Essays

Responsible Credit in European Law

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Abstract

Responsible Credit has been the lesson G20 drew from the world financial crisis in 2008. The crisis had indeed started with subprime credit in the USA. Its toxic contents contaminated all other financial products which are all based on a credit relation. This principle has conquered not only bank supervision but also contract law and seems to be able to prevent exploitation of States by private enterprises. But a closer look reveals that its meaning has changed. In its EU-codification at least it is no longer the usurious gambling financial product which the suppliers are blamed for. It is now the consumer who is blamed for his or her irresponsible borrowing. The ignorance and good faith of the victims of irresponsible banking are the target of responsible credit regulation. Banks are turned into guardians of decent consumer behaviour. They should watch out that credit-unworthy clients do not ask for a loan. This will achieve the opposite and help further deregulate banking law. The Consumer Credit and Mortgage Directives of 2008 and 2014, which replaced the promising 2002 draft, can be taken as an example. This essay provides an alternative historic path. Responsible Credit is part of the 2000 years of usury and gambling regulation. It is and has always been intended to prevent overindebtedness without excluding its victims from further credit.

I. Irresponsible Credit

'Towards an interdiction of usury and gambling' is the subtitle of my analysis of the 2008 financial crisis.[1] These ancient legal principles summarise and explain the remedies we need for the development of sustainable finance in the future. They are still in force for private activities but should be extended to the whole financial system. The legal principle of usury remedies the basic tendency of all markets to cream the rich at the detriment of the poor and weak. Without usury ceilings, markets would reflect the law of the jungle, which is admissible where it stands for economic success, but becomes inacceptable where human development is at stake.

Usury law makes contracts not only unenforceable but also void and criminal. Unlike the regulation on betting, the finance industry has not been exempted from usury law. Anatocism, which creates an autonomously growing capital with no productive investments, is one side of usury, while the other side is extortionate

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[1] U. Reifner, *Die Finanzkrise. Für ein Wucher- und Glücksspielverbot* (Wiesbaden: Springer VS, 2017).

credit: instead of providing participation in the surplus created by the borrowers' investment, it exploits their weakness and diminishes their well-being.

The law should have set limits to it but the crisis revealed the ways how to circumvent the law. Instalment credit paid back with the help of an overdraft facility charges interest on interest. It is not seen as anatocism since from a legal perspective both are independent contracts. Another type of circumvention occurs after credit cancellation. Disguised as an indemnity the bank is allowed to transform interest into interest-bearing capital. Products are offered where the borrowed capital is artificially reduced by deducting future interest in a lump sum.

Other circumventions define interest as fee, rent or price for linked services. When usury laws do not cover these developments, they lose their teeth. Kick-back provisions in Payment Protection Insurance (PPI) are up to six times more expensive than ordinary life insurance. In the case of death of people with no liquid assets, PPI secures the bank, and not the debtor's family. Risk-based pricing lures customers into credit with low interest advertisements. In the end the poorest pay up to five times more than what rich people are asked to pay. Variable interest rates increase but fail to follow falling market rates. Lack of money is a risk for which the poor must bear the cost.

The explosion of usurious credit is commonly attributed to the incapability of consumers to buy suitable and cheap financial services for themselves. Empirical data does not support that. Overindebtedness is no logical consequence of poverty. It is its exploitation. Default is the result of unforeseen changes in the social and economic conditions of credit households. They are chained to an inflexible credit system, whose mechanism of regular instalments is not designed to adapt payments to changes in income and expenditure. While this fate is mentioned in the recitals of the Directive 14/17/EU (Mortgage Credit Directive, MCD),[2] its binding articles follow instead the ideology of 'borrower beware!'.

The following credit example stems from Citibank Germany, which recently has been overtaken by Credit Mutuel and renamed Targobank. Regularly, at prime time, they advertise their suitable, adapted and cheap instalment credit.

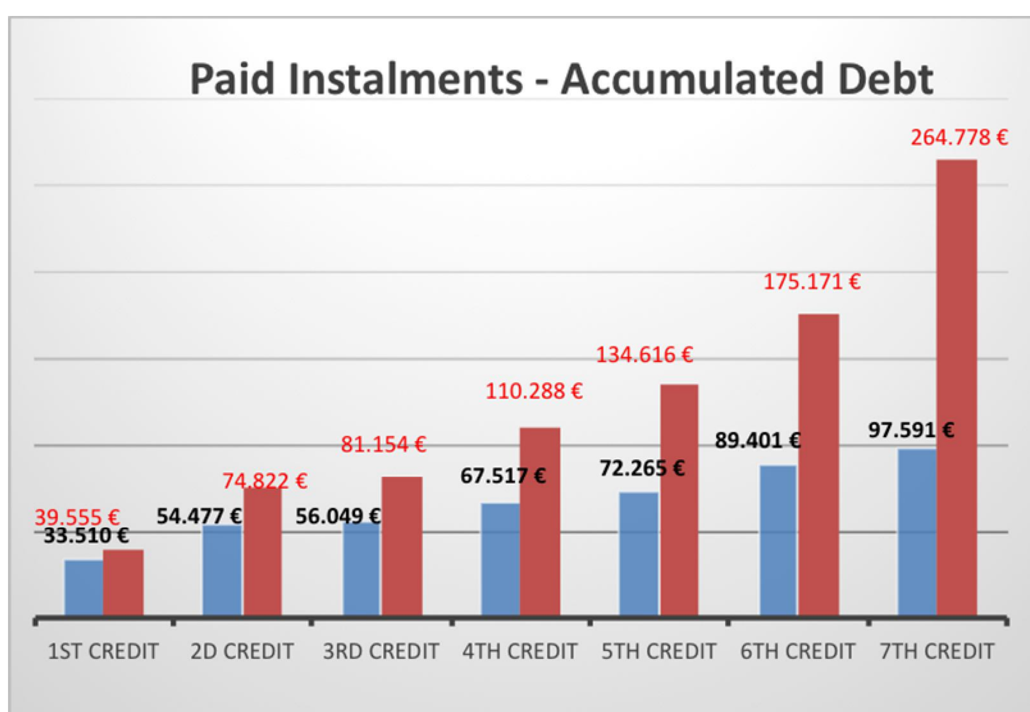
In a case, provided by an attorney, a single woman started her debt career with a credit contract in 2003 worth forty thousand euros. Whenever her situation changed her credit contract was refinanced, provided with a new and usuriously financed insurance agreement with extremely high kick-back provisions with more than fifty per cent of the premium serving as a commission for the bank. After her seventh contract, her debt had accrued to two-hundred and sixty thousand euros. The judge who decided on the foundations of the bank's claim refrained from examining the issue of usury. It would have made extensive recalculations necessary. For our one hundred pages of expertise on the subject the judge gave it – as her Honour put it – only a glance.

[2] European Parliament and Council Directive 14/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property (2014) OJ L60/34.

The judge preferred to dismiss the bank's claim on the grounds that the statute of limitation thereof had elapsed, rather than on the merit. Targobank did not appeal the case, perhaps afraid that their system would finally be judged at its roots by a higher court. This rendered our expertise as well as the campaign of the anti-usury coalition led by consumer centrals, trade unions, debt advice and welfare organisations, ineffective. As a recurring player in court, the bank could sacrifice this case to retain its unjustified advantage in all others.

