

# The Mortgage Credit Directive under Review

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## Preface

Over a decade since the adoption of Directive 2014/17/EU, the Mortgage Credit Directive (MCD), this book aims to offer a timely analysis of the complexity and evolving nature of its implementation, in light of its possible review.

Recognising the need to evaluate the directive's effectiveness and relevance, the European Commission initiated a review of the MCD in 2020. This review, as highlighted in Chapter 1, aimed to measure the MCD's success in achieving its goals and to identify areas where further EU action might be necessary. While the revision process faced delays and is suspended at the time of publishing this book, the feedback gathered underscores the ongoing importance of the issues addressed by the MCD. Moreover, the adoption of a new Consumer Credit Directive in 2023 sets the path for amendments to the MCD in certain areas at least. In this process, some of the legislative decisions made on consumer credit may need to be revised.

Mortgage credit markets continue to be shaped by both persistent challenges and emerging new dynamics. Existing problems such as consumer over-indebtedness, the complexities surrounding foreign currency loans, the intricacies of early repayment, and the varying approaches to enforcement and forbearance remain highly relevant across Member States. These issues, often exacerbated by the long-term nature of mortgage agreements, require ongoing scrutiny and adaptation of regulatory frameworks.

Furthermore, the past decade has witnessed the rise of new challenges that add layers of complexity to mortgage credit regulation. Digitalisation is transforming how mortgage products are offered and accessed, raising questions about information provision, creditworthiness assessments, and the role of online platforms. The latter, together with other non-bank lenders that are entering the market, require reconsideration of the scope of the MCD so that it ensures a level playing field and adequate consumer protection. The growing urgency to mitigate and adapt to climate change has also brought sustainable mortgage financing and the risk of greenwashing into focus, requiring evaluation of how the mortgage market can contribute to decarbonisation goals.

This volume provides a critical assessment of the impact of the MCD across thirteen Member States, considering both the formal legal frameworks and their practical application in the years since its enactment, as well as the recent developments in the United Kingdom.

Part 1 of this book sets the stage by examining the key areas of where a review is required and the overarching matters that have emerged in the decade since the MCD's adoption. It considers the scope of the MCD in light of new market participants and products, as well as some of the most questioned exclusions, because of their impact on ageing populations, the evolving approaches to pre-contractual information and creditworthiness assessments in a digital age, and the ongoing debates surrounding responsible lending and the treatment



of borrowers facing financial difficulties. It also includes a chapter on the new consumer duty in the United Kingdom.

Part 2 then offers the perspectives from the thirteen Member States covered in this volume: Belgium, Czech Republic, France, Greece, Hungary, Ireland, Italy, Lithuania, Netherlands, Poland, Portugal, Romania and Spain. Each national chapter provides valuable insights into the local nuances of mortgage credit regulation and together they contribute to a broader understanding of the ongoing relevance and the need for potential evolution of the MCD in the face of both enduring problems and new market realities. Building upon the research presented in *The Impact of the Mortgage Credit Directive in Europe. Contrasting Views from Member States* (Europa Law Publishing, 2017), this book aims to contribute further to the analysis of the European regulatory framework for mortgage credit and its effects, while it continues to adapt to the challenges of the 21st century, hoping to offer useful insights for policymakers, legal practitioners and academics.

This book is one of the main results of a research project entitled *Mortgage credit under review: towards a sustainable, inclusive and digital European Market* that began over three years ago (Grant PID2021-127197NB-I00, funded by MICIU/AEI/ 10.13039/501100011033 and by ERDF/EU), which is being carried out also with the collaboration of the Consolidated Research Group 2021 SGR 00347, funded by the Generalitat de Catalunya, and the Law School of the editors' institution (Universitat de Barcelona).

We need to thank a number of people for making this book possible. First of all, our contributors. We had already worked together with some of the authors, and it has been a real pleasure to delve into the world of mortgage credit with them again. Others we met while preparing this research and hope to collaborate with in the future. All of them have enriched this joint project with their enthusiasm, critical views, time and patience. To all we owe the immense joy of unfailingly friendly communication, even when some were going through challenging and even downright bad times. Also, we wish to thank Marta Guerrero Ovejas, for her help editing the first drafts of the book. Finally, we are grateful to be publishing a collective volume of this nature with Europa Law Publishing for the third time around, and hopefully not the last.

