of poverty and social exclusion.[30] Among the main causes for over-indebtedness are the lack of financial repayment capacity, so for example in high loan-to-value-ratio-loans and low net worth of borrowers, and unforeseen events, such as unemployment, which can interrupt the flow of income.[31] As a consequence of the rise in over-indebtedness, both the US and Europe have seen an unprecedented wave of evictions of defaulting debtors from their homes in the aftermath of the financial crisis. In 2016, with 2,3 billion evictions requests in the U.S., Mark Desmond believes that the U.S. is witnessing an "eviction crisis".[32] In Europe, Spain was especially affected: until 2015, more than half a million people have been evicted.[33] But all over Europe, states were struggling to cope with defaulting debtors and to respond to the entailing social crisis in terms of rising poverty levels and homelessness. Many put in place moratoria on evictions in order to avoid the deeper social repercussions involved in mass homelessness.[34] This shows that the democratization of finance as termed in the US or financial inclusion as termed in the EU does not necessarily lead to higher standards of living, more welfare, or social inclusion.

III. THE ROLE OF LAW: TRUST IN FINANCIAL MARKETS

In this section, we will elaborate the role of law in these developments. It is argued that law plays a twofold role, first, with regard to the expansion of credit and advancing financial inclusion, and second, with regard to the protection of debtors

26 Mian & Sufi (2014), pp. 101 *et seq*.

27 Korczak (2009); for a cross-country analysis of access to personal insolvency proceedings, see Ramsay (2017).

28 This is the "harshness of debt", Mian & Sufi (2014), p 14.

29 Domurath *et al.* (2014).

30 For an overview, see Domurath (2017), pp. 60-61.

31 For an overview, see Domurath (2017), pp. 64 *et subs*.

32 This data includes both homeowners and tenants, see www.evictionlab.org. Also Desmond (2017).

33 Buck (2013); INE (2014).

34 Confer the case studies in Domurath *et al.* (2014).

from over-indebtedness. In both dimensions, law acts a tool to generate trust of all financial actors, including homeowners and banks, in the financial system as a mechanism of both profit-making and private welfare.

In order to increase reliance on private welfare, states needed to encourage financial institutions and their citizens to engage in financial transactions. They must incentivize citizens to buy the goods and services they need on private markets for their own welfare, *inter alia* through credit taking. The vast majority of individuals rely on mortgage credit when purchasing an own home. Thus, states de-regulate or flexibilize financial markets, arguably allowing for competition and innovation and facilitate access to consumer and mortgage credit and other retail financial products.

The main concern underlying the incentivization of financial transactions is the establishment of trust in markets. Confident actors, especially consumers, are needed in the maintenance of a capitalist economic system.[35] As a consequence, institutional safeguards are needed to create and maintain trust between the economic actors, such as trust in the repayment of credit and trust in the stability of currencies and markets.[36] In the end, financial crises are crises of trust: in 2008, when the first mortgagors started defaulting on their loans, their homes were liquidated as assets. The ensuing downturn in the housing market affected the quality of the mortgage-backed securities. The markets started doubting the values of the securities and the solvency of the holding institutions.[37]

3.1 Market regulation and contract law

From a legal point of view, institutional safeguards for the creation of trust are part of (macro) market regulation and (micro) contract law. Both contract law and regulation are needed to create and sustain the actors' trust and confidence in markets.[38] In the field of mortgage credit, this means that governments bring about a legal framework for financial markets, which emphasizes trust, stability, and strong protection of property rights. In this way, states can use their regulatory power to create demand for household debt by commercial banks.[39] According to the economic narrative, trust in the stability of financial markets and the repayment of credit encourage risk-taking necessary for the expansion of credit.

The importance of trust in the macro-structure of financial markets is evidenced by the regulatory responses after the financial crisis. For example, one regulatory response of central banks to faltering trust of investors in markets –as always happens in financial crises– is the injection of short-term liquidity into financial markets. Also bank bailouts are needed to prevent the insolvency of the financial institution and

35 Crouch (2009).

36 Beckert (2013), pp. 331 *et seq*; Beckert (2016).

37 Hellwig (2009), p. 133.

38 Beckert (2013); Beckert (2016).

39 Trumbull (2012a); Trumbull (2012b).

to preserve the trust in central banks as lenders of last resort. In the EU, in response to the crisis, the European Central Bank (ECB) adjusted interest rates in order to maintain trust in price stability, worked on restoring inter-bank trust by changing its policies on lending and collateral, and purchased bonds.[40] All this served to maintain the trust in the stability of the financial system and even led to the establishment of a Banking Union under the supervision of the ECB.[41]

Contract law also plays a pivotal role in affecting access to financial markets, including consumer and mortgage credit markets, because it lays down an institutional structure that leads lenders to believe that the principle and interest owed under the credit agreement will be repaid.[42] In this vein, all contract law starts from the principle of *pacta sunt servanda*. Contracts are only concluded if the creditor can trust in the fulfilment of the contract, or in case of default of the borrower, that she can enforce the contract. This principle is of elevated importance in long-term contracts: the longer the period of the contract the more insecurity regarding the contract's performance is involved for the creditor. In order to mitigate this insecurity, property can be rendered as a security in case of default. The prospect of punishment of defaulting debtors through enforcement of property rights is to discipline the debtor towards compliance. This gives contract law a pivotal role in the expansion of credit.

At the same time, acknowledging the need for mechanisms that protect consumers from the risks involved in financial inclusion if private home ownership is to be effected, legal rules must be geared towards the protection of borrowers. To use the language of the EU, we can argue that social inclusion through financial inclusion is a paradox and that financial inclusion must necessarily include social protection.[43] Therefore, we will now examine the main rules for the expansion of credit markets and the protection of borrowers. Both roles of the law will be analysed in the following two sections, before drawing possible implications for the Chilean context.

3.2 Access to markets: expansion of mortgage credit

In this section, we will have a closer look at the rules adopted by states to expand access to mortgage credit. These rules can be divided into regulatory approaches that deal with the legal framework for the operation of financial markets and contractual approaches regarding the contract's lenders conclude with borrowers. With regard to the regulatory approach, we will first describe the more general developments, before then looking in more detail into the legal framework of the EU concerning consumer protection on financial markets. Emphasis will not be on prudential regulatory oversight that is to ensure the stability of the financial system in general, but rather the rules pertaining to the individual credit risk of borrowers.

40 For an overview, Stark (2009).

41 Single supervision, resolution of banks, and deposit guarantees are considered pivotal for financial stability and trust in EU financial markets. For an overview of the pillars of the EU Banking Union, see https://www.ebf.eu/priorities/banking-supervision/banking-union/.

42 Beckert (2016), p. 129.

43 Also Micklitz (2010).

3.2.1 The regulation of financial markets

The U.S. was arguably the first country to push for the financialization of its housing market. In response to the Great Depression and its decades-long decline as an economic global power, the U.S. sought to re-gain its economic strength. It needed to generate revenue with which to fund its trade deficit,[44] and establish a global demand for debt denominated in highly rated US dollars.[45] It decided that the national housing and lending industries and the purchasing of mortgages through foreigners were to play a pivotal role in this regard.[46] So, in order to incentivise mortgage lending and expand mortgage credit markets, the 1934 Housing Act and the creation of the Federal Housing Administration provided insurance to private lenders for the loss on home rehabilitation loans and mortgages for new homes; simultaneously, home-building subsidies and land-planning policies were put in place that encouraged the expansion of developers' and building companies' activities.[47] The Federal National Mortgage Association (Freddie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Government National Mortgage Association (Ginnie Mae) introduced the standardised mortgage loan.[48] They bought mortgages, packaged them and sold mortgage-backed securities on the open market, providing guarantees for the promised payments of securities.[49] Securitisation was, in fact, one of the key financial innovations underlying the integration of global finance,[50] because it disconnected globalised mortgage markets from local housing markets and their vulnerabilities to local risks.[51] In this system, the emphasis lies not on the profitability of granting credit to an individual consumer, but on the profitability of the global circulation of pooled mortgages.

In the EU, even though many Member States had already participated in pushing for financialization of housing, credit expansion became an integral part of the establishment of the internal market in the 1990s. Here, the subprime mortgage market was arguably much smaller and surely more diverse than in the U.S. Nevertheless, mortgage lending was fostered by low interest rates, the growth in housing prices, and increasing liberalisation and integration of EU financial markets.[52] Automated credit scoring through credit bureaus and the move to risk-based pricing also contributed to an extension of credit. On EU level, the Consumer Credit Directive 2008/48/EC (CCD),[53] adopted just before the financial crisis,

44 Schwartz (2012), p. 60

45 Mian & Sufi (2014), p. 97

46 Schwartz (2012), pp. 54ff

47 Gotham (2012), pp. 32-35.

48 Aalbers (2012), p. 10

49 Hellwig (2009), p. 146.

50 Fligstein & Habinek (2014), p. 641.

51 Mian & Sufi (2014), pp. 95-96.

52 European Commission (2005), point 5.

53 Directive 2008/48/EC of 2008.

and the Mortgage Credit Directive 2014/17/EU (MCD),[54] adopted after lengthy negotiations seven years into the financial crisis, aim at creating a cross-border internal market through the facilitation of available consumer and mortgage credit.[55] The EU Commission admits that the integration of EU mortgage markets is "essentially supply-driven", putting emphasis on the freedom of establishment of mortgage suppliers in other Member States.[56]

3.2.2 EU consumer law: Access to markets for confident consumers

Besides the (macro) regulatory expansion of mortgage markets, the EU also establishes rules concerning (the micro dimension of) credit contracts. EU legislation on mortgages pertains to the field of consumer law. Consumer legislation is largely based on Articles 4 (2) lit. a) and 114 Treaty on the Functioning of the European Union (TFEU),[57] which deals with the establishment and functioning of the internal market. And since the *Tobacco Advertisement*, in which the CJEU struck down a proposed directive on the advertising of tobacco products due to its primary concern with public health that could not be based on Article 114 TFEU, it is clear that any legislation based on this article must have the genuine aim of improving the conditions of the internal market; consumer protection can only be a side effect of that legislation.[58] So, the EU acts whenever there is a danger of the obstruction of the internal market and cross-border movement of goods, services, people, and capital.