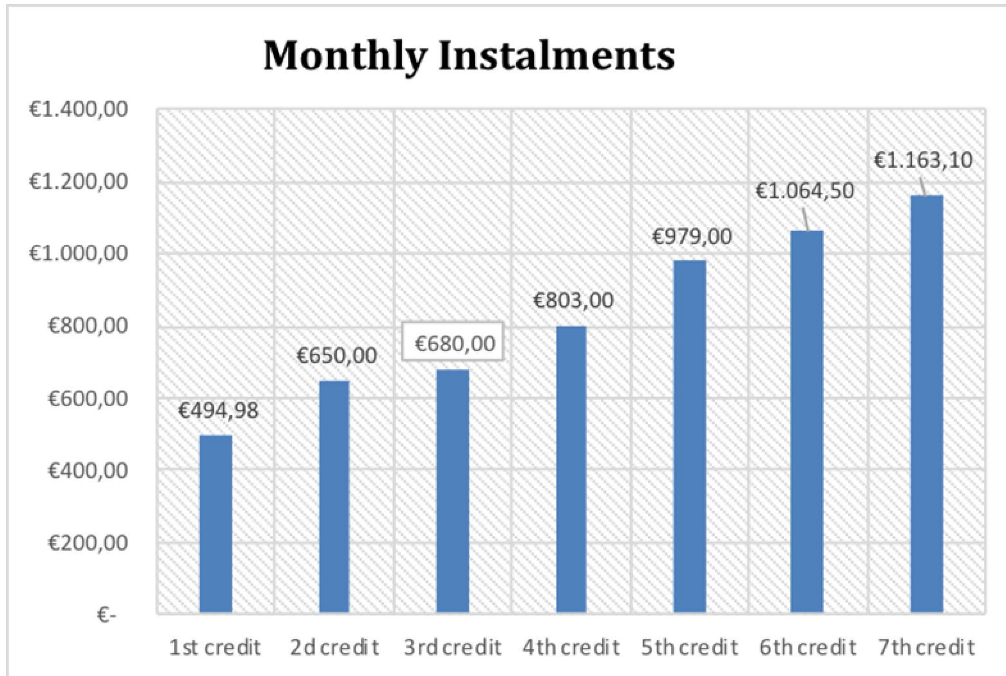
The following chart shows the growing disproportion between payments and accumulated debt.

Graph 1



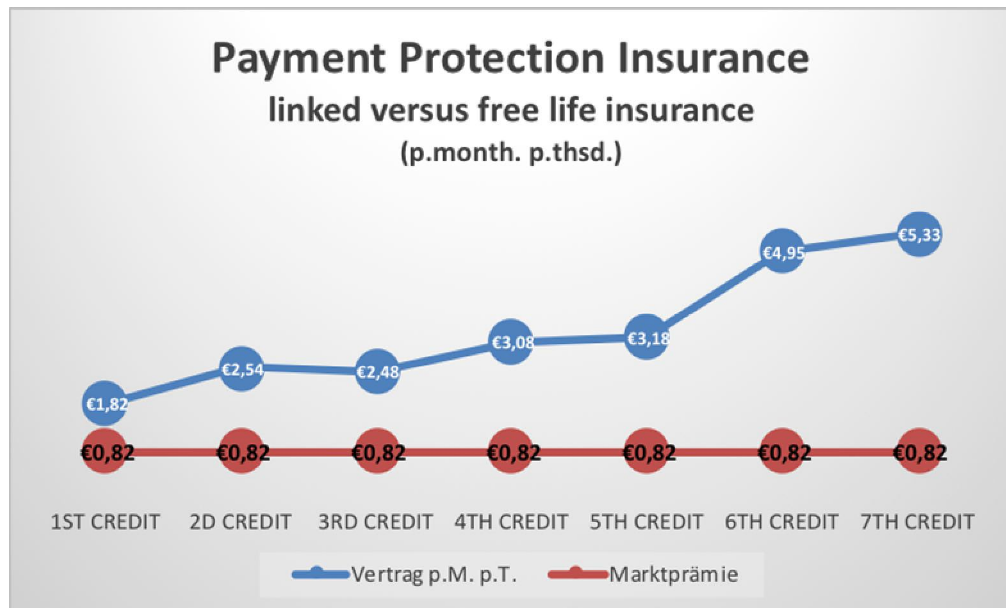
The next graph indicates that the increasing amount of each single instalment exhausted the liquidity of the borrower.

Graph 2



The core problem of the contract is shown in *Graph 3*. At each refinancing, the bank cancelled the ongoing insurance contract and concluded a new one, with ever growing usurious premiums for basically the same risk.

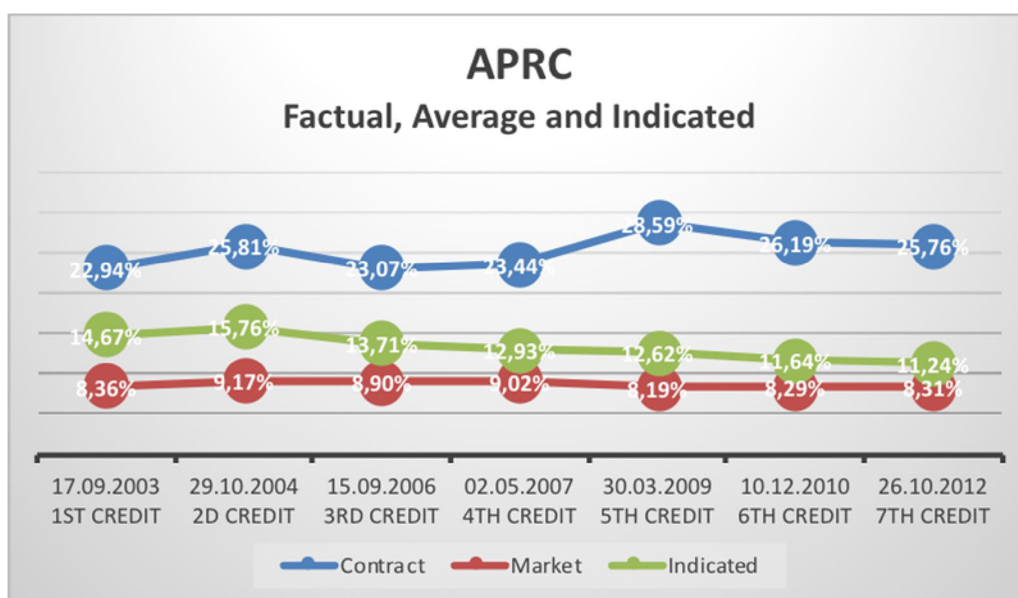
Graph 3



Such a mechanism helped the bank to keep the true Annual Percentage Rate of Charge (APRC) of the credit contract stable at ten per cent above the market rate for consumer credit. But it remained invisible to the consumer. While the Commission's 2002 draft of the Consumer Credit Directive[3] made inclusion of insurance costs obligatory, the 2004 draft assumed the opposite.[4]

The solution envisaged in the Consumer Credit Directive 08/48/EC[5] (CCD) is that usurious insurance may not be comprised within the 'total cost of the credit' if voluntarily concluded. National courts and administrative authorities of the Members States in charge of usury ceilings have adopted this view although the Directive expressively excludes usury ceiling from its scope. The practical result can be seen below: twenty-five point sixteen per cent appears as eleven point twenty-four percent per annum.

Graph 4



[3] European Commission proposal COM(2002)443 final of 11 September 2002 for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers (2002) OJ C331E/200.

[4] European Parliament position of 20 April 2004 with a view to the adoption of Directive 04/.../EC of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers (2004) OJ C104E/233.

[5] European Parliament and Council Directive 08/48/EC of 23 April 2008 on credit agreements for consumers and (2008) OJ L133/66.

II. Responsible Borrowing

1. Irresponsible Borrowing in Disguise

None of the phenomena illustrated above in para I have been considered yet in EU regulation. With its total harmonisation approach, the 2008 CCD has in fact deregulated the usury prohibitions in national law. National legislators and courts used the EU disclosure law as a blue print for their usury assessments. Lack of expertise and lobbyism made them apply the APRC as usury ceiling. To compensate for this failure the EU invented a principle derived from bank supervisory law: responsible lending. It pretends to take up the thread of usury legislation, transforming it into a modern tool against overindebtedness and exploitation.

Commission, Parliament and Council correctly assessed that irresponsible credit extension and circulation of empty claims had ruined the financial system and needed taxpayers' intervention in order to recover. Recital 26 of the 2008 CCD required legal barriers for irresponsible lending which would compensate for the then still favoured abolition of historical usury laws in financial services:

> 'It is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so'.

The European institutions seemed to be ready to ban irresponsible bank behaviour that exploits the poor, using tricky constructions of combined credit with insurance and multiplying their gains through intentional and repeated refinancing mechanisms. Instead, the Directives did not target the supplier side but only consumer behaviour. The recital continues by summarising bankers' responsibility as an assessment of consumers' responsibility:

> 'Creditors should bear the responsibility of checking individually the creditworthiness of the consumer'.

We find this reiterated in Art 8 CCD as well as in Arts 18-21 of the MCD. It supposes that the responsibility for poor credit performance lies with a borrower who wants to take up credit without being able to repay it properly. Leaving aside the liberal achievements of capitalism using the paternalistic feudal tradition, credit extension is identified as a generous donation to unworthy borrowers. Usurious creditors instead are promoted to guardians of responsible borrowing. This amounts to victim bashing, well-known in labour and housing policies where unemployed are blamed for their laziness and homeless for their incapability to find an adequate offer.