Miriam Anderson and Esther Arroyo Amayuelas  
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### I Introduction

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, commonly referred to as the Mortgage Credit Directive (MCD), is still a relatively recent piece of legislation. Moreover, most Member States did not transpose on time, with Spain – one of the countries that suffered most in this area as a result of the 2008 financial crisis – being the latest to implement the MCD in 2019. Evaluating the effectiveness of the Directive is therefore complicated due to the limited availability of data.

However, Article 44 MCD provided that its review should begin by 21 March 2021. In compliance with this mandate, the European Commission's Directorate General for Financial Stability, Financial Services and Capital Markets Union commissioned Risk & Policy Analysts (RPA) to produce an

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evaluation report, which was published at the end of 2020.<sup>1</sup> The evaluation report aimed to measure the MCD's effectiveness and appropriateness in attaining its goals, and it highlighted areas where the EU could develop its powers to a larger extent. It also covered the need for supervision of credit registers, in line with Article 45 MCD.

The evaluation report was followed by a report from the Commission to the European Parliament and the Council on the review of the MCD dated 11 May 2021,<sup>2</sup> which emphasised the already-mentioned limitations of the data obtained due to the relatively short lapse of time since its adoption and transposition, and also as a result of the difficulties generated by the Covid-19 pandemic. A public consultation was launched.<sup>3</sup> In its report, the Commission stated that it would meet the requirement under Article 45 MCD to 'submit a comprehensive report assessing the wider challenges of private over-indebtedness directly linked to credit activity at a later stage', in light of the impact of the pandemic on consumers.

Although in autumn 2024 the Commission's website on the review of the MCD still stated that the adoption of the revised text was expected in the first quarter of 2024,<sup>4</sup> it was not included in the Commission's agenda for the year<sup>5</sup> and the impact assessment was still pending. In late December 2024, the Commission announced that the revision was suspended, but feedback received remained valuable for future reference.

In the meantime, however, there have been other significant legislative developments at EU level that most likely anticipate some of the changes to be expected in the realm of mortgage credit. Particularly relevant examples in this respect are the Non-Performing Loans Directive (NPLD),<sup>6</sup> with regard to credit assignment and reasonable forbearance prior to enforcement, and the revised

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1 Directorate General for Financial Stability, Financial Services and Capital Markets Union (European Commission), Risk & Policy Analysts (RPA), 'Report on the Evaluation of the Mortgage Credit Directive' (Luxembourg, Publications Office of the European Union), November 2020 <<https://data.europa.eu/doi/10.2874/41965>>.

2 COM(2021) 229 final.

3 European Commission, 'Call for evidence for an evaluation and impact assessment run in parallel', Ref. Ares(2021)7165942, 22 November 2021. See also the Consultation document at <[https://finance.ec.europa.eu/system/files/2021-11/2021-mortgage-credit-review-consultation-document\\_en.pdf](https://finance.ec.europa.eu/system/files/2021-11/2021-mortgage-credit-review-consultation-document_en.pdf)>. The responses are available at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13090-Mortgage-credit-review-of-EU-rules/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13090-Mortgage-credit-review-of-EU-rules/public-consultation_en).

4 See <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13090-Mortgage-credit-review-of-EU-rules\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13090-Mortgage-credit-review-of-EU-rules_en)>.

5 See <[https://commission.europa.eu/document/download/812f6e9c-15da-4913-8fd2-aea6c26674c0\\_en?filename=COM\\_2023\\_638\\_1\\_annexes\\_EN.pdf](https://commission.europa.eu/document/download/812f6e9c-15da-4913-8fd2-aea6c26674c0_en?filename=COM_2023_638_1_annexes_EN.pdf)>.

6 Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU.