Consumer law in the EU is driven by those considerations. In order to establish a functioning internal market, the EU needs confident consumers. So, the normative standard for protection in EU consumer law is the "reasonably circumspect" consumer. Since the famous *Mars*-case,[59] consumers in the EU are supposed to be autonomous, self-reliant, and well informed when shopping for goods and products on the internal markets. They are considered and supposed to be rational actors. Only then will they benefit from EU consumer protection rules.[60] So, the legal framework in consumer law is geared towards protecting those reasonably circumspect consumers – this consumer is the benchmark for the assessment of business dealings with consumers, such as commercial practices and standard contracts.

---

54 Directive 2014/17/EU of 2014. The date for Member States to implement the MCD into their national legal orders was 21 March 2016. By now, all of the EU Member States have implemented the Directive, see Anderson & Arroyo Amayuelas (2018).

55 Preamble 4 CCD, Preamble 2 MCD.

56 European Commission (2007), point 3.

57 Treaty on the Functioning of the European Union of 2009, OJ C 326/47, 26.10.2012.

58 CJEU, 05/10/2000, C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* (2000), ECLI:EU:C:2000:54.

59 CJEU, 06/07/1995, C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH* (1995), ECLI:EU:C:1995:224, para 24.

60 This makes the "reasonably circumspect" consumer the normative standard in EU consumer law. For a differentiated discussion, see Wilhelmsson (2004), Incardona & Poncibó (2007), Domurath (2013); Mak (2013).

In order to ensure that consumers can be reasonable circumspect and well-informed, EU law imposes information obligations on the professionals and allows for the control of unfair contract terms. The assumption here is that consumers are the structurally weaker parties in contractual relationships with professionals. The CJEU has made it clear on several occasions that the weak position of consumers derives from both their bargaining power and their level of knowledge.[61] Thus, limitations to the freedom of contract of both the "stronger" professional party and the consumer as the "weaker" party are considered justified.[62] In the field of financial consumer protection, EU rules interfere with freedom of contract via the requirement to check the repayment capacities of the borrower (creditworthiness assessment, CWA), and through information requirements and the control of standard contract terms.

i. Creditworthiness assessment

The main tool for the lender to decide whether to enter into a loan agreement with a prospective borrower is the assessment of individual financial capacities. In fact, CWAs have long been an integral part of a bank's retail operations.

The MCD dedicates a chapter to CWAs. Article 18(1) MCD states that the lender shall be obliged to undertake a "thorough" CWA, taking into appropriate account the factors relevant "to verifying the prospect of the consumer to meet his obligations under the credit agreement". The CWA should focus on the consumer's ability to meet the contractual obligations (Preamble 55 and Article 18(1) MCD). Since the CWA is often realised with the consultation of credit bureaus, which collect and store data relating to the financial obligations and liabilities of the consumers, Article 20 makes obligatory the non-discriminatory access to credit bureau databases and to monitor the consumer's compliance with the credit obligations over the life of the credit agreement. Finally, Article 18(5) lit (a) MCD stipulates that the credit shall only be made available to the consumer if the CWA indicates that the consumer will be able to meet the financial obligations assumed under the credit agreement. Since the CCD does not contain such a provision, we can assume that the inclusion of these provisions in the MCD is influenced by the prevalence of overoptimistic practices before the financial crisis.

Lenders have long developed expertise in screening and monitoring of borrowers. Therefore, they are considered to eliminate some of the cognitive biases of borrowers.[63] They gather information on the payment history and consumer borrowers' accounts, organise and manage the information on the borrowers' performance, and provide the credit industry with reports issued before the underwriting of a loan agreement.[64] So, CWAs allow lenders to have a more complete

61 For example in CJEU, 09/11/2010, C-137/08 *VB Pezügji Lizing Zrt v Ferenc Schneider* (2010), ECLI:EU:C:2010:659, paras 27, 46; CJEU 26/04/2012, C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközesi Zrt (Invitel)* (2012), ECLI:EU:C:2012:242, para 33.

62 Hondius (2004), p. 246.

63 Atamer (2011), p. 199.

64 Ferretti (2010), p. 1.

picture of an individual's total debt exposure.[65] In addition, the credit bureaus that are often used by lenders for their CWAs help lenders to reduce adverse selection and detect overcommitted borrowers.[66] Economic theory regards them as designed to eliminate the information asymmetries that supposedly exist with regard to both the borrower's ability and willingness to repay the loan.[67] When undertaken diligently, consumers who fall below a certain threshold in terms of income and wealth, with insufficient financial capacity to repay the loan, will not obtain credit.

While it is evident that the objective of any CWA is to ensure that the loan will be repaid, which is in the primary interest of the lender (risk minimisation), it is debatable whether the CWA pursues a further goal. In the *Crédit Lyonnais* case, the CJEU interpreted the aim of the CWA as to prevent consumers from the danger of over-indebtedness and insolvency and to protect them from getting loans beyond their financial capacities.[68] Preamble 3 MCD states that the prevention of household over-indebtedness forms part of the EU's regulatory framework in the area of mortgage credit. Also, the references in Preamble 55 and Article 18(3) MCD to the value of the secured property can be interpreted as underlining that CWAs also protect the consumer from the loss of the property acquired with the credit. However, we can doubt that this is a proper goal in itself. Preamble 3 MCD considers the prevention of over-indebtedness merely as a tool to restore consumer confidence after the financial crisis. The narrative is that irresponsible lending practices have undermined the foundations of the financial system as well as consumer confidence and that, therefore, the EU should aim at preventing household over-indebtedness. So, the prevention of over-indebtedness is instrumental for a bigger aim: to restore consumer confidence in the internal market. Through better CWAs, consumers will have more confidence in the internal market and engage in more cross-border transactions, thus the rationale.

ii. Information obligations

Upon the decision to grant credit to a prospective borrower, the bank will offer a standard mortgage credit contract to the consumer. The MCD contains a long catalogue of provisions relating to the supply of information for the conclusion of a loan agreement. Here, the MCD follows the general EU law approach to consumer law, which is based on fostering the internal market and ensuring transparency of economic transactions.

Commercial transactions are to be transparent in order to foster deregulation of the internal market because market liberalisation through competition is assumed to allocate production factors in an optimum manner.[69] Thus, the EU is to ensure

65 Vandone (2009), p. 77.

66 Rona-Tas (2015).

67 For example: Jappelli & Pagano (2002).

68 CJEU 27/03/2014, C-565/12 *LCL Le Crédit Lyonnais SA v Fesih Kalhan* (2014), ECLI:EU:C:2014:190, paras 42 – 43. Thus, it has been claimed that the goal of responsible lending now also comprises the financial stability of the consumer; see Rott (2014 v).

69 European Commission (1993), points 2 and 5.

the free flow and transparency of information, a stance held firmly since the seminal *Cassis* ruling in which the CJEU stated that "greater transparency of commercial transactions" could be achieved by providing suitable information to the consumer.[70] With the help of the information provided, the confident consumer then can make an informed choice about whether or not to buy the product in question. Thus, all of EU consumer legislation includes a great amount of information requirements for the professional, since it is assumed that traders know more than consumers about the products and services they offer.

The MCD contains many articles imposing information requirements. Article 11 MCD deals with advertising as the first contact between lender and borrower. Suppliers of mortgage credit must provide information of the borrowing rate, the total amount of credit, the annual percentage of rate (APR), the duration of the credit agreement, the total amount payable by the consumer, and the amount and number of instalments. Furthermore, Article 14 MCD demands the provision of personalised information without undue delay and in good time before the consumer is bound by the agreement. Even after the contract has been signed, Article 27 MCD obliges the lender to inform the consumer about any changes in the borrowing rate before that change enters into force. Since the MCD was adopted seven years into the financial crisis, it goes partly beyond what is required in the CCD that was adopted in 2008. For example, the information to be provided includes additional information concerning mortgage credit agreements in foreign currencies, requiring the calculation of a loss of 20 per cent of the value of the national currency of the borrower relative to the credit currency.[71]

In addition to the requirement to provide specific information about the credit agreement, the EU legal framework also addresses the issue of the transparency of information. Article 14(3) MCD introduces the requirement of providing pre-contractual information in a standardised form, namely the European Standardized Information Sheet (ESIS). Standardisation is to enable consumers to compare different offers more easily. The MCD imposes not only information obligations on the lender, but also the obligation to use accessible language when providing that information to the consumer. For example, they demand that the lender gives "adequate explanations" to the consumer on the proposed credit agreement (Article 16 MCD). Hence, the ESIS contain simpler language ("This means …"; addressing the consumer directly in 'you'-form) than the legal terms in the Directives, acknowledging the difficulty consumers face in understanding financial and legal language.[72]

Coupling the information requirements with intelligibility requirements, the legal framework also addresses the difficulties consumers may have in understanding

70 CJEU 20/02/1979, C-120/78 *Rewe Zentral v Bundesmonopolverwaltung für Branntwein* (1979), ECLI:EU:C:1983:202 (*Cassis de Dijon*).