2. The Unworthy Consumer

Art 8 CCD provides an 'obligation to assess the creditworthiness of the consumer'. Art 9 requires a secure database accessible to all lenders also in other Members States. Art 1 MCD creates an

> 'obligation to carry out a creditworthiness assessment before granting a credit, as a basis for the development of effective underwriting standards'.

It has been promoted into a general goal of the whole regulation. Arts 18-21 regulate to what extent and in which way this request must be fulfilled.

The nature of this principle is unclear. Should it protect the safety of banks or consumers from becoming overindebted? If its aim is to save banks from unsafe behaviour, its weak sanction – the prospect of a reduced interest rate in the single credit contract – then turns into a similarly weak incentive to act more responsibly. Risky behaviour usually promises high profits which will compensate for losses and sanctions, while prevention through cautious and responsible lending totally misses these opportunities.

A regulation for bank safety already exists where it belongs. The European Banking Authority (EBA) issued guidelines for the assessment of creditworthiness in accordance with Art 16 of Regulation (EU) no 1093/2010. They are mandatory for all banks. These standards are assumed to play an important role in the interpretation of civil law. But the goals of bank safety and consumer protection can contradict each other. For example, a usurious product sold to a solvent consumer may be regarded as responsible in terms of bank safety but irresponsible in the sense of good faith in contracts. Irresponsible lending may be the fruit of irresponsible bank behaviour itself or just a way whereby a banker reacts to irresponsible consumer behaviour.

This ambiguity is also seen in Art 8 CCD, entitled *obligation to assess*. Assessment is retrospective. Its enforcement depends on consumers taking legal action. Implicitly it forces them to blame themselves for irresponsible borrowing since it was them who applied for the credit. Arts 8 and 18 of the 2014 Mortgage Credit Directive are more cautious than the CCD: A Member State 'shall ensure' responsible lending. In any case, credit without a prior check of creditworthiness seems to be forbidden. This would mean that the contract will be unenforceable. § 505a (1) sentence 2 of the German Civil Code in fact *forbids* the conclusion of such contracts without assessment. This wording is repeated in § 18a of the *Kreditwesengesetz* (KWG, German Banking Act). But this is not what the Directives (and national laws implementing them) provide. Such contracts are not void: the interest rate will only be lowered to market standards. On the extreme, consider that § 18a KWG provides even no sanctions at all.

There is also uncertainty as to what extent the creditworthiness has to be evaluated. Art 8 CCD wants the lender to 'assess the consumer's creditworthiness'. Art 18 (1) MCD provides that 'the creditor makes a *thorough* assessment of the

consumer's creditworthiness'. Art 18 (5)(a) MCD wants the lender to assess whether the obligations 'are likely to be met in the manner required under that agreement'. The German legislation differentiates between the 'feasibility' (*Wahrscheinlichkeit*) of repayments in mortgage loans and the CCD standard whereby the lender should have 'no significant doubts' with regard to this ability (*keine erheblichen Zweifel*). Neither notion fits into civil law. They transform the impartial judge into a bank supervisor who has to examine and even replace the banker's decision with his own estimations.

Recital 55 MCD discloses the philosophy behind all this, which relates lending as a form of tutelage:

> 'It is essential that the consumer's ability and propensity to repay the credit is assessed and verified before a credit agreement is concluded'.

'Propensity', which the German version of the Directive translates as *Neigung*, considers the inability to repay as a specific feature of a consumer's personality. Certain groups of consumers, known from the insolvency statistics, are suspected to be lazy debtors. This qualification refers to more to guilt and sin than to rational economic behaviour. But only the latter is covered by the regulatory power of the EU.

The difference between 'no significant doubts' and 'feasibility' relates to the political process after the subprime crisis and its impact on mortgage loans. The subprime crisis changed the historic view that mortgage loans could be left to self-regulation while instalment credit should be embedded into stricter rules. The 2004 draft unlike its 2002 predecessor left mortgage loans unregulated, offering only a recommendation for self-regulation which our study for the Commission revealed as insufficient and ineffective.

The assumed difference between mortgage loans and consumer credit underlying the Directives is artificial. US mortgage loans, which had been held responsible for the 2008 crisis, had to a large degree been used before to refinance the cost of credit card debt. The second mortgage market is in fact a consumer credit market in disguise. On the other hand, consumer credit is significantly used to fill the gap where the equity from a mortgage is not sufficient to cover the total price of the home. In addition, homes and flats are developing into simple consumption goods where the necessity for continuous investments reflects their consumability, which has an impact on their price just as the depreciation of other durable goods. The situation in Germany and Switzerland with low homeownership rates differs from that in other states with a higher rate of mortgage loans than instalment credit.

3. Scale for Assessment

Creditworthiness is a dazzling term carrying hierarchical pre-democratic values. Linguistically the lender slips into the role of the Lord, who provides the

debtor (vassal) benefits for which he must prove to be 'worthy'. The language in the 2014 MCD is more rational. It does not use the word 'worthiness'. Art 4 (17) MCD requires 'the assessment of the prospect that the obligations under the loan agreement will be fulfilled'. This is correct. A reference to personal characteristics would have been erroneous.

Neither dignity nor fidelity, but only solvency and liquidity are rational requirements in a capitalist economy. The term *loan* (lien) still contains feudal traces. A lender should anyhow not be confounded with the historic landlord, who entrusts his land to others in the fief. The only question is how much money will be available in the future when predefined obligations are due.

a) Crash Value

Historically a person was overindebted when his balance sheet showed more debt than assets. If this definition were adopted for creditworthiness, poor consumers could never borrow responsibly if they were not rich enough to provide a balanced account.

Not only in mortgage loans did this view prevail until today. German legislation allowed credit up to sixty per cent of the equity. The credit for a car should never equal its price. Cars and real estate were seen as the main security. A loan seemed to be safe as long as the amount of money received through liquidation of the financed item ('crash value') promised full repayment of the debt.

In business loans the extension of credit is seen as an investment. It should itself create the values that enable the repayment of debt with interest. This view should also prevail in consumer credit. The crash value, obtained through disadvantageous foreclosures and forced sales artificially kept low, does not mirror the economic value of the investment. Its assessment is done at a time where the productivity of the credit has not yet been proved. This leads also to overstating where the financed items are still difficult to liquidate.

Traces of this insight can be found in Art 18 (3) MCD:

> 'The assessment of creditworthiness shall not rely predominantly on the value of the residential immovable property exceeding the amount of the credit or the assumption that the residential immovable property will increase in value (...)'.

The subprime crisis has shown that linking the market value of a home to the amount of credit extended for its acquisition led to a vicious circle. It was the artificially increased demand created by the extension of more credit based on rising house prices which also increased the volume of credit. Owner-occupied homes are atypical commodities. Offer as well as demand is limited. Kept empty, the prices of such homes are exposed to speculation. The doubling of the prices of homes between 2000 and 2008 in the US at a time when no significant increase in home repair and investment took place showed that the increase in

credit volume was not a function of the value but rather of the creation of empty claims and usury. Only a system where house prices are kept within legally defined limits of interest rates could stop the vicious circle of credit volume and sales prices.

The idea of crash value strongly related to lending on securities has motivated different regulations for mortgage and consumer loans. It is outdated. Buying a home as well as acquiring durables like a car is not different from any other investment into a consumer's future. Both create profit, income and increase of well-being which justify as well as secure credit extension.

b) Cash Flow

The prevailing philosophy on responsible consumer and mortgage credit regulation is moving towards the cash flow approach in the evaluation of business loans. Liquidity replaces liquidation. The relation between labour or labour-related income and expenditures for living, rent, regular fees and taxes is calculated monthly.

All expenditures are gradually transformed into monthly contributions to services. Property is replaced by access. Rent replaces the sales price just as credit did before. With stable income, credit could thus become superfluous. But while expenditures turn into stable contributions, income becomes more and more instable or flexible by time and volume.

The EU regulation on credit did not pay attention to it. Instead it created the average consumer, whose stable income would be the basis of creditworthiness. In this it followed the paternalistic philosophy. Swiss law defined responsible lending by a mathematical procedure. Each consumer credit contract has to be recalculated and its debt transformed into thirty-six equal instalments. The size of these instalments then shall not account for more than thirty per cent of the monthly income. Such limit without the thirty-six instalments rule can also be found in French bank supervisory law and in the practice of a number of lenders in Germany.[6] Since a similar limit is seen in the price for renting a house, the rule is absurd for those who depend on both: credit and rent.