Consumer Credit Directive 2023 (CCD 2023),<sup>7</sup> especially considering the option to maintain strict information duties, the role of automated decisions during the creditworthiness assessment and the approach towards distressed debtors.

This introductory chapter does not aim to cover all aspects of the MCD that may require attention. It simply intends to describe the matters on which the Commission appears to be focusing its attention, sometimes querying whether it should go further (II), and to elaborate on other issues that arise in different Member States represented in this volume and that could be worthy of harmonised solutions, from the perspective of market efficiency but also with the goal of attaining a higher level of consumer protection (III). The chapter ends with some final thoughts that suggest perhaps more holistic approaches than those discussed with regard to concrete mortgage loan issues are required in order to adequately protect consumers, whilst preserving the stability of the financial system (IV).

## II The Main Aspects under Review

The evaluation report and the Commission's report cover in detail a broad range of issues addressed by the MCD or related to it. In light of the public consultation, there appear to be some areas of particular interest, including those relating to the scope of the MCD, challenges deriving from digitalisation and climate change and the ever-recurring fear of consumer over-indebtedness, which, as a result, may lead to financial instability. This section does not address relevant aspects, such as the use of AI and digitalisation towards the conclusion of the contract, including with regard to the creditworthiness assessment, that are carefully considered in the following chapter in this volume.

### 1 Scope

The Commission's report concludes that, in general terms, the scope of the MCD remains appropriate to meet the objectives of the Directive, although it recognises the need to make certain adjustments.<sup>8</sup>

In particular, the Commission considers that the exclusion of equity release schemes as per Article 3(2)(a) MCD may result in an insufficient level of protection for consumers. The reasons for excluding these products, as explained in Recital 16, do not seem solid: although pre-contractual information should be slightly different and the creditworthiness assessment is irrelevant, where there is in effect a reverse mortgage, there is credit secured by residential property, regardless of the fact that maturity does not occur, typically, until the consumer

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<sup>7</sup> Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC.

<sup>8</sup> Directorate General for Financial Stability, Financial Services and Capital Markets Union (European Commission) & RPA (2020) 10.



dies. A different matter is that of home reversion plans and other similar products, which do not involve the provision of credit. Although some make the case to include them as well,<sup>9</sup> this would entail broadening the scope of the MCD considerably, probably pushing its boundaries too far. It is undeniable that both types of product (ie those involving credit and those that do not) pose similar problems insofar as the target consumer groups are particularly vulnerable to misinformation (not necessarily due to age, but because they are encountering difficulties to make ends meet and therefore may make rash decisions) and equity release products are often what would be considered ‘a bad investment’ under normal circumstances. However, the MCD is a piece of legislation on credit, as defined in its Article 4, and there does not seem to be a reason to depart from this, given the confusion it would generate. Nevertheless, it should be noted that the potential inclusion of reverse mortgages in the MCD is without prejudice to the desirable design of legal frameworks, at EU and/or domestic level, that protect consumers of this kind of products whether they include the provision of credit or not. The lack of such a general framework could lead to opportunistic decisions, ie professionals offering non-credit products only, in order to escape more stringent rules on reverse mortgages, and to consumers making choices based on diverging taxation rules, rather than on the convenience of a given product.<sup>10</sup>

The Commission’s report also refers to unsecured loans for property renovation. These are now covered by CCD 2023 (Article 2(3)), even if they exceed EUR 100,000 (instead of the previous 75,000). However, consumer credit for purposes other than acquiring or retaining property rights over immovable property (eg consumer credit to pay for holidays or medical bills) secured by non-residential immovables continue not to be covered either by the MCD or by the CCD 2023.<sup>11</sup>

The Commission considers the need to monitor the emergence of new entrants in the mortgage market, including non-bank lenders and in particular, peer-to-peer platforms, and their possible classification as credit intermediaries, a matter that is specifically discussed in the second chapter of this volume. Suffice it to say here that in most Member States covered in this volume, currently mortgage credit does not appear to be concluded via such platforms, with the (notable) exception of France. However, most contributors foresee that this may change rapidly, and that diverging regulatory approaches may emerge. In Ireland, the number of crowdfunding service providers is growing, but they do not as yet facilitate mortgage lending to consumers. The review of the MCD should certainly take this possibility into account. On a more general level, the appearance of non-banking lenders, often mortgage loan assignees, has led to the ‘mortgage prisoner’ issue in Ireland (and in the United Kingdom), it generates problems in the Netherlands, and conflicts escalate when the new holder

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<sup>9</sup> See Del Pozo Carrascosa in Chapter 3 of this volume.