71 See Point 3(3) and (4) ESIS, and the possibility of changing interest rates, Point 6(3) ESIS.

72 See Preamble 41 MCD

the information provided. This is an especially big problem in the case of financial services.[73] Concerning the inability to evaluate the consequences of indebtedness, the MCD puts obligations on both the lender and the borrower with a view to achieving responsible lending and borrowing practices. Addressing, albeit incidentally, the consumer's inability to evaluate the consequences of indebtedness, the MCD foresees certain warnings to the consumer. Here, the MCD imposes the obligation on the lender to warn the borrower against the possible consequences of non-compliance with the financial commitment under the credit agreement (Article 13(1) lit (n)). Because of the minimum harmonisation character of the MCD, Member States can introduce further warning requirements.[74]

All these provisions are clearly geared towards striking a balance between complete and understandable information that should be provided to the consumer in order to make accessible the European internal mortgage market.

iii. Fairness control of contracts

Providing the consumer with all kinds of information, irrespective of its accessibility for the average reasonably circumspect consumer, can only be one part of the legal framework on mortgages. From the viewpoint of fostering the internal market, it must be taken into account that the consumer is not always able to use the provided information in a way that fosters competition. As a consequence of either a monopoly of the professional or because all competitors use the same clauses, consumers in need of goods and services are not in a position to shop around for better quality or different contract terms. So, the bargaining power of consumers is usually inhibited because of the use of standardised contracts that are presented to consumers on a take-it-or-leave-it basis. This deprives them – the weaker party – of their freedom of contract.[75]

This problem is addressed in EU law by the Unfair Contract Terms Directive 93/13/EEC (UCTD).[76] Its proclaimed goal is to facilitate the establishment of the internal market through the abolishment of unfair terms from standard consumer contracts which stand in the way of the consumer being able to shop around for goods and services in different Member States with different contract law rules (Preambles 4-6 UCTD). It aims at enabling consumers to trust that the contracts they enter into everywhere in the EU do not contain unfair terms, which they cannot understand due to language or identify due to a lack of knowledge of diverse national legal orders.

Article 3 (1) UCTD stipulates the requirement for 'unfairness': "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

73 See for example: Atamer (2011); Cartwright (2012); ECCG Plenary (2013), p. 14.

74 See Preamble 43 MCD

75 Kessler (1943).

76 Council Directive 93/13/EEC of 1993.

The Annex to the UCTD contains a non-exhaustive list of clauses that are considered *prima facie* unfair.

Article 4 UCTD lays down the method to be used to assess the fairness of a term:

> 1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
>
> 2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.

While the assessment of unfairness in the precise cases is left to the national courts,[77] an outflow of the principle of the procedural autonomy of the Member States, it is settled case law of the CJEU that the national courts must assess *ex officio* the fairness of contractual terms.[78] Once a term is found unfair, Member States must make sure that their legal frameworks ensure that the term is not binding on the consumer and that the contract "shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms" (Article 6 (1) UCTD). Article 7 (1) UCTD lays down the obligation for Member States to ensure the existence of adequate and effective means to prevent the continued use of unfair terms in consumer contracts.

The UCTD has been very much in the focus of jurisprudence of the CJEU in the last decade. As we will see in more detail in the next section, the CJEU has used the UCTD in order to connect enforcement with declaratory proceedings. For now, we only need to bear in mind that the UCTD is considered key in establishment of the internal market. It aims at facilitating access to the internal market for consumers because with its aim of banning unfair contract terms it aims at lifting the burden of having to navigate an unknown legal system in another Member State.

3.3 Protection of mortgagors from default

Now, we turn to the extent to which the examined tools for the expansion of markets take into account or are supplemented with protective mechanisms that can help to prevent the two main causes of default: lack of financial means (high loan-to-

77 Nevertheless, the CJEU has given substantial guidance as to what kind of clauses it would deem unfair. Some of the respective case law is mentioned below.

78 CJEU 27/06/2000, in Joined Cases *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) y *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) y *Emilio Viñas Feliú* (C-244/98) (2000), para 26; also CJEU 03/06/2009, C-243/08 *Pannon GSM Zrt v Erz'ebet Sustikn'e Gy'orfi,* (2009), ECLI:EU:C:2009:350, para 24; CJEU 21/11/2002, C-473/00 *Cofidis SA v Jean-Luois Fredout* (2002), ECLI:EU:C:2002:705.

value-ratio and low net-worth) and unforeseen adverse events that directly affect the financial capacities of the borrower.

3.3.1 The role of the European Central Bank

The prevention of over-indebtedness of consumers is a field of law that cuts across regulatory and private law approaches. Besides a lack of initial means, the repayment capacity of consumers is affected by the larger macro-economic situation, since macroeconomic shocks can, for example, lead to unemployment or a rise in interest rates. The stability of the larger financial systems is also affected by irresponsible lending practices. If over-indebtedness is a serious concern for legislators, it must be tackled through both regulatory and contract law.

However, regulatory oversight in the EU is not concerned with the protection of debtors. Notwithstanding significant regulatory activity in the field of the supervision of financial markets, regulatory oversight is concerned with monitoring systemic risks. As such, it is geared towards the prevention of larger macro-economic shocks, which can adversely impact the repayment capacity of the borrower. It is not directly concerned with individual credit risks.

There is an important problem of scope and competence. The Banking Union, the last piece of the puzzle in the completion of the internal market, and a fiscal union was established after the financial crisis of 2008. It complements the internal market for capital and the single European currency. Its main elements are the creation of the Single Supervisory Mechanism (SSM), under the prudential supervision of the European Central Bank (ECB), and the Single Resolution Mechanism (SRM). Both are based on the "single rulebook", a set of rules laying down standards to regulate, supervise and govern the financial sector in the EU. Within its supervisory mandate, the ECB reiterates routinely that consumer protection is not part of its mandate and refers to the role of national supervisory authorities in this regard.[79-80] The ECB sees its role limited to cooperation with national authorities on issues such as consumer protection.[81]

The lack of concern with borrower protection is not mitigated through the issuance of the ECB guidance on non-performing loans (NPL Guidance) in 2017. This guidance builds up a basic framework for conducting the supervisory evaluation of banks with regard to the management of NPLs. Therefore, the NPL guidance also includes principles for affordability assessments. For example, the assumed prospective future increases should be "credible and conservative" and take into account regular income, expenditure, assets and debts, living expenses, employment prospects, as well as behavioural history.[82] The impact of the financial crisis is clearly visible with regard to the prognoses of future income. The affordability assessment

79 See Preamble 28 of the SSM Regulation.

80 Council Regulation 24/2013 of 2013.

81 See Preamble 29 SSM Regulation.

82 European Central Bank (2017), p. 45.

must be reasonably documented and demonstrate the appropriate conservatism; future income increase should be sound and in line with sector and market norms.[83] With regard to the collateral valuation for immovable property the ECB states that all valuation must be performed by independent qualified appraisers who are, *inter alia*, not guided by the debtor's creditworthiness.[84] It also states that the appraisal of future cash flows should be based on "adequate and realistic" assumptions. Also, here documentation must be provided on the valuation.

Despite the elaboration of these substantive principles, the ECB is well concerned about explaining that its competence derives from its supervisory powers. It clearly states that the "deliberate and sustainable reduction of NPLs in banks' balance sheets is beneficial to the economy from both a micro- and macro prudential perspective"[85] and that NPLs pose significant risk to EURO-area banks.[86] At the same time, the ECB is well aware that its competence would not include the issuance of binding guidelines. Thus, the NPL guidance merely aims at fostering best practices among lenders in their approaches to non-performing loans, who are to integrate consumer protection into their NPLs-strategy of the supervised financial institutions.[87] Due to the non-bindingness of the guidance, it also does not include any sanctions for the case of the violation of the guidance. The protection of consumers from over-indebtedness is not guaranteed by the sole regulatory oversight and possible imposition of fines through supervisory bodies without an individual enforceable right of the consumer.[88]

3.3.2 Creditworthiness assessment

In section 3.2., we have seen that, apart from enabling access to credit markets, CWAs also have a protective purpose. However, we can question whether the CWA rules of the MCD can actually prevent the over-indebtedness of consumers due to a lack of financial means. Protective gaps lie in the absence of sanctions and in the very nature of the CWA.

Even though the MCD obliges Member States to ensure that the creditor only makes the credit available to the consumer if the CWA proves positive (Article 18(5) lit (a) MCD), which implies that credit shall not be granted if the CWA is negative, it lacks a provision on the legal consequences of the lender's failure to deny credit in case of a negative or missing CWA. Article 38 MCD merely provides the almost standard formula (in EU legislation) of obliging Member States to determine "effective, proportionate, and dissuasive penalties for the breach of MCD provisions".[89] Under

83 European Central Bank (2017), p. 46.

84 European Central Bank (2017), p. 89.

85 European Central Bank (2017), p. 4.

86 European Central Bank (2017), p. 5.

87 European Central Bank (2017), p. 11.

88 Rott *et al.* (2011); Rott (2015), paras 78 – 79.

89 The dissuasiveness of penalties was at issue in the *Crédit Lyonnais* case, in which the CJEU ruled on a provision in French law that provided for the penalty of forfeiture of entitlement to interest

EU law, the question of penalties and remedies lies in the hands of national courts, which have to assess the effectiveness, proportionality and dissuasiveness of the national penalties in the light of the MCD. This might not be enough of an incentive for lenders to undertake sound CWAs.

Despite the existence of CWA obligations and even though banks routinely assess the creditworthiness of their customers, evidence suggests that lenders do not always use their knowledge to discourage borrowing. On the contrary, they might even encourage high-risk borrowers to extend their credit.[90] The neglect of liability of the lender to undertake CWAs can have a negative impact on the protection of consumers, especially high-loan-to-value borrowers and low net-worth borrowers. Particularly in the years just before the financial crisis, credit was also given to low-net-worth consumers even though it should have been obvious at the time of contract conclusion that they might not be able to repay the loan, which suggests that either CWAs were not undertaken or negative CWA results ignored.[91] We can wonder whether Mr. Aziz had undergone a thorough CWA. Surely, he was granted a loan in a socioeconomic climate of over-optimism and other cognitive limitations,[92] in which the incentives for "thorough" CWAs were not in place or did not take function. It remains to be seen whether the MCD will change this on the long run.