It is a simplification of social differences in income and expenditure. Warren Buffet would be creditworthy even with an instalment representing more than ninety-nine per cent of his monthly income. The remaining one percent would provide him with three million dollars per month. The respective allowance for a low-income household would be seven hundred euros if thirty per cent of his assumed income of one thousand euros per month had to be paid for an instalment.

Modern societies are composed out of rich and poor people, unstable and stable income, high and low needs. They face different situations in their life cycles.

[6] For its functioning see D. Henseler, 'Kreditfähigkeitsprüfung nach Konsumkreditgesetz' *Aktuelle juristische Praxis*, 487-492 (2015).

Their fate is marked by accidents and illnesses, heritage and donations. It has winners and losers.

Switzerland, Luxembourg or the Cayman Islands and its citizens are not average. Women between twenty-five and forty have volatile income and expenditures. Under the age of thirty people start their income career with negative fortune and cash flow. Figures from overindebted households reveal that the number of adults per household is linked to their ability to repay. Single mothers are therefore up to six times more exposed to overindebtedness than couples without children. The social composition of society decides on how risks influence their well-being.

c) Productive Investment

EU legislation restricts the consumer role to the demand side in a profit-driven market economy. It ignores that demand can only serve needs if it is based on liquid assets. Those without money do not count. This provides credit with high importance. It can bridge the gap and provide liquidity based on the income that may derive from the use of credit. Law has not yet reacted to this. Consumer protection is primarily restricted to the idea of sale and property but not to that of rent and use. In sales law the 'caveat emptor' principle has gradually developed from a duty of the seller to deliver a good or service into a duty to provide the use for the needs that motivated the purchase. Warranties for defective and unsuitable goods last for at least two years. In credit law there still is a principle of 'caveat debitor'. The borrower must care for the usefulness of the credit, in terms of investment, for its productivity. He is the one to blame in case of overindebtedness, arguably due to him having ignored the imperatives of *responsible borrowing*. The purpose of the credit and sources for its repayment and interest are allocated outside the contractual synallagma.

Such an approach discriminates especially against the most vulnerable consumers. They take out the credit to compensate for unsteady expenses and income. The loan contract assumes an average 'normal' consumer whose living conditions resemble steady income and expenditures, while durables are financed through savings. It is the fault of the vulnerable consumer if he or she can not cope with such conditions: if they become abnormal, then the consumer has to compensate the lender for his sufferings from unsteady income and lack of savings.

The principle of responsible credit is at least a legal quest to change this ideology. It targets the supplier's behaviour. Lenders' responsibility is more than just providing safe banking. The best protection of savers is to care for the productivity of the credit investment on the borrower's side.

Historically, productiveness has been considered totally alien to consumer credit. In the early 1950s, food industries financed public campaigns against what they called 'pre-eaten bread'. Low income consumers should not use their monthly income for durables but stay with food and services that could be paid

out of the monthly budget. They wanted to keep income available only for short-term expenditures. This was economically unfounded. Statistical evidence proved that consumer credit had an overall productive effect on the economy. The extension of consumer credit to low income families provided flexibility with jobs and income. It also created additional demand for the most advanced forms of consumption. Affordable and productively invested consumer credit added significantly to the welfare of the modern state.

But this insight does not seem to reflect bankers' view. They do not praise the contribution to general welfare when overindebtedness is discussed but focus on the advantages each individual borrower seems to draw from the opportunity of having liquid assets. This has political advantages. The less the common good is evoked, the less their responsibility has to confront a social dimension beyond individual profit seeking. Banks even use the false ideology of unproductive consumer finance in their marketing strategies. Instead of explaining the 2008 US subprime crisis with unproductive investment of usurious credit, against all statistical evidence they blame consumers. They are supposed to have bought too many homes at prices they could not afford. The same ideology is used to allocate a higher risk to vulnerable consumers justifying higher profits in risk-based pricing. High debt-collection costs are also attributed to consumers' (de)*fault*.

Even in 1963 David Caplovitz entitled his famous empirical survey 'The Poor Pay More'. His research showed that consumer credit in lower Manhattan had not been designed to create productive effects for consumers and their families but just to exploit public subsidies, the needs of poor consumers for furniture and their weak bargaining position. This subprime credit intentionally created needs for further credit, which facilitated usurious refinancing deals. Instead of access to goods and services, the additional costs and insolvency rules forced these debtors out of the market and out of well-being. Ill-designed consumer credit became the driving force in social discrimination and impoverishment. Caplovitz' studies were confirmed by similar studies by Janet Ford on 'The Indebted Society' in the UK. In Germany Günther Hörmann followed with '*Die Praxis des Konsumentenkredits*'. Many others reported on similar research in their contributions to the second volume of 'Banking for People'. These efforts were terminated when overindebtedness out of irresponsible credit grew. Sponsors preferred it the opposite way: instead of credit, what had to be studied was the consumer. The focus on the reasons for default shifted from the offer to the demand side, which finally led to the philosophy of the EU Credit Directives.

With respect to the 2008 financial crisis, the name 'subprime crisis' indicated at first that usurious, unproductive, unsuitable and irresponsible credit had destabilized the world financial system with empty claims. This perspective was quickly changed. Instead of subprime, the crisis turned into an investor' crisis, then into a banking crisis (eg Lehman had been deprived of their usual refinancing resources) and finally into a crisis of public debt where states had been unable

to shoulder the deficits of their banking together with their usuriously inflated own debts. 'Consumers in Trouble – A Study of Debtors in Default' was Caplovitz' second study in 1972. It would be a perfect title for an independent study on the 2008 crisis.

The 'faulty debtor' instead characterises the consumer's image in both the 2008 CCD and the 2014 MCD. The CCD adapted European law to the US situation before 2008. It even monopolised this approach with maximum harmonisation. National product regulations were replaced by information rights. The duty to inform about the lack of suitability replaced the quest for suitability. The way was thus paved for the next crisis.

Since then, special systems and institutions only for the poor have been spreading. 'Payday loans', a usurious small credit called 'Crazy George', specialised instalment banks and finance companies, loan sharks disguised as credit brokers, churning of 'credit card credit', redefinition of defaulting debts from overdraft facilities into high priced voluntary agreements for so-called 'overrunning' of its limits, as well as 'subprime mortgages' threaten social cohesion. Fintechs with hidden bank licences like Wirecard, which recently replaced Commerzbank in the German DAX, use loopholes in the Directive 15/2366/EU (Payment Services Directive).[7] Small credit up to one hundred ninety-nine euros extended by non-banks are exempted from consumer protection. Dostoevsky would have unlimited evidence for many more novels on the question of fault in default.

Banks participated in this race to the bottom. Risk-based pricing, obligatory PPI with kick-back provisions of more than fifty per cent combined with costly refinancing mechanisms and savings-into-loan constructions have flooded the market. These products are concentrated where there is no choice. Social discrimination is legitimately incorporated into the principles of civil law. Those who have less pay more and get less. Poverty, as a personally attributable risk, has a price that is eventually paid by those who are supposed to carry it.

Credit is an indispensable tool to render any economic activity productive. Economy is efficient 'cooperation' for reaching what Aristotle called 'good life'.[8] Credit that links past with future work revolutionized cooperation for poor people. Providing access to cars, houses or washing machines makes borrowers part of intertemporal cooperation. Providing stable liquidity through flexible credit like overdraft, variable rate or credit card credit at reasonable prices allows borrowers to join customer networks that require equal monthly contributions to a service economy. Telecommunication, utilities, fitness, housing, even the use of bicycles and cars or the search for a future partner are paid through equal and regular contributions in a shared economy at a time labour markets go into the other

[7] European Parliament and Council Directive 15/2366/EU of 25 November 2015 on payment services in the internal market [2015] OJ L337/35.

[8] See U. Reifner, *Das Geld. 1. Ökonomie des Geldes - Kooperation und Akkumulation* (Wiesbaden: Springer VS, 2017), 91.

direction.

In a credit relationship the important person is not the investor. This notion, as well as the notion of 'creditor', is misleading. The only one who invests is the debtor. He or she transforms money into real value. His or her role as a debtor is secondary *vis-à-vis* this productive function of borrowers in the credit society. Without borrowers the money owners would suffer out of it.