<sup>10</sup> Anderson, (2021) 187 ff; Arnaiz (2021) 209 ff.

<sup>11</sup> Arroyo Amayuelas (2024) 6.



of the credit does not fall under EU legislation, as shown in the chapter on Romania. This issue, and potential remedies, will be discussed in a little more detail below (section 6).

Another aspect highlighted during the preliminary review stage was that only Finland used the opt-out provided for in Article 3(3)(a) MCD and only the UK used the option to exclude ‘buy-to-let’ agreements as per Article 3(3)(b) MCD, which might be read as an indication that these exclusions are not necessary in most Member States, although it is more likely to be the result of rushed and minimal-effort transposition in most of them.

There is another matter concerning Article 3(1) MCD that should be taken into account: its wording is cryptic. Whilst subsection (a) is probably understandable in all Member States, as long as ‘secured by a right related to residential immovable property’ refers to a *ius in rem*, subsection (b) is problematic. According to the latter, the MCD applies to ‘credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building’. A problem arises from the use of the expression ‘property rights’, which has a clear meaning in common law systems but is lost when it is translated as ‘rights of property’ in the French, Spanish and Italian versions. This expression has no legal meaning whatsoever in said jurisdictions and it suggests the idea of ownership, thus excluding other possible property rights that may be acquired or retained over an immovable. Moreover, the central and undefined concept of residential property is absent from this subsection, thus suggesting that a credit agreement the purpose of which is to retain ownership over a piece of rustic land or parcels of land destined to industrial purposes may be covered by the MCD. Also, and no less importantly, in subsection (b) the notion of ‘security’ disappears: what matters is the purpose of the credit agreement and not that the loan is secured by a mortgage or other similar security right. The land or construction is not necessarily collateral to the credit.

And yet, the MCD seems to have been drafted with only mortgages in mind: the provisions on the creditworthiness assessment, which must not rely predominantly on an increase in value of the property (Article 18), and those on enforcement (Article 28), are clear examples of this. The question arises as to whether the MCD applies or should apply to other financing mechanisms that may have a role in the market. An illustrative case is that of deferred payment guaranteed by a resolutive condition whereby, in the event of default, the vendor recovers ownership of the residential immovable property. It can be argued that, in so far as it is acting in the course of its trade or business, a developer, for instance, falls within the concept of ‘creditor’ as per Article 4(2) MCD, and the agreement meets the definition of ‘credit agreement’ provided by Article 4(3) MCD.<sup>12</sup> However, it is difficult to see how the ESIS or the rules on creditworthiness or enforcement can encompass such financing systems. In France, the

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<sup>12</sup> See also Art 2(2)(h) CCD 2023, where deferred (and unsecured) payments are only excluded when they comply with certain stringent conditions, ie when they are interest free and payment is due within 50 days of the delivery of the goods. Therefore, even if there is no interest due, if payment is deferred for



mortgage granted to the vendor of immovables may not pose problems with regard to enforcement; however, the fact that the contract between the vendor and the buyer is not a loan contract, but rather a sale contract, also creates difficulties when considering the application of the MCD. Adjustments in this respect would be welcome, since arrangements of this kind may be beneficial to consumers as there is no third party providing credit. Caution is required to avoid unfair practices arising in this area as well.

## 2 Advertising, Pre-Contractual Information and Unfair Terms

The Commission's report, drawing from the evaluation report, concluded that although the provisions on advertising (Articles 10 and 11) and on pre-contractual information (especially, Articles 14 and 17) had managed to enhance consumer