Apart from the lack of sanctions, another important limitation of CWAs is that they are by nature used at the beginning of lender-borrower relationship, before the loan agreement is entered into. Their very function lies in the assessment of whether to enter into an agreement or not. This means that unforeseen adverse events that happen after the contract is concluded can hardly be taken into account. To be sure, a few provisions in the MCD deal with future market developments. Article 18(3) MCD and Preamble 55 MCD acknowledge that housing prices may fall. According to Article 18(3) MCD, the CWA shall not predominantly rely on the value of the underlying property and the Member States shall ensure that the standards for property evaluation for mortgage lending purposes are reliable. Similarly, Article 19 MCD ensures that the property evaluation shall be conducted in accordance with reliable standards in the Member States. These provisions are clearly meant to respond to the overoptimistic real-estate evaluations that took place during the housing bubble before the financial crisis. Thus, they aim at mitigating the impact of a possible macro-economic shock on the consumer's repayment capacity. They

payments should the creditworthiness of the consumer not be assessed by the lender. In that case, the CJEU considered it not dissuasive if the amounts the lender receives if the borrower defaults are not significantly lower than without the default (here the contractual interest rate was replaced with a higher statutory rate, which was in effect more beneficial for the lender), CJEU 27/03/2014, C-565/12 *LCL Le Crédit Lyonnais SA v Fesih Kalhan* (2014), ECLI:EU:C:2014:190, paras 52 – 53.

90 Atamer (2011), pp. 199 *et seq*.

91 See the country reports in Domurath *et al.* (2014); for the USA, see Mian & Sufi (2014).

92 Many commentators have analysed the reckless over-confidence and other behavioural biases of humans Sharot (2011), and especially economic actors: Jolls *et al.* (1998), Etzioni (2011), Spindler (2011).

acknowledge that a consumer with a lack of financial means does not mitigate her lack of repayment capacity with overly optimistic economic forecasts.

Moreover, from a technical point of view, the data that is being used for the CWA is only able to render an approximation of the financial repayment capacity of the borrower. The data is never complete and can be biased.[93] Just as much as humans cannot foresee all possible events that might affect the repayment capacity of the borrower, so cannot algorithms, which are –after all– programmed by humans. Since not all events can be foreseen and calculated beforehand, CWAs are not enough to ensure the prevention of over-indebtedness.

3.3.3 Information and financial literacy

We have seen above that the provision of information under EU law serves the purpose of putting the consumer on par with the trader during their negotiations. In retail finance, this approach is geared towards credit expansion and market access, but not towards the two main causes of default: high loan-to-value loans and low net-worth of borrowers and unforeseen adverse events. The very nature of information obligations is to improve the transparency of the transactions; any protective effects for borrowers from default due to a lack of initial means or adverse supervening events are incidental.

This is not to say that information provision is not protective at all. With its aim to make information transparent and accessible, it is to ensure that consumers at least understand the terms and conditions of their credit obligations. The standardisation of information aims at preventing the so-called information overload.[94] Because of bounded rationality, people cannot process infinite information, which leads to a diminished quality of decisions when the information level reaches a certain point.[95] This even holds true for experts.[96] This information overload can lead to increased transaction costs and make the provision of information counterproductive.[97] The ESIS of the MCD focuses on 15 types of information. This does not amount to dozens or more pages of information that is usually alluded to when talking about information overload. Thus, consumers might actually be put into a position in which they will be able to compare significant information pertaining to credit. Whether they understand the impact of the agreement on their financial situation in general is another question; but the focus of standardisation on a few crucial points is generally suitable to counteract information overload.

Nevertheless, the EU information model can be criticized, mainly because of doubts on its effectiveness. In particular, research in behavioural economics questions

93 Ramsay (1995); also: Rona-Tas (2015); Rona-Tas (2008).

94 For securities regulation in the US, see Paredes (2003).

95 Paredes (2003), pp. 441 *et seq* with further references.

96 Paredes (2003).

97 Spindler (2011), p. 322.

the usefulness of information disclosure based on the rational actor model.[98] The last financial crisis has shown once again that individuals do not behave in the rational way assumed by classical economic approaches.[99] Cognitive limitations lead to individuals overestimating their financial capabilities and underestimating the likelihood of adverse events that affect those capabilities. As a result, the effects of disclosure on consumer behaviour are rather modest.[100]

In conclusion, this approach has limitations with regard to how rational actors actually function. This does not mean that information should not be provided, but it should not be the only tool of consumer protection. Moreover, there is not much evidence that suggests that consumers become over-indebted because of information overload. If the aim of preventing default and further welfare losses is to be taken seriously, emphasis must be on other legal tools.

3.3.4 Fairness control of contract terms

We have already seen that the control of unfair terms has an important access dimension. At the same time, the UCTD has been one of the most important directives on which over-indebted consumers have relied in the aftermath of the financial crisis. Some of the seminal CJEU judgments have been crucial in changing the rules in EU Member States in order to help consumers to deal with their debt and avoid even more severe social repercussions. The main issue has been the enforcement of credit agreements after default of the consumer. Many borrowers tried to use the UCTD in order to challenge national procedural legislation that they perceived as disadvantageous to them as far as it allowed the lender to enforce the credit agreement upon the fulfilment of low-threshold conditions. The cases have attracted much academic commentary, because of their impact on national procedural rules, which – under EU law – in principle remain in the competence of Member States under the principle of national procedural autonomy.

The most prominent case in point is the already-mentioned *Aziz*, where the CJEU ruled that Spanish procedural law, according to which the enforcement

98 Studies in the field of behavioral economics are not undisputed. The most common criticism concerns the narrow scope of applicability of the very context-specific behavioral economics studies to particular consumer groups (Faure & Luth (2011)). Similarly, Levine (2009) claims that the field of application for behavioral economics is limited (e.g. to explaining group panics) — and that the 'bulk of human behavior' can be adequately explained by the rational actor model — thus arguing for a strengthened but only supportive role of behavioral economics. Concerning the critique from the field of economic sociology (e.g. Frerichs (2011)), which favors a contextualization of different consumer 'natures' into a cultural environment, it can be said that this critique does not contradict the use of insights from behavioral economics as such. In general, one can argue that the criticism against behavioral economics can be taken seriously without rejecting its insights altogether, Faure & Luth (2011). Please note that in the field of consumer protection the application of behavioural economics is less disputed. So, for our purposes, it is enough to acknowledge the doubt that is cast on the extent to which consumers respond to the removal of information asymmetry.

99 Jolls *et al.* (1998).

100 Whitford (1973), showing that effects might be limited to higher-income groups.

of a mortgage contract (eventually leading to the eviction of the borrower) can proceed without allowing the assessment of the fairness of the contract terms, runs counter to the effectiveness of EU law.[101] It must be possible for the consumer to have the unfairness of the underlying contract assessed by the court in enforcement proceedings in order to avoid the often irreversible loss of their home and to make protection from unfair terms under the UCTD effective. After the *Aziz* ruling, the Spanish legislator amended its civil procedure law such that the party opposing the mortgage enforcement proceedings could object to those proceedings based on the claim of unfairness of the underlying contract.[102] However, the legislative amendment gave rise to new enforcement problems. In *Sánchez Morcillo*,[103] the CJEU ruled that Article 695(4) of the Spanish Law on Civil Procedure, according to which a court could stay enforcement proceedings while a judgment on the possible unfairness of terms is pending, conveys an unjustified advantage to the bank at the expense of the homeowner, because the former could appeal against the staying of the proceedings whereas the latter could not. Spanish procedural law did not offer adequate and effective protection to homeowners in the sense of Article 7(1) UCT in conjunction with Article 47 EU Charter of Fundamental Rights (ChFR), because the imbalance between the procedural rights available to the consumer on one hand and the lender on the other "accentuates the imbalance existing between the parties" in terms of bargaining power and level of knowledge.[104] This violation of the principle of procedural equality — the balance of arms in the enforcement of rights — jeopardises the effectiveness of the UCTD.

This, and subsequent case law of the CJEU, has attracted significant academic commentary in Europe. The CJEU is at the same time praised and criticized for its "judicial activism" and its social conscience and legal innovation.[105] In *Aziz*, the CJEU clearly stated that the importance of the purchased property as a family home must play a role in the assessment of unfairness of terms.[106] Similarly, the Court was aware in *Sánchez Morcillo* of the significant consequences of its ruling in Spain, where many people have in recent years been subject to foreclosure proceedings in respect of their private dwellings.[107] Moreover, the CJEU noted that the risk of losing the main dwelling puts the consumer and his family in a "particularly fragile situation".[108] These interventions show that the Court shows a certain social and societal consciousness, when intervening significantly into Member States' legal orders.

101 C-415/11 (*Aziz*), paras 57-59.

102 Chapter III of Law 1/2013 of 2013 amended the Code of Civil Procedure (Ley de enjuiciamiento civil) of 2000, which was also amended by Decree Law 7/2013 of 2013.

103 CJEU 14/07/2014, C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* (2014), ECLI:EU:C:2014:2099.

104 C-169/14 *(Sánchez Morcillo)*, paras 46, 50 – 51.

105 For example Micklitz (2013); Micklitz & Reich (2014); Della Negra (2015); Sánchez (2014).

106 C-415/11 (*Aziz*), paras 60-61.

107 C-169/14 *(Sánchez Morcillo)*, para 7.

108 C-169/14 *(Sánchez Morcillo)*, para 11.

Nevertheless, from the viewpoint taken in this contribution, the assessment of unfair terms is not enough to protect borrowers from the two main causes of default. This is because the UCTD is not concerned with a substantive type of fairness. It does not say how a "fair" consumer contract should look like. This is reflected in Article 4 UCTD. First, Article 4 (2) UCTD states that the main subject matter of the contract, including the adequacy of price, is not part of the fairness assessment, as long as the clauses setting out the price are transparent and intelligible.[109] This means that borrowers are not protected against taking out loans they cannot afford. Instead of establishing a model of fairness, which could, for example, take into account the amount of monthly instalments or the length of the repayment period, it is assumed that the unfairness of his contract derives merely from the fact that the borrower could not negotiate the terms of the contract. So, for the UCTD to apply in *Aziz*, it does not matter why Mr Aziz defaulted to begin with. Second, even if the default occurred as a consequence of unfairness, we still face text another problem. The assessment of unfairness is based on the circumstances prevailing at the time of the conclusion of the contract, Article 4(1) UCTD. This means that circumstances that occur after the contract has been concluded do not play any role in the assessment of unfairness, thus neglecting factors that could in effect render contractual clauses unfair after considering the changed situation of the consumer (or professional for that matter). So, unforeseen events, such as job loss, cannot be considered in fairness assessments.