CCD and MCD have not adopted the cooperative approach. With the word 'creditworthiness', they resurrected feudal statuses. In former times, when accumulation of property was preferred to accumulation of money, the extension of credit was only a means to overcome mishaps, death, illness and accidents. A loan (Latin *mutuum*, English *mutual*) had its roots in a moral obligation to donate ('credit'). Providing money to her or him was sharing and caring, not investing. In modern societies, not the person but the investment is the benefit. Data reflecting the debtor's past borrowing behaviour may help substantiate a prognosis but it cannot replace it.

The most advanced models of responsible credit are student loans. Investment into students learning efforts and their future serves the whole of society. This insight drives its regulation. This is why the credit history of a student is not even mentioned in the law.[9] The student loan model has been extended to all who learn in the educational sector. Some states have adopted it for credit to new families and newly arrived immigrants. Housing loans in slum areas of the cities of Los Angeles and Chicago are similarly structured. Also loans for energy efficient repair are defined by their investment goals.

Art 2 (2) (l) CCD[10] exempts them from ordinary consumer credit. They are supposed to lie outside these models, not requiring the same level of protection entrusted to consumers. The truth is quite the opposite. Student loans are the right models for future regulation of productive consumer credit. Superfluous information rules for general consumer credit could be compared with substantive rules that regulate the efficient use of it.

Overindebtedness is not the effect of unworthy borrowers, lazy debtors and incapable customers. It is the effect of individually unpredictable events with high collective feasibility. Lenders could use their data to provide adjusted products and services. But social research for responsible credit products is inexistent. The flood

[9] The German law for educational loans (BAFÖG) starts with the purposes (Arts 2-7) followed by three personal conditions (nationality, suitability of the purpose, age) enumerating the kind of loans and subsidies available to students. Personal conditions as to creditworthiness are not even mentioned.

[10] It excludes 'credit agreements which relate to loans granted to a restricted public under a statutory provision with a general interest purpose, and at lower interest rates than those prevailing on the market or free of interest or on other terms which are more favourable to the consumer than those prevailing on the market and at interest rates not higher than those prevailing on the market.' But as to the other exemptions the neo-liberal view prevails that exempted credit should be such credit which offers lower rates while the purpose is only once addressed in the fluid notion of a 'general interest purpose'.

of studies on *behavioural finance*, *financial capability*, *consumer morals, irrational decision making* and *unconscius use* of credit can be summarized into one single ideology: 'Who is in default is faulty'.

III. Responsible Lending

1. Responsibility in Financial Services

Overindebtedness has grown into a major problem for millions of families. Many are excluded from general welfare in modern society. It has weakened their ability to service existing debt. This has rendered the financial system unstable. The Credit Directives have replaced the two traditional goals: prevention of overindebtedness and promotion of consumer protection by legal harmonization and facilitation of internal markets. Regulation is now governed by two assumptions: (1) only the borrower can guarantee the repayment of the debt; (2) the fate of the debt is finalized at the time of the conclusion of the credit agreement. Lenders have to classify customers into admitted solvent and excluded insolvent borrowers.

Sociological research produces a different picture. Insolvency is strongly related to price, form and servicing of credit as well as to certain suppliers. The supplier side can choose between different forms of a loan, advise how to use sustainable credit with regard to the statistically known threats and especially change the conditions with regard to the social situation of the borrower at a later stage. But a credit contract, just like a labour or tenancy contract, is a long-term 'life-time'[11] relation between two partners who under uncertain circumstances must cooperate to find ways out of unforeseen problems.

When investigating the problems of failed mortgage loans, we found that the core of insolvency cases related to a few specialized suppliers and products. They offered combined savings with credit. Endowment insurance and financed investment in home mortgage agreements loaded consumer credit contracts up front with unsupportable high instalments in order to be able to make higher profit through in refinancing at a higher price.[12] Other studies on the credit relations that led to the subprime crisis in the US revealed that customers had been lured into costly financing in a form of a snowball system where the initial interest was to be paid by future credit.[13] From surveys on insolvent small businesses,[14]

[11] L. Nogler and U. Reifner eds, *Life time contracts. Social long-term contracts in labour, tenancy and consumer credit law* (The Hague: Eleven International Publishing, 2014); L. Ratti ed, *Embedding the Principles of Life Time Contracts. A Research Agenda for Contract Law* (The Hague: Eleven International Publishing, 2018).

[12] U. Reifner and R. Keich, *Risiko Baufinanzierung* (Kriftel: Luchterhand, 2nd ed, 1996).

[13] D. Immergluck, *Foreclosed. High-risk lending, deregulation, and the undermining of America's mortgage market* (Ithaca: Cornell University Press, 2009).

[14] U. Reifner et al, *Kleinunternehmen und Banken in der Krise. Produktive Konfliktbeilegung durch Recht* (Baden-Baden: Nomos, 2003).

we learned that banks profit from the harsh legal situation of debtors in default. They can exercise illegitimate power seemingly in reaction to the outbreak of untamed rage of desperate entrepreneurs who try to escape insolvency with increased worktime. At this stage, a bank occupied only with the fate of its own credit may be heavily disturbing for the continuation of business. In fact, small arrears were used to justify blocking a business' bank account, which caused the final closure of the business at a time when it had enough work and opportunities, but not time and liquidity, to employ its workforce. The bank had its own false picture of the debtor's behaviour, along the general ideology of lazy debtors who try to cheat their creditors. Since no objective information was available, the bank was unable to ascertain whether the crisis was structural or temporary.

In consumer instalment credit the situation is even worse and resembles the fate of developing countries. The only difference lies in the form of credit: loan contracts versus bonds.[15] With consumers, specialized credit institutions acting like loan sharks have developed a revolving credit system. Its core elements are long-term relations with growing debt and growing profitability as shown above in para I. Given the possibility to securitize such credit and sell it on the market, they are no longer hit by the breakdown.

Extra profit is achieved through refinancing, flipping between overdraft, overrunning, payday loans and instalment credit. Small loans refinance instalments creating factual anatocism. Second mortgages allow the refinancing of interest. Securitization turns the production of risky claims into an opportunity. Debt explodes just after its investment has proved to be unproductive and the refinancing spread goes up. The development of Greek and Italian public debt since 2008 is a good example.[16] Nominal debt promises higher profits than true debts provided that the *showdown* is postponed to the general crisis when state help is inevitable.

Most defaulting credit relationships start with reasonable credit.[17] The problem did not lie with the amount of debt but the relationship of its instalments to future liquidity and opportunities for productive use. Besides, overindebtedness is the consequence of profound changes in the debt due, which occur at the initiative of the lender, not of the borrower. The lender has the legal power to

[15] U. Reifner, 'Die Sittenwidrigkeit von Konsumentenkrediten nach der höchstrichterlichen Rechtsprechung' *Der Betrieb*, 2178 (1984); U. Reifner and M. Volkmer, *Ratenkredite an Konsumenten: Rechtsprobleme, Hintergründe und Strategien zum Verbraucherschutz gegnüber Banken* (Hamburg: Verbraucher-Zentrale, 1984); U. Reifner, 'Die neue Sittenwidrigkeit von Ratenkrediten' *Zeitschrift für Bank- und Kapitalmarktrecht*, 51 (2009).

[16] Italy just as Greece increased their debt load significantly after the 2008 crisis although in the wording of the Directive they were already 'unworthy for credit'. Nobody has since revealed what kind of credit they could accrue under the supervision of the EU. Credit unworthiness is a commodity that sells well.

[17] See the annual iff report on data from about eighty thousand overindebted households in Germany: D. Ulbricht et al, *iff-Überschuldungsreport 2016. Überschuldung in Deutschland* (Hamburg: Institut für Finanzdienstleistungen, 2016).

turn any credit relationship from an adequate monthly debt into an unsurmountable immediate debt. Defaulting with two instalments reaching a threshold of five per cent (less than thirty-six instalments), ten per cent (thirty-six and more instalments) or two point five per cent (mortgage loans)[18] provides the power to make the total residual debt come due irrespective of whether it is still in use and necessary to continue the overall productive investment process. Protection against early termination as in labour and tenancy law does not exist in credit law. Where the credit has been invested into houses and cars (fixed capital) the sum due is now transformed into a claim on liquid assets. Bankers are aware of this, since it was the different degree of liquidity between assets and debt that made them bankrupt in 2008.

Cancellation instead of adaptation is justified by an outdated view that creditors in default compete for the rest and need to be faster than any other in order to secure their claims. In practice they destroy the debtors' economy to the detriment of all. Debtors are also burdened with debt collection practices the costs of which pile up on top of the residual debt. Consumer bankruptcy procedures try to heal this evil, retransforming the residual debt into monthly instalments adapted to the liquidity of the debtor with the prospect of discharge in the future.