In this way, the UCTD, in a formalistic way, aims at the restoration of the balance of negotiating power at the time the contract is concluded. But remedying an asymmetrical bargaining position between consumers and traders is not a substantive approach to assess fairness that aims at generating actually balanced outcomes of contracts.[110] It is premised on the notion that, once they are on an equal bargaining position, actors will negotiate a contract that is fair to their standards. Notwithstanding the undisputed social awareness of the CJEU, the approach of connecting eviction proceedings to substantive fairness assessment of contracts does not protect homeowners from defaulting on their loans, no matter if they contain unfair clauses or not. We must bear in mind that, in the end, Mohammed Aziz like many others, lost his home despite the judicial activism of the CJEU.

3.4 Interim conclusions

We have seen that the legal framework in the EU is more oriented towards access to financial markets for borrowers than towards protection from default.

109 See for a discussion, CJEU 30/04/2014, C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* (2014), ECLI:EU:C:2014:282 (*Kásler*), paras 32-34.

110 This is, of course, related to the issue of competence of the CJEU as ensuring the interpretation and application of EU law, Article 19 Treaty on European Union (TEU), which is, albeit significant encroachment through the EU law principles of equivalence and effectiveness, restrained by the procedural autonomy of the Member States and the remaining competence of Member States for their contract law rules. See Domurath (2017), p. 103.

First, the rules on CWAs neglect behavioural and legal limitations, in particular the biases inherent in any technologically driven governance[111] and the lack of sanctions for disregard the outcome of the CWA. The financial crisis has shown that the rules on CWAs can be easily ignored. As a result, the financial repayment capacity of borrowers is not always adequately assessed and thus credit can be granted despite a lack of financial means. Second, the main EU consumer law approach of providing information to borrowers is not concerned with protection either; its very essence lies in lifting the consumer on par with the trader in negotiation processes, thus reinforcing the position of the consumer to access credit markets and to choose financial products and, in this way, fostering competition on the EU internal market. The main problem here is that the financial situation of borrowers does not play a role. Third, the judicial *ex officio* control of unfair terms is, albeit driven by an obvious social concern of the CJEU, not suitable to protect mortgage borrowers from default caused by a lack of financial means or unforeseen adverse events. As to the former, the UCTD does not extend unfairness control to transparent price clauses (Article 4 (2) UCTD); as to the latter, the fairness control relates only to the circumstances prevailing at the time of conclusion of the contract (Article 4 (1) UCTD). This excludes the possibility of contractual adjustment based on a change-in-circumstances approach, which could enable borrowers to re-negotiate their financial obligations under the contract in line with their new, changed financial abilities.[112]

In this regard, the EU legal framework could look for inspiration in the existing doctrines of change in circumstance, which forms part of most civil codes across Europe, even if only applied in exceptional circumstances. The most open provisions and application of such doctrine can be found in the Nordic legal orders, where judges can adjust contract terms as a matter of fairness.[113] Also, the Portuguese Supreme Court has applied the *rebus sic stantibus* principle to an interest-rate swap contract that was supposed to mitigate the risks involved in loan contract with a variable interest rate linked to the Euribor rate.[114] The financial crisis has surely revived debates on the change in circumstances doctrines across Europe.[115]

111 See for CWAs: Ramsay (1995); more generally: Koops (2011), Leese (2014). For an engaging and accessible talk by Joy Buolamiwini, Buolamiwini (2016).

112 This is a possibility especially in Articles 36 of the Contract Acts of the Nordic Countries. For a discussion see Wilhelmsson (1990); Wilhelmsson (1993), p. 440 with further references; Häyhä (1994); Momberg Uribe (2011); Domurath (2017).

113 For a discussion see Wilhelmsson (1990); Häyhä (1994); Momberg Uribe (2011); Domurath (2017).

114 Decision of the Supremo Tribunal de Justicia of 10 October 2013. It should be noted that further decisions exist, in which the Supreme Court denied the existence of "hardship"; see Costa e Silva & Henriques, p. 11. For a discussion of further cases, see Domurath (2017), pp. 112 *et seq*.

115 For a discussion see Momberg Uribe (2011); Domurath (2017).

IV. THE CHILEAN CASE: FROM FINANCIAL CRISES TO BETTER PROTECTION OF MORTGAGORS?

In this last section, we will see how a legal framework outside of the EU deals with the access to mortgage credit and housing markets and the protection of mortgage borrowers. We will see that a differentiated picture emerges that is, albeit similar in approach, not identical to the protection of mortgage borrowers in the EU.

4.1 Chilean housing and mortgage policies: expansion of access

In Chile, housing policy was distinct from the developments on European and US-American housing sectors, but largely followed the same trend in terms of emphasis on private markets and finance. In the past, Chile had constructed a relatively stable financial system in which the government intervened strongly in times of depression and instability.[116] The provision of land for housing by the state was directed at the poor, who then had to build their own homes on the site (the policy was discontinued under Allende's government for ideological reasons). Since the 1950s, state-subsidies schemes and public land seizures dominated the housing sector.[117] In the 1970s, even before privatization really took off elsewhere, General Pinochet, who took power through a military coup on September 11, 1973, increasingly commercialized the housing sector.[118] In fact, the Pinochet regime was at the forefront of marketization and privatization efforts in Latin America with regard to policies such as health, education, housing, and public utilities. Chile was considered a laboratory for neo-liberal policies that were later to be adopted even in other Latin American countries, as well as in the UK and the USA.[119]

Later, especially since the early 1980s policies all over Latin America became more market-oriented, largely supported and required by the World Bank.[120] These developments favoured individual property rights and private market development, supported by the economic theory of the in Latin America highly influential, Peruvian neo-liberal economist De Soto and the so-called *Chicago Boys*, who influenced Pinochet's rule advocating for abandonment of structural economic policies and institution of unfettered markets.[121] In line with neo-liberal thought, the Chilean state understood its role as a subsidiary one, focussing on social policy for only the poorest families in the country.[122]

116 Brock (2000), pp. 73-74.

117 Richards (1995), p. 522.

118 See Long (2016).

119 Prieto Larraín (2011), p. 104.

120 Clegg (2017), pp. 69-70.

121 Valdés (2008).

122 Gil McCawley (forthcoming), pp. 25-26, on file with author.

In a pragmatic neo-liberal approach that was to support the legitimization of the technocratic military regime,[123] regulation of financial markets in Chile went hand in hand with increasing privatization and expansion of mortgage lending since the mid-1970s. The government eliminated interest-rate controls and liberalized the banking sector so that more financial institutions could enter the credit market.[124] The main tool to bring citizens into private homeownership were direct, means-tested subsidies to the "poor", providing up to 75 per cent of the value of the house in subsidies, with the remainder financed by a fixed-interest state mortgage. In those times, mortgage markets expanded significantly. The expansion of financial institutions in commerce, investment, mortgage lending, and pension funds led to a deepening of bank credit and capital markets.

However, the Chilean financial system soon plunged into a crisis, not unlike in the U.S in 2008. The massive expansion of credit, coupled with loose regulations and prudential supervision and exacerbated by structural problems due to opaque conglomeralization of the banking sector, led to asset bubbles.[125] The government intervened with rescue packages and a deep restructuring of the Chilean financial system. A three-tier strategy was employed, including debt restructuring for commercial and household borrowers, the purchases of non-performing loans from financial institutions, and the sale, merger, or liquidation of distressed institutions.[126] Subsequently, in 1986, the government amended the General Banking Act (GBA), which sought a middle path between strong prudential regulation and a market-based economy.[127] The new GBA introduced the endorsable mortgage credit (*préstamo o mutuo hipotecario*) at the expense of the until then dominant mortgage bonds (*letra hipotecarias*).[128] Then, securitization in Latin America increased rapidly in the early 2000s, but slowed down shortly after that.[129]

The narrative in Chile for the expansion of credit and private homeownership is similar to the "democratization of credit" in the US and the financial-and-social inclusion policies in Europe. In Chile, homeownership became considered a "springboard to prosperity".[130] Just like in U.S. and Europe, the expansion of credit went hand in hand with the responsibilization of citizens for their own welfare in a political economy, in which the states are only to play a residual role. Also, in Chile

123 Silva (1991); Prieto Larraín (2011), pp. 122-124, available at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/18141/03.pdf?sequence=13.

124 Alvayay & Schwartz (1997), p. 49.

125 Hornbeck (2009), p. 8.

126 Hornbeck (2009), p. 9.

127 Hornbeck (2009), p. 9.

128 Micco *et al.* (2012), pp. 11-12.

129 Scatigna & Tovar (2007). However, also in Chile, where the financial crisis has had less impact and the financial system is considered relatively stable, the percentage of non-performing loans has risen, see https://www.theglobaleconomy.com/Chile/Nonperforming_loans/.

130 Richards (1995), p. 526.

debt has become a form of governance[131] and governmentality.[132] At the same time, in the housing sector, there is a strong emphasis on social policy for poor households. The overall regulatory framework provides strong protection of property rights and a business-friendly environment for real estate development and transactions, an approach of "enabling markets."[133]

4.2 Protection of mortgage borrowers: differences and similarities to EU law

The main difference between the Chilean regulation of mortgage lending and mortgage lending in Europe or the U.S. seems to be a strict legal framework on loan-to-value ratios and household net worth and special policies for low-income households. Nowadays, such households can obtain private housing solely on the basis of a governmental subsidy and a small percentage of household savings, around 5 per cent of the government voucher. This, in essence, amounts to the provision of free housing to low-income families.[134] This policy was implemented after a substantial wave of defaults on mortgage loans by low-income households.[135] The Chilean policy on middle-income households also relies on a government voucher program, under which eligible households receive certificates they must complement with personal savings and a mortgage loan.[136]

The regulatory oversight concerning rules on CWAs seems stricter in the Chilean legal framework than in EU law. According to Article 84 (1) GBA, a bank shall not grant direct or indirect loans for an amount exceeding 10 per cent of its effective net worth. In case of a violation of this provision, the bank will be fined an equivalent to 10 per cent of the amount, see Article 84 (1) lit d), sentence 6 GBA. Even though this might not be a very high sanction, if incurred for high number of individual loans (so, if lending beyond the limitations set is structural), this provision has no equivalent in EU law. Moreover, financial institutions must ensure that the monthly repayments do not exceed 20 per cent of the household's income.[137] This shows that there is a bigger emphasis on *ex ante* control of mortgage lending in the Chilean legal framework. The legislator has not shied away from putting into place lending limitations. Here, Mohammed Aziz might not have been able to get this loan.

At first glance, this seems to imply that through a strong regulatory approach, the Chilean legal framework is more apt to protect mortgage borrowers from over-indebtedness. A note of caution is advised though; this does not mean that Chile's housing policy has been an overall success. Indebtedness rates in Chile have reached

131 Lazzarato (2015).

132 González (2018).

133 Gil McCawley (forthcoming, on file with author), pp. 37 *et seq*.

134 Gil McCawley (forthcoming), p. 34.

135 Gil McCawley (forthcoming), p. 34, fn 121.

136 See Simian (2010), pp. 288-293.

137 Richards (1995), p. 524.

a historical record.[138] There is an on-going conflict between the Chilean government and over-indebted homeowners, who are struggling for debt forgiveness.[139] Furthermore, acknowledging its achievement of bringing large parts of the poor population into home ownership, it has been shown that the Chilean housing policy reinforces social and geographical inequality. From a planning perspective, Chile's enabling housing regime has failed to lead to urban inclusion. This is because the government has concentrated low-income families in areas of cheap land, which typically lack adequate access to private and public goods such as job opportunities, high quality schools or public transport, thus reinforcing a strong "spatial bias".[140]

As regards the protection from adverse supervening event, the Chilean legal framework is not more protective than the European one. In fact, in Chile there is no habitual intervention into the contractual substance of the loan agreement. Similarly to their colleagues in Europe, judges in Latin America tend to be reluctant to interfere with contracts.[141] Classical legal doctrine and Chilean judiciary are formalistic and positivist, rejecting the use of "generic concepts" or "external considerations".[142] The Chilean Supreme Court has long ruled that courts do not have the power to ignore or revise the terms of contracts, thus upholding the sanctity of contracts.[143] In the legal commentary, the principle of *pacta sunt servanda,* in Article 1545 of the Chilean Civil Code (CC) is regarded as an insurmountable obstacle to the acceptance of *teoría de la imprevisión* that only an express legal provision could abolish.[144] What is more, in the context of credit relations, creditors are protected against any such possible legislative modification because they also enjoy express constitutional protection as holders of a property right over their contractual rights, Article 10 n. 24 of the Chilean Constitution, so that any legislative modification that would change the terms of contract in a way as to deprive them of or reduce such rights would be unconstitutional.[145] So, the fact that Mohammed Aziz could not continue repaying his loan because he had lost his job would not have any legal importance in Chilean law either.

However, similarly to the discussions in Europe, the possibility of some kind of change-in-circumstances approach is elicited in both modern legal commentary and, albeit isolated, jurisprudence. Based on the French doctrine of *imprévision,* the Court of Appeal of Santiago accepted that the economic equilibrium of the contract had been severely altered by unexpected circumstances, which were unknown to

138 Banco Central de Chile (2018).

139 Casgrain (2010).

140 Gil McCawley (forthcoming), pp. 45 *et seq*.

141 Rubim Borges Fortes (2016), p. 290.

142 Momberg Uribe (2011), p. 98.

143 Momberg Uribe (2011), p. 109 with reference to Gaceta de los Tribunales of 1925, l.er Sem., p. 23. RDJ, T. 23, sec. 1, p. 423 (judgment of 10 January 1925).

144 Momberg Uribe (2011), p. 100.

145 Momberg Uribe (2011), p. 101.

the parties at the time of the conclusion of the contract, and which changed the interpretation of the will of the parties.[146] This has definitely led to discussions about the theory of *imprévision* in Chilean law.[147]

Irrespective of singular judgments, both the EU legal order and the Chilean legal framework for long-term contracts such as mortgages do not foresee the adjustment of debt obligations after an adverse event has changed the repayment capacity of the borrower. In the EU, this is left to the Member States' different approaches, which – just as is the case in Chile – struggle with the balance between *pacta sunt servanda* and some form of *rebus sic stantibus*.

V. CONCLUSIONS

In this article, we have traced the ideology of home ownership and access to mortgage credit in the pertaining legal frameworks. Against the backdrop of increasing privatization and a retreat of welfare states, private home ownership has become a major social institution of modern life. States have used their regulatory powers to put into place legal frameworks that allow the expansion of private housing markets.

The main tool for this expansion is access to mortgage finance, so the expansion of financial markets to include more and more mortgage borrowers. To this end, states have actively sought to de-regulate and flexibilize financial markets (macro level) in order to allow for financial innovation. One such innovation, securitization, has been vital in the massive expansion of mortgage credit just before the last financial crisis of 2008. At the same time, contract law (micro level) emphasizes individual responsibility and transparency of information. However, we have seen that there is an inherent contradiction in access to mortgage finance for private welfare purposes because the expansion of credit to more and more segments of society necessarily means extending credit to more and more borrowers with bad credit histories. These borrowers are more likely to default on their mortgage loans and, in the end, to be evicted from their homes. Therefore, it is argued that rules aiming at the expansion of mortgage finance markets must also include protective mechanisms to prevent borrowers from default.

Our analysis of the MCD and UCTD shows that the protective mechanisms are underdeveloped in contrast to the provisions aiming at expanding access to credit. We have identified three main problems. First, there are inherent biases in CWAs as well as a lack of sanctions for neglecting negative credit histories, which leads to a lack of protection of consumers with insufficient financial means. Second, there is an emphasis on the provision of information, which however disregards behavioural biases of non-rational actors. Third, the control of standard contract terms, significantly used by the CJEU to encroach upon Member States' legal orders

146 *Guillermo Larraín Vial con Servicio de Vivienda y Urbanización de la Región Metropolitana* (2006).

147 Rodríguez (2007).

to protect homeowners facing evictions, is not geared towards the prevention of over-indebtedness. The price of credit remains outside of the scope of the UCTD, as long as set out in a transparent way, and the unfairness assessment only relates to circumstances prevailing at the time of the conclusion of the contract. As a consequence, adverse events, which negatively alter the financial repayment capacity of the borrower, are not made part of the unfairness assessment.

So, what would have happened if Mohammed Aziz were Chilean? Mr. Aziz might not have obtained the loan he got from the Spanish bank. The Chilean legal framework is stronger with regard to the supervision of CWAs, because it contains precise limits and sanctions. This approach seems to acknowledge that the exclusion from credit might be needed to protect some borrowers from over-indebtedness. For the "poor", the Chilean government then offers other means to obtain private homeownership. This underlines the embeddedness of access to mortgage credit into larger housing policies. Concerning the acknowledgement of supervening adverse events, the Chilean legal order is as rigid as EU law. Mr. Aziz – once he had obtained the loan - would not have been better protected under Chilean law after he lost his employment. Both legal orders have trouble dealing with the acknowledgement that consumers can suddenly have extremely diminished repayment capacities. The principle of *pacta sunt servanda* remains strong even in cases of significant economic (and social) hardship. This article might give food for thoughts towards relaxing the requirements for a change in circumstances approach when the home of individuals and families are concerned.

BIBLIOGRAPHY CITED

Aalbers, Manuel B. (2012). *Subprime Cities – The Political Economy of Mortgage Markets* (Wiley-Blackwell).

Acemoglu, Daron; Ozdaglar, Asuman & Tahbar-Salehi, Alireza (2015). "Systemic Risk and Stability in Financial Networks", *American Economic Review*, Vol. 105, N° 2, pp. 564–608.

Alcalde Rodríguez, Enrique (2007). "Corte de Apelaciones de Santiago y Teoría de la Imprevisión. Un Hito Fundamental en la Evolución de Nuestra Justicia Ordinaria", *Revista Chilena de Derecho*, Vol. 34, N° 2, pp. 361-372.

Alvayay, Jaime R. & Schwartz, Arthur L. (1997). "Housing and Mortgage Market Policies in Chile", *Journal of Real Estate Literature*, Vol. 55, N° 5, pp. 47-55.

Anderson, Miriam & Arroyo Amayuelas, Esther (2018). *The Impact of the Mortgage Credit Directive in Europe - Contrasting Views from Member States* (Europa Law Publishing).

Atamer, Yesim M. (2011). "No Duty of Responsible Lending: Should the European Union Take Action?", in Grundmann, Stefan & Atamer, Yesim M. (eds.), *Financial Services, Financial Crisis and General European Contract Law* (Wolters Kluwer), pp. 179-202.

Beckert, Jens (2019). "The exhausted futures of neoliberalism. From promissory legitimacy to social anomy", *Journal of Cultural Economy*. DOI: 10.1080/17530350.2019.1574867.

Beckert, Jens (2016). *Imagined Futures - Fictional Expectations and Capitalist Dynamics* (Harvard University Press).

Beckert, Jens (2013). "Capitalism as a System of Expectations: Toward a Sociological Microfoundation of Political Economy", *Politics and Society*, Vol. 41, N° 3, pp. 323-350.

Brock, Philip L. (2000). "Financial Safety Nets: Lessons from Chile", *The World Bank Research Observer*, Vol. 15, N° 1, pp. 69–84.

Buck, Tobias (2013): "EU court strikes down Spain's eviction law", *Financial Times*, 14 de marzo de 2014, en: www.ft.com/intl/cms/s/0/16e37aca-8ca5-11e2-8ee0-0144feabdc0.html#axzz3buvOJuPd

Buolamiwini, Joy (2016): "How I'm fighting bias in algorithms", in: https://www.ted.com/talks/joy_buolamwini_how_i_m_fighting_bias_in_algorithms?referrer=playlist-the_inherent_bias_in_our_techn.