But before discharge can occur, the insolvency laws require a total destruction of household finance even where the items seized do not have a significant market value. For most households giving up all the things they need is not an option. This is why only five per cent of overindebted families in Germany use this procedure.

Ideologically, it is again the feudal reminiscence of fault that provides legitimacy for this destruction. 'Default' implicates that the arrears are the result of faulty consumer behaviour. But low-income consumers have little influence on their future financial situation. It is the creditors' perspective that leads to the acceleration of an outstanding debt favoured by the advantages the legal order offers in such cases.

The Directives allow, without regard to its effects on the productivity of the loan, to turn a long-term relationship into a short time debt at a time when the user of this capital is not even able to pay the next instalments.[19] Legal protection against early termination has not even been discussed. Instead, it could make credit relationships much more responsible than the retrospective assessment of the debtor's creditworthiness targeted at what the Directives recognize as responsible lending.

[18] See § 498 German Civil Code; Art 8 CCD.

[19] With regard to early cancellation at an unsuitable time see Bundesgerichtshof 20 May 2003, XI ZR 50/02.

2. From Responsible Lending to the Prevention of Overindebtedness[20]

CCD and MCD are similar. Consumers are primarily supposed to be the victims of their own behaviour. But it has some contradictory traces that can be used for future development of this principle. These traces point to an alternative model of credit responsibility that aims to adapt the creditors' profit-driven behaviour to the needs of consumers in trouble.

a) The 2002 CCD Draft

Such an alternative model was even dominant in the 2002 draft of the CCD by the consumer department of the EU Commission. But it was replaced in the EU Parliament. Lobbyism finally led to the illegal neo-liberal draft of 2004 that dictated the final version of the CCD.[21] Responsible credit, as a leading principle in the 2002 draft, was eradicated from the rules in the final version of 2008.[22]

A glimpse into legal history may unveil how the EU lost its social competence in consumer credit regulation. It started with Directive 1987/102/EEC,[23] which respected national laws with its minimum harmonization principle but harmonized the national information rights as in use in France, Benelux, Germany and Great Britain. The EU Commission started its work for further reformation at an early stage. The persons in charge were enflamed to ameliorate the social image of the common market. In the public eye the EU was primarily seen as an organisation to satisfy the needs of the industry and especially transnational banks. A socio-economic directive engaged in preventing overindebtedness could have strengthened the position of consumers against almighty banks, provided adequate remedies and even delivered a clear pro-European social message. To this aim, harmonization could have profited from the skills acquired by nations that had already a long experience in consumer credit.

Twelve years of research into consumer markets, including its problems

[20] Earlier drafts and reactions can be found under https://tinyurl.com/y8m9yq5k (last visited 27 December 2018).

[21] For a comparison see P. Carillo et al, 'The EU Consumer Credit Directive 2008 in the light of the EuSoCo Principles', in L. Nogler and U. Reifner eds, n 11 above, 321-339.

[22] The 2008 CCD uses this notion only three times appealing in recital 26 to the member states to seek: 'responsible procedures', not to be 'irresponsible in credit extension' and to assess 'creditworthiness responsibly'. In the 2014 MCD this notion is used quite often ie in recital 3: 'responsible action of market participants'; recital 4: 'irresponsible lending and borrowing'; recital 5: 'act professionally and responsible'. Recital 29 even requires 'responsible debt management', which in Art 6 includes the quest for financial education of consumers. In general, Art 45 opens up the floor for new activities when it says that after 21 March 2019 further initiatives for responsible lending and borrowing will be announced, in order to master the 'challenges posed by private overindebtedness, directly related to credit'.

[23] European Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions oft he Member States concerning consumer credit (1987) OJ L42/48.

like usury, early termination, refinancing, pay-day loans, linked products, intermediaries etc led to the 2002 draft.[24] Dieter Hoffmann, Thierry Vissol, Jens Ring, van Lisebetten were the experts in charge of this reform. They were obsessed with the idea that consumer credit could be extended fairly and responsibly. They used the social elements of the national consumer credit codes like the one in Germany from 1991 and especially socially minded rules in Belgian and French law. The information rights were copied from the Anglo-American regulatory model.

The draft reflected the experience of many EU Member States. With the emergence of credit-driven overindebtedness they had developed new bankruptcy schemes for consumers but refrained from consumer credit legislation because of the pending EU harmonisation process. Instead of the creditor related perspective of bankruptcy or *Konkurs*, the new codes overtook a debtor perspective already in their titles: insolvency code, rehabilitation or debt rescheduling code, were their denominations. Adaptation of debt was preferred to the liquidation of consumer assets. They mostly provided a choice between a cooperative prolongation with an insolvency plan, on the one hand, and straight bankruptcy, on the other. This path towards prolonged and adapted credit relations – to prevent the crash of the debtor's ability to reinstate a productive use of resources – also flourished in the new commercial bankruptcy schemes.[25]

The draft of the new CCD[26] was presented on 11 September 2002 by the General Department in charge of consumer protection. Para 2.4 of its reasoning reads:

> The directive will improve stability by putting in place a draft of provisions on responsible lending, on providing information and protection both when the credit agreement is concluded and during its performance (or in

[24] The following studies are cited in the draft: M.J. Lea et al, 'Study on the mortgage credit in the European Economic Area. Structure of the sector and application of the rules in the directives 87/102 and 90/88' Final Report for Contract no XXIV/96/U6/21; R. Seckelmann, 'Methods of calculation, in the European Economic Area, of the annual percentage rate of charge' Final Report 31 October 1995, Contract no AO 2600/94/00101; U. Reifner, 'Harmonisation of cost elements of the annual percentage rate of charge, APR' Project no AO-2600/97/000169 (Hamburg, 1998); F. Domont-Naert and A.C. Lacoste, 'Etude sur le problème de l'usure dans certains états membres de l'espace économique européen' Contract no AO-2600/96/000260 (Louvain-la-Neuve, 1997); F. Domont-Naert and P. Dejemeppe, 'Etude sur le rôle et les activités des intermédiaires de crédit aux consommateurs', Contract no AO-2600/95/000254 (1996); E. Balate and P. Dejemeppe, 'Conséquences de l'inexécution des contrats de crédit à la consommation' Studie AO-2600/95/000270 EU-Commission Final Report.

[25] J. Pulgar Ezquerra, *Preconcursalidad y acuerdos de refinanciación. Adaptado a la Ley 38/2011, de 10 de octubre, de reforma de la Ley concursal* (Madrid: La Ley, 2012); Id, 'Ambito delle soluzioni negoziali alla crisi d'impresa e abuso del diritto nel confronto tra sistema spagnolo ed italiano', in A. Caiafa and S. Romeo eds, *Il fallimento e le altre procedure concorsuali* (Padova: CEDAM, 2014), III, 142; Id, 'A Contractual Approach to Overindebtedness: *rebus sic stantibus* instead of Bankruptcy', in L. Nogler and U. Reifner eds, n 11 above, 365-377.

[26] n 3 above.

the event of its possible non-performance) that will reduce the probability of a creditor or credit intermediary being able to mislead consumers in another Member State or jeopardise their financial situation or even of acting irresponsibly. The directive being proposed, and in particular its provisions relating to the prevention of overindebtedness, together with the rules on consulting central databases, will further improve the quality of loans and lessen the risk of consumers falling victim to disproportionate commitments that they are unable to meet, resulting in their economic exclusion and costly action on the part of Member States' social services.

It focused on lender behaviour, dangerous products, credit intermediaries and the quality of the credit relationship. This is why it did not become EU law. The way the 2002 draft was transformed into the 2004 draft, finally replaced by the Commission's 2005 draft,[27] justifies a few comments. Its development coincided with the deregulation of financial services to achieve lighter standards for banks in Europe like those in the US.[28] The 2002 draft did not fit into this pattern because it assumed correctly that responsible lending was necessary not only to get public support for the European project but also because bad debt would undermine the stability of the financial system. But this was opposed by the bankers' associations that had worked on their own draft, presented by the rapporteur in the EU economic committee Joachim Wuermeling.[29]

The committee did not care for the fact that the European Parliament had no legal power to provide an own draft. It had to be instructed likewise by the president of the Parliament who rejected it. But this did not pose an obstacle. Within a few days the whole draft was transformed into more than 100 'amendments' to the initial text. Pending European elections in June 2005, the deputies took little notice neither of this procedure nor of its contents in its first reading in the old Parliament. The second reading with new uniformed deputies took place in the new Parliament. The Commission also revised its own legislative team and overtook the new version of the Parliament. Efforts within the European Council under the presidency of Austria and Finland to rescue at least a minimum of responsible credit ideas failed. Germany, UK, Ireland and

[27] European Commission proposal COM(2005)443 final of 7 October 2005 for a Directive of the European Parliament and of the Council on credit agreements for consumers (2006) OJ C49/45. See the changes notified by the Commission in its presentation from 7 October 2005.

[28] In Germany the respective legislation was launched in five consecutive laws entitled 'Financial markets development laws 1-5' (*Finanzmarktfördergesetze*).

[29] Mr Wuermeling is a member of the Bavarian Christian Socialist Party. His draft reflected the ideas of Eurofinas to whom he had close contacts during this procedure. He was known for his lobbyist activities which in January 2008 led to his dismissal as joint state secretary by the minister of economics Michael Glos (CSU). His lobbyism for software industries had been too much. After this he moved into private practice and lobbied for the finance industry; first for the insurance industry then for Sparda banks in Germany. He was appointed to the Presidency of Deutsche Bundesbank. Since 2018 he is the Head of Bank Supervisor at Deutsche Bank.

the Netherlands were the pillars of an ongoing deregulatory process well-disguised under hundreds of rules.[30]

b) The 2004 Draft and CCD 2008/48/EU

The 2004 draft and its implementation into the CCD of 2008 assumed that overindebtedness could be defeated through consumer information and consumer selection. Recital 26, referring literally to responsible credit, shows through its specifications the opposite. Lenders only had to assess whether the consumer alone was creditworthy:

> 'Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the specific features of their credit market. Those measures may include, for instance, the provision of information to, and the education of, consumers, including warnings about the risks attaching to default on payment and to over-indebtedness. In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so. (...) Creditors should bear the responsibility of checking individually the creditworthiness of the consumer. To that end, they should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a long-standing commercial relationship. (...) Consumers should also act with prudence and respect their contractual obligations'.

The 2002 draft limited possible effects of chain-credit-contracts, open-end-credit, linked credit agreements, add-on products sold under the threat of insolvency. It also promoted an inclusive APRC that would have defined a European-wide method of calculation with regard to existing usury ceilings. It incorporated all cost including Payment Protection Insurance if they had been convened at the same time the loan was taken out. It also required banks to hand out a comprehensive payment plan before conclusion of the contract, so that the impact on future liquidity would have been visible early enough for changes.

Nothing of it was saved in the CCD of 2008. It limited itself to information, cooling off periods, a right of withdrawal within the first 10 days including

[30] For the whole procedure including the illegal form of the second reading which was done in a newly elected Parliament by deputies who had not been there for the first reading see U. Reifner, 'Die weitere Deregulierung des Verbraucherkredites - eine merkwürdige Antwort auf die Kreditkrise' *Kritische Justiz*, 132 (2009).

misleading information on a so-called 'borrowing rate'. This legitimized a rate that can be increased or reduced through the use of mathematically incorrect formulas and arbitrary definitions of cost elements as interest or fees. The borrowing rate competes with the APRC but is preferred to it in German law where sanctions, refund of interest or recalculation are required. A truly comprehensive APRC including annexed service fees should allow for comparison of the contract with other offers irrespective how these offers are construed. Such APRC is also needed to find out whether the offer is usurious. A non-inclusive APRC, as allowed in the Directives, has become a major permission for misselling.

The same is true with regard to the payment plan. It would allow a consumer to compare future income developments with the instalment to be paid and the residual debt on each. But the Directive built it into the borrowing rate, allowed incorrect calculation and offers it only upon request after the contract has already been concluded. In any case, consumer credit protection should prevent overindebtedness through responsible lending practices during the lifetime of the credit.

The information model instead implies that overindebtedness is a fruit of erroneous credit decisions on the part of the consumer. The provision of a right of withdrawal should give the vulnerable consumer time to reflect. In practice, about half of loan agreements incorporate refinancing which usually ties the client to the old creditor.

But judges were confronted with real problems of overindebted defendants who sought to escape this trap. With the new EU driven law they could not easily apply old usury laws. The 2008 CCD had excluded 'non-mandatory' PPI from the APRC. Lenders had hence shifted usurious costs to these products, which cost up to eight times more than an ordinary life insurance. In order to find a way to react to this situation, judges 'found' that the required information on the right of withdrawal lacked a comma, the correct postal code, was one day shorter than required or not printed big enough, etc. In case of flawed information concerning the right of withdrawal, EU law provided an unlimited period for its execution. This led to an 'eternal right of withdrawal' or – as the bank lawyers called it – a 'withdrawal joker'. At the stage of insolvency, it still could transform the usurious contractual debt into a reduced debt based on restitutions for undue enrichment, with interest rates drawn from the average market rate. This misuse of two bad laws had acceptable effects but disguised the structural problem even further.

Information rights offer stones instead of bread. In addition, they provide mostly confusing, unnecessary and even false information up to five times in the same contract, which inflated the length from two to sixteen pages. These rights contain information about an embarrassing 'Borrowing rate' (Art 4 (16) MCD) that is allowed to reflect arbitrary decisions by the lender: they want to be included in it and how it should be calculated even if mathematically this

calculation is incorrect. Questionable is also the 'total amount of credit' which destroys the idea of the APRC. It omits the time dimension of credit and misleads comparison.

c) Some Reactions to the 2008 Financial Crisis

In reaction to the memorable way responsible credit lost its advocates in Brussels in 2004, a worldwide group of consumer and debt advice organizations created a network together with the US Coalition for Community Reinvestment. It summarized the idea of responsible credit in seven principles.[31]

Principle 3 reads:

> Lending has at all times to be cautious, responsible and fair. a) Credit and its servicing must be productive for the borrower. b) Responsible lending requires the provision of all necessary information and advice to consumers and liability for missing and incorrect information. c) No lender should be allowed to exploit the weakness, need or naivety of borrowers. d) Early repayment, without penalty, must be possible. e) The conditions under which consumers can refinance or reschedule their debt should be regulated.

This idea became more famous in 2008 when the banks themselves asked for state help deploring the lack of comprehensive product regulation. State agencies supported this view. The Board of the US Federal Reserve deplored irresponsible credit products, procedures, contractual forms, credit bundling and sales practices as well as unconscious debt collection practices.[32] The special G20 summit on the financial crisis held in Washington DC on November 2008 mandated the creation of principles on responsible lending from the OECD. The 'Ten High Level Principles on Financial Consumer Protection' were passed by G20 in 2011, taking much of what had been previously demanded. Its principle no 3 required 'Equitable and Fair Treatment of Consumers (…)'. This should not be limited to the conclusion of the contract but persists throughout its execution:

> 'All financial consumers should be treated equitably, honestly and fairly at all stages of their relationship with financial service providers. Treating consumers fairly should be an integral part of the good governance and corporate culture of all financial services providers and authorized agents. Special attention should be dedicated to the needs of vulnerable groups'.

Principle six calls for 'Responsible Business Conduct of Financial Services Providers and Authorised Agents'. It should be executed in the best interest of all financial consumers with regards to the social 'situation and needs' of customers.

[31] Reprinted in U. Reifner, *Das Geld. 3. Recht des Geldes - Regulierung und Gerechtigkeit* (Wiesbaden: Springer VS, 2017), 318.

[32] ibid 16.

d) MCD 2014/17/EU

The 2014 MCD has profited from this development. It pays some tribute to the idea of responsible products and services. Recital 48, first sentence, requires a bank to consider

> 'which credit agreement, within the range of products proposed, is the most appropriate for his (the consumer's) needs and financial situation'.

More of this we can find in its rhetoric. The informational duty of Art 5 (6) CCD developed into a general regulatory concept. Since the lender has to inform 'whether the proposed credit agreement is adapted to his needs and to his financial situation', they also have to inform the consumer about 'the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of default in payment by the consumer'. Is this still an informational duty?

Would a bank get away with the information that all their products are inadequate, usurious and not adapted to consumers' needs? If a bank offers usurious products, speculates with chain credit and the opportunity to sell bad credit before default, it is hard to imagine that this bank is able to provide responsible advice. Best advice is worst advice if the offer can only harm the borrower. Historically, usury has never been excused due to the free decision of an informed victim. If the contract is usurious, then such information would have no effect.

Long-term experience in labour and tenancy law, the sister relations to credit within lifetime contracts, reveals the error. If employers and landlords only had to inform workers and tenants about future intolerable conditions, such a law would not be taken seriously.

At least recital 27 MCD refers to overindebtedness. It evokes the possibility of protection against early termination and asks banks to refrain from enforcement procedures when a credit relation in default could still be repaired. Also changing needs and circumstances have to be taken into account by means of adaptation. It calls for a more substantive regulation of the principle of responsible lending, which should not be reduced to assessing the actual creditworthiness of consumers.

> 'Given the significant consequences for creditors, consumers and potentially financial stability of foreclosure, it is appropriate to encourage creditors to deal proactively with emerging credit risk at an early stage and that the necessary measures are in place to ensure that creditors exercise reasonable forbearance and make reasonable attempts to resolve the situation through other means before foreclosure proceedings are initiated. Where possible, solutions should be found which take account of the practical circumstances and reasonable need for living expenses of the consumer.

> Where after foreclosure proceedings outstanding debt remains, Member States should ensure the protection of minimum living conditions and put in place measures to facilitate repayment while avoiding long-term over-indebtedness. At least where the price obtained for the immovable property affects the amount owed by the consumer, Member States should encourage creditors to take reasonable steps to obtain the best efforts price for the foreclosed immovable property in the context of market conditions. Member States should not prevent the parties to a credit agreement from expressly agreeing that the transfer of the security to the creditor is sufficient to repay the credit'.

Recital 55 enumerates credit products having a negative effect on future solvency, especially the increase of instalments or negative amortization.

> 'That assessment of creditworthiness should take into consideration all necessary and relevant factors that could influence a consumer's ability to repay the credit over its lifetime. In particular, the consumer's ability to service and fully repay the credit should include consideration of future payments or payment increases needed due to negative amortisation or deferred payments of principal or interest and should be considered in the light of other regular expenditure, debts and other financial commitments as well as income, savings and assets. Reasonable allowance should be made for future events'.

These deliberations have not yet triggered actual regulation. Due to the failure of the EU Commission[33] to propose a significant reform, it is up to the national

[33] Art 27 (2) CCD has mandated the EU Commission to report to the Parliament every five years about its implementation and especially the implementation of the APRC and the choices national legislators could make. For the first Report 2013 a tender was written out for which only one consortium of renown experts in consumer credit protection delivered a bid. The Commission rejected this bid, then reopened it. But this time again the consortium was rejected in favour of a newly emerging second bid. The consortium had to learn that its concept had been too much concerned with consumer protection. The report carefully omits the problems enumerated in this essay. See Risk & Policy Analysts Ltd, 'Framework Contract on Evaluation, Impact Assessment and Related Services. Study on the Impact of the Legal Choices of the Member States and other Aspects of Implementing the Directive 2008/48/EC on the Functioning of the Consumer Credit Market in the European Union', released on 22 October 2013, available at https://tinyurl.com/yad69hco (last visited 27 December 2018).

The next report of CCD is due in 2019. For this the Commission has preselected five bidders in an earlier framework contract. Detailed questions narrow down what can be researched and should be answered. Unwanted problems are not asked for (see the tender 'Framework contract no JUST/2015/PR/01/0003 on Supply of Impact Assessment, Evaluation and Evaluation related services in the policy areas under the responsibility of DG Justice and Consumers – Lot 1 Request for service number – Just/2017/Cons/Fw/C001/0176 Evaluation of the Directive 2008/48/EC on Credit Agreements for Consumers').

legislators to turn this concept into law. The MCD, with its minimum harmonization design, invites national legislators to provide a better model than the one that already failed in 2008. But also the total harmonisation approach, pursued by the CCD in 2008, is not an obstacle. It does not restrict national regulation in the areas that (like product regulation) are not covered by it.

IV. Responsible Lending and Usury

Responsible lending is a vague principle in EU law. In its present form, as provided by CCD and MCD, it turns civil courts into administrative bodies. Instead of justice and the constitutional right of access also to credit, the judge has become a watchdog on bank safety. But this depends on economic decisions that are not even expected to be efficiently controlled by banking authorities, which prefer to sanction the effects. Whether the extension of a credit to a certain person for a defined purpose will lead to a default in future is a complex socio-economic decision which combines productivity, history, individual and collective data with the present liquidity expectations. For this, bankers use models, statistical evidence, experience and intuition.

Its wording creates legal insecurity. The probability of future insolvency based on data reflecting the borrowers former payment behaviour shall be used to assess average risks. It presupposes that the sustainability of a credit is mirrored by the character of a person to whom the credit is entrusted. This implies that those who most need it should be excluded. But exclusion is not the answer in practice. Banks – or, in countries without bank monopoly, financial institutions – will use the argument of a higher risk for risk-adjusted pricing. Weak customers will be burdened with additional demand of securities, will be sold additional linked products and charged higher prices. It is a self-fulfilling prophecy towards systemic insolvency. People with less money will have to pay more so that they have ever less money.

At least some recitals that according to the European Court have a binding effect for the interpretation of the rules do not favour such effects. Responsible lending as defined in the G20 statements could be interpreted in a broader way.

The German history of strict consumer protection gives some hints as to how information duties can lead to responsible product regulation. German courts have built their usury ceilings on the assumption that usuriously overpriced credit is the manifestation of bad advice (*culpa in contrahendo*). The bad advice is

The EU Parliamentary Committee on internal market and consumer protection (IMCO) delivered an own report of a few pages based on the informational model (IMCO, 'Report on the Implementation of the Consumer Credit Directive 2008/48/EC', released on 19 October 2012).

According to Art 44 MCD also this Directive mandates the Commission to provide an evaluation report by 21 March 2019. The question is quite general and regards the 'effectiveness and appropriateness' of the regulation. Twelve special questions follow. It is interesting to see how this will be introduced into a tender and how the selection process of experts will be organised.

refutably assumed to be causally linked to the usurious contract. This damage has to be compensated. Since the contract itself is the damage, it leads to the abolition of the contract and thus of the usurious credit. In the end, such products have no chance of legal enforcement. Good advice cannot turn bad products into good products. Responsible lending requires responsible credit. Also the use of the substantive notion of responsibility instead of the procedural notion of fairness underlines that lending is measured according to its social and productive effects and not only by the way it has been organized.

Consumer organizations, attorneys and legal scientists in Germany have recently founded a movement entitled '#StopWucher'. It is based on the ancient principle[34] that exploitation of needs and poverty should be prohibited by law. § 138, para 2 of the German Civil Code summarizes this principle:

> '(2) (Usury) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance'.

Other anti-usury principles of general civil law, like the interdiction of anatocism, default interest rate ceilings, protection against early termination or insolvency protection can be added. But they have lost their teeth. Usury is seen as a mere market failure that can be cured by rational consumer behaviour.

In 1981, the then third chamber of the German Supreme Court took a different road. It adapted the old usury principle to the modern forms of systemic usury. Average interest rates in consumer credit had fallen sharply between 1976 and 1979. The court found that the rates for poor people remained at the same level. But the old usury principle cited above was inapplicable. There was no 'exploitation' in its traditional meaning. The usurer would have to act intentionally in reaction to the individual situation of the debtor and not driven by a system exploiting the situation of a whole class of borrowers. Anyhow, the effects are even worse, because people are caught in a trap and blamed for their ignorance, without the law that historically claimed to shelter the weak.

The courts reacted. They argued that a bank selling such loans to poor people exploits its monopolistic position in relation to such a class. The double of the average interest would provide an irrefutable assumption of systemic exploitation. The eleventh chamber in charge of bank law abandoned this view and followed the neo-liberal EU regulation.

Usury was hence reduced to a faulty consumer decision. Cost could be allocated to different products. Chain credit was no longer a usurious system

[34] H.P. Benöhr, 'Zweitausend Jahre Kampf gegen den Wucher (usura)' *Roma e America. Diritto romano comune*, 109 (2009).

but a number of separate contracts which had nothing to do with each other. In usury law, the creditor's perspective overruled that of the borrower.

The principle of responsible lending, although reduced to the assessment of creditworthiness, obviously targets the lenders again. It is their behaviour that should be responsible. This provides some hope that the usury principle, which for thousands of years protected the poor, could finally be resurrected in the form of the principle of responsible credit.