Cartwright, Peter (2012). "The Vulnerable Consumer of Financial Services: Law, Policy and Regulation", en: https://www.nottingham.ac.uk/business/businesscentres/gcbfi/documents/researchreports/paper78.pdf.

Casgrain, Antoine (2010). "La apuesta del endeudamiento en la política habitacional chilena", *Revista INVI*, Vol. 25, Issue 68, pp. 155-182.

Castles, Francis G. (1998). "The Really Big Trade-Off: Home Ownership and the Welfare State in the New World and the Old", *Acta Politica*, Vol. 33, Issue 1, pp. 5–19.

Castles, Francis G.; Leibfried, Stephan; Lewis, Jane; Obinger, Herbert & Pierson, Christopher (2010). "Introduction", en mismos autores (eds.), *Oxford Handbook of the Welfare State* (Oxford University Press), pp. 1–15.

Clegg, Liam (2017). *The World Bank and the Globalization of Housing Finance: Mortgaging Development* (Edward Elgar Publishing).

Comparato, Guido (2018). *The Financialisation of the Citizen - Social and Financial Inclusion through European Private Law* (Hart Publishing Ltd).

Comparato, Guido (2015). "The rationales of financial inclusion in the changing European private law", *European Review of Contract Law*, Vol. 11, Issue 1, pp. 22–45.

Comparato, Guido & Domurath, Irina (2015). "Financialisation and its implications for private autonomy in consumer credit law", *Osservatorio del Diritto Civile e Commerciale*, N°1/2015, pp. 269-288.

Conley, Dalton & Gifford, Brian (2006). "Home Ownership, Social Insurance, and the Welfare State", *Sociological Forum*, Vol. 21, N° 1, p. 55-82.

Costa e Silva, Paula & Henriquez, Duarte (2016). "Arbitration in swaps: The Portuguese experience", *Arbitration International*, pp. 1-25.

Crouch, Colin (2009). "Privatised Keynesianism: An unacknowledged policy regime", *British Journal of Politics and International Relations*, Vol. 11, Issue 3, pp.382–399.

Della Negra, Federico (2015). "The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: Sánchez Morcilla and Kusionová", *Common Market Law Review*, Vol. 52, Issue 4, pp. 1009–1032.

Desmond, Matthew (2017). *Evicted - Poverty and profit in the American City* (Penguin Random House LLC).

Domurath, Irina (2017). *Consumer Vulnerability and Welfare in Mortgage Contracts* (Hart Publishing).

Domurath, Irina (2013). "The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law", *Journal of European Consumer and Market Law*, Vol. 2, Issue 3, pp. 124–137.

Domurath, Irina; Comparato, Guido & Micklitz, Hans W. (eds.) (2014). *The Over-indebtedness of European consumers: A View from six countries* (European University Institute).

ECCG Plenary (2013). European Consumer Consultative Group Opinion on consumers and vulnerability.

Edgar, Bill; Doherty, Joe & Meert, Hendrik (2002). *Access to Housing : Homelessness and Vulnerability in Europe* (Bristol Policy Press).

Etzioni, Amitai (2011). "Behavioural Economics: Next Steps", *Journal of Consumer Policy*, Vol. 34, Issue 3, pp. 277–287.

European Central Bank (2017). Guidance to banks on non- performing loans.

European Commission (2007). White Paper on the Integration of EU mortgage Credit Markets, COM (2007) 807 final, Brussels, 18.12.2007.

European Commission (2005). Green Paper Mortgage Credit in the EU, COM (2005) 327 final, Brussels, 19.7.2005.

European Commission (1993). Action plan 1993-1995 'Placing the Single Market at the Service of European consumers', COM (93) 378 final, Brussels, 23.07.1993.

Faure, Michael G. & Luth, Hanneke A. (2011). "Behavioural Economics in Unfair Contract Terms", *Journal of Consumer Policy*, Vol. 34, Issue 3, pp. 337-358.

Ferretti, Federico (2010). "A European perspective on consumer loans and the role of credit registries: The need to reconcile data protection, risk management, efficiency, over-indebtedness, and a better prudential supervision of the financial system", *Journal of Consumer Policy*, Vol. 33, Issue 1, pp. 1–27.

Fligstein, Neil & Habinek, Jacob (2014). "Sucker punched by the invisible hand: the world financial markets and the globalization of the US mortgage crisis", *Socio-Economic Review*, Vol. 12, Issue 4, pp. 637-665.

Frerichs, Sabine (2011). "False Promises? A Sociological Critique of the Behavioural Turn in Law and Economics", *Journal of Consumer Policy*, Vol. 34, Issue 3, pp. 289-314.

Friedman, Milton (2002). *Capitalism and Freedom*, (University of Chicago Press, 40th Anniv. ed.).

Fulcher, James (2004). *Capitalism – A very short introduction*, (Oxford University Press).

Gil McCawley, Diego (forthcoming). *Law and Inclusive Urban Development: Lessons from Chile's Enabling Markets Housing Policy Regime*.

González López, Felipe (2018). "Crédito, deuda y gubernamentalidad financiera en Chile", *Revista Mexicana de Sociología*, Vol. 80, N° 4, pp. 881–908.

Gotham, Kevin Fox (2012). "Creating Liquidity Out of Spatial Fixity - The Secondary Circuit of Capital and the Restructuring of the US Housing Finance System", in Aalbers, Manuel (ed.) *Subprime Cities – The Political Economy of Mortgage Markets* (Wiley-Blackwell), pp. 25-52.

HARLOE, Michael (1995). *The Golden Age : Social Housing in an Era of Reconstruction and Growth* (Blackwell Publishing Ltd).

HÄYHÄ, Juha (1994). "Scandinavian Techniques for Controlling Fairness in Contracts", en BROWNSWORD, Roger; HOWELLS, Geraint G. & WILHELMSSON, Thomas (eds.), *Welfarism in Contract Law* (Ashgate), pp. 127–157.

HELLWIG, Martin F. (2009). "Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis", *De Economist*, Vol. 157, Issue 2, pp. 129–207.

HONDIUS, Ewoud (2004). "The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis", *Journal of Consumer Policy*, Vol. 27, Issue 3, pp. 245-251.

HORNBECK, John F. (2009). "Financial Regulation and Oversight: Latin American Financial Crises and Reform Lessons from Chile" (Congressional Research Service).

HUFFSCHMID, Jörg (2009). "Finance as Driver of Privatisation", en FRANGAKIS, Marica *et al.* (eds.) *Privatisation against the European Social Model - A Critique of European Policies and Proposals for Alternatives* (Palgrave Macmillan), pp. 49-60.

IGLESIAS SÁNCHEZ, Sara (2014). "Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: Aziz c. Catalunyacaixa", *Common Market Law Review*, Vol. 51, N° 3, pp. 955–974.

INCARDONA, Rossella & PONCIBÓ, Cristina (2007). "The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution", *Journal of Consumer Policy*, Vol. 30, pp. 21-38.

INSTITUTO NACIONAL DE ESTADÍSTICAS (INE) (2014): "Foreclosure Statistics. Fourth quarter of 2014 and Year 2014. Provisional data", *Press Release*, en: www.ine.es/en/daco/daco42/eh/eh0414_en.pdf.

JAPPELLI, Tullio & PAGANO, Marco (2002). "Information sharing, lending and defaults: Cross-country evidence", *Journal of Banking and Finance*, Vol. 26, Issue 10, pp. 2017–2045.

JOLLS, Christine; SUNSTEIN, Cass R. & THALER, Richard (1998). "A Behavioral Approach to Law and Economics", *Stanford Law Review*, Vol. 50, Issue 5, pp. 1471–1549.

KEMENY, Jim (2004). "Home ownership against the welfare state: The thesis and the evidence", *ENHR Conference, Cambridge University 2-6 July 2004*, pp. 1–10.

KESSLER, Friedrich (1943). "Contracts of Adhesion-Some Thoughts about Freedom of Contract", *Columbia Law Review*, Vol. 43, N° 5, pp. 629-642.

KOOPS, Bert-Jaap (2011). "The (in)flexibility of Techno-Regulation and the Case of Purpose-binding", *Legisprudence*, Vol. 5, N° 2, pp. 171-194.

KORCZAK, Dieter (2009). "Der öffentliche Umgang mit privaten Schulden", *Aus Politik und Zeitgeschichte*, Vol. 26, pp .26-32.

Krippner, Greta R. (2005). "The financialization of the American economy", *Socio-Economic Review*, Vol. 3, Issue 2, pp. 173–208.

Lazzarrato, Maurizio (2015). *Governing by Debt* (MIT Press).

Leese, Matthias (2014). "The new profiling: Algorithms, black boxes, and the failure of anti-discriminatory safeguards in the European Union", *Security Dialogue*, Vol. 45 N° 5, pp. 494-511.

Levine, David K. (2009). "Is Behavioural Economics doomed? The Ordinary versus the Extraordinary", *Max Weber Lecture Series*, MWP-LS 2.

Logemann, Jan (ed.) (2012). *The Development of Consumer Credit in Global Perspective* (Palgrave Macmillan).

Long, Gideon (2016): "Story of cities #33: how Santiago tackled its housing crisis with 'Operation Chalk'", *The Guardian*, 29 April 2016, in: https://www.theguardian.com/cities/2016/apr/29/story-cities-33-santiago-chile-housing-crisis-operacion-sitio-operation-chalk.

Mak, Vanessa (2013). "The 'Average Consumer' of EU Law in Domestic and European Litigation", in Leczykiewicz D. & Weatherill, S. (eds.), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing), pp. 333–356.

Mattei, Ugo (2014). *'Senza proprietá non c'è libertá" (Falso!)* (Idòla Laterza).

Mian, Atif & Sufi, Amir (2014). *House of Debt - How They (and You) Caused the Great Recession, and How We Can Prevent It from Happening Again* (University of Chicago Press).

Micco, Alejandro; Parrado, Eric; Piedrabuena, Bernardita & Rebucci, Alessandro (2012). "Housing Finance in Chile: Instruments, Actors, and Policies", *IDB Working Paper Series*, Nº IDB-WP-312.

Micklitz, Hans W. (2013). "Comment to Case C415/11, Mohamed Aziz V Caixa D'Estalvis de Catalunya, Tarragona I Manresa (Catalunyacaixa), NYR", in Terryn, E.; Straetmans, G. & Colaert, V. (eds.), *Landmark Cases of EU Consumer Law - In Honour of Jules Stuyck* (Intersentia), pp. 633–652.

Micklitz, Hans W. (2010). "The Paradox of Access in Financial Services for Consumers", *European Journal of Consumer Law*, Vol. 1, pp. 7–26.

Micklitz, Hans W. & Reich, Norbert (2014). "The Court and the Sleeping Beauty: the revival of the Unfair Contract Terms Directive (UCTD)", *Common Market Law Review*, Vol. 51, Issue 3, pp. 771–808.

Momberg Uribe, Rodrigo (2011). *The effect of a change of circumstances on the binding force of contracts* (Intersentia).

Olson, Mark W. (2003): "Increased Availability of Financial Products and the Need for Improved Financial Literacy", in: http://www.federalreserve.gov/boarddocs/speeches/2003/20030922/default.htm.

Paredes, Troy A. (2003). "Blinded by the Light: Information Overload and its Consequences for Securities Regulation", *Washington University Law Quaterly*, Vol. 81, Issue 2, pp. 417-485.

PARKER, David (1998). "Privatisation in the European Union: an Overview", en del mismo (ed.), *Privatisation in the European Union - Theory and Policy Perspectives* (Routledge), pp. 10–48.

PIERSON, Paul (1996). "The New Politics of the Welfare State", *World Politics*, Vol. 48, Issue 2, pp. 143–179.

PRIETO LARRAÍN, María Cristina (2011). *Branding the Chilean Nation Socio-Cultural Change, National Identity and International Image* (Diss. Department of Latin American Studies, Leiden Institute for History, Faculty of Humanities, Leiden University).

RAMSAY, Iain (2017). *Personal Insolvency in the 21st Century* (Hart Publishing Ltd).

RAMSAY, Iain (1995). "Consumer Credit Law, Distributive Justice and the Welfare State", *Oxford Journal of Legal Studies*, Vol. 15, N°2, pp. 177–197.

RICHARDS, Ben (1995). "Poverty and Housing in Chile: the Development of a Neo-liberal Welfare State", *Habitat International,* Vol. 19, N°4, pp. 515-527.

RONA-TAS, Akos (2015). "The Role of Credit Bureaus in Globalised Economies: Why They Matter Less Than We Think and How They Can Matter More", in MICKLITZ, Hans W. & DOMURATH, Irina (eds.), *Consumer Debt and Social Exclusion in Europe* (Ashgate Publishing Ltd), pp. 177-188.

RONA-TAS, Akos & HISS, Stefanie (2008). "Consumer and Corporate Credit Ratings and the Subprime Crisis in the U.S. with Some Lessons for Germany", *Wiesbaden: SCHUFA*.

ROSE, Nikolas (1999). *Powers of Freedom - Reframing Political Thought* (Cambridge University Press).

ROTT, P. (2014). "Verbraucherschutz durch Prüfung der Kreditwürdigkeit Bedeutung des EuGH-Urteils vom 27.3.2014- Rs. C-561/12 LCL Le Crédit Lyonnais für das deutsche Recht", *Europäische Zeitschrift für Wirtschafts- und Steuerrecht*, Vol. 4, pp. 211-215.

ROTT, P. (2012). "Verbraucherschutz im Bereich Finanzdienstleistungen", in TONNER, Klaus y TAMM, Marina (eds.), *Verbraucherrecht - Rechtliches Umfeld, Vertragstypen, Rechtsdurchsetzung* (Nomos Verlagsgesellschaft), pp. 661-811.

ROTT, P.; TERRYN, E. & TWIGG-FLESNER, C. (2011). "Kreditwürdigkeitsprüfung: Verbraucherschutzverhinderung durch Zuweisung zum Öffentlichen Recht?", *Verbraucher und Recht*, Vol. 26, Issue 5, pp. 163–167.

RUBIM BORGES FORTES, Pedro (2016). "The Future of Contract Law in Latin America", *European Review of Private Law*, Vol. 24, Issue 2, pp. 287–296.

SCATIGNA, Michela & TOVAR, Camilo E. (2007). "Securitization in Latin America", *BIS Quarterly Review*, September 2007, pp. 71-82.

SCHWARTZ, Herman (2012). "Housing, the Welfare State, and the Global Financial Crisis", *Politics and Society*, Vol. 40 N° 1, pp. 35-38.

LATIN AMERICAN LEGAL STUDIES Volume 5 (2019)

Sharot, Tali (2011). "The optimism bias", *Current Biology*, Vol. 21, Issue 23, pp. 941–945.

Simian, José Miguel (2010). *Logros y desafíos de la política habitacional en Chile* (Centro de Estudios Públicos).

Silva, Eduardo (1991). "The Political Economy of Chile's Regime Transition: From Radical to 'Pragmatic' Neo-liberal policies", in Drake, P.W. & Jaksic, I. (eds.), *The Struggle for Democracy in Chile 1982-1990* (University of Nebraska Press), pp .98-121.

Spindler, Gerald (2011). "Behavioural Finance and Investor Protection Regulations", *Journal of Consumer Policy*, Vol. 34, Issue 3, pp. 315–336.

Stark, Jürgen (2009): "Monetary Policy before, during and after the financial crisis", en: https://www.ecb.europa.eu/press/key/date/2009/html/sp091109.en.html

Trumbull, Gunnar (2012a). "Banking on Consumer Credit: Explaining Patterns of Household Borrowing in the United States and France", in Logemann, Jan (ed.), *The Development of Consumer Credit in Global Perspective* (Palgrave Macmillan), pp. 157-182.

Trumbull, Gunnar (2012b). "Credit Access and Social Welfare: The Rise of Consumer Lending in the United States and France", *Politics & Society*, Vol. 40, Issue 1, pp. 9–34.

Valdés, Juan Gabriel (2008). *Pinochet's Economists: The Chicago School of Economics in Chile* (Cambridge University Press).

Vandone, Daniela (2009). *Consumer Credit in Europe - Risks and opportunities of a Dynamic Industry* (Springer Verlag).

Whitford, William C. (1973). "The Functions of Disclosure Regulation in Consumer Transactions", *Wisconsin Law Review*, Vol. 2, pp. 400–470.

Wilhelmsson, Thomas (2004). "Varieties of Welfarism in European Contract Law", *European Law Journal*, Vol. 10, Issue 6, pp. 712-733.

Wilhelmsson, Thomas (1993). "Control of unfair contract terms and social values: EC and Nordic approaches", *Journal of Consumer Policy*, Vol. 16, Issue 3-4, pp. 435–453.

Wilhelmsson, Thomas (1990). "Social Force Majeure - A New Concept in Nordic Consumer Law", *Journal of Consumer Policy*, Vol. 13, Issue 1, pp. 1–14.

CASES CITED

Chile:

Guillermo Larraín Vial con Servicio de Vivienda y Urbanización de la Región Metropolitana (2006). Court of Appeal of Santiago, 14 December 2006.

European Union:

Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt (2014). CJEU, Judgment of 30 April 2014, C-26/13, ECLI:EU:C:2014:282 (Kásler).

Cofidis SA v Jean-Luois Fredout (2002). CJEU, Judgment of 21 November 2002, C-473/00, ECLI:EU:C:2002:705.

Federal Republic of Germany v European Parliament and Council of the European Union (2000). CJEU, Judgment of 5 October 2000, C-376/98, ECLI:EU:C:2000:54.

Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA (2014). CJEU, Judgment of 17 July 2014, C-169/14, ECLI:EU:C:2014:2099 (*Sánchez Morcillo*).

LCL Le Crédit Lyonnais SA v Fesih Kalhan (2014). CJEU, Judgment of 27 March 2014, C-565/12, ECLI:EU:C:2014:190.

Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) (2013). CJEU, Judgment of 14 March 2013, C-415/11, ECLI:EU:C:2013:164.

Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközesi Zrt (Invitel) (2012). CJEU, Judgment of 26 April 2012, C-472/10, ECLI:EU:C:2012:242.

Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98) (2000). CJEU, Judgment of 27 June 2000, Joined Cases C-240/98 to 244/98.

Pannon GSM Zrt v Erz'ebet Sustikn'e Gy'orfi (2009). CJEU, Judgment of 3 June 2009, C-243/08, ECLI:EU:C:2009:350.

Rewe Zentral v Bundesmonopolverwaltung für Branntwein (1979). CJEU, Judgment of 20 February 1979, C-120/78, ECLI:EU:C:1983:202 (*Cassis de Dijon*).

VB Pezügji Lizing Zrt v Ferenc Schneider (2010). CJEU, Judgment of 9 November 2010, C-137/08, ECLI:EU:C:2010:659.

Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH (1995). CJEU, Judgment of 6 July 1995, C-470/93, ECLI:EU:C:1995:224.

LEGISLATION CITED

European Union:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29.

Council Regulation 24/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63.

Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66.

Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ L 60/34.

Treaty on the Functioning of the European Union of 1 December 2009, OJ L 83/47, 30.03.2010.

Spain:

Decreto-ley 7/2013 of 28 June 2013, de medidas urgentes de naturaleza tributaria, presupuestarias y de fomento de la investigación, el desarrollo y la innovación. BOE No 155, of 29 June 2013, p. 48767, the 'LEC.'

Ley 1/2013 of 14 May 2013, ley de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social. BOE No 116, of 15 May 2013, p. 36373, 'Ley 1/2013.'

Ley de Enjuiciamiento Civil of 7 January 2000. BOE No 7, of 8 January 2000, p. 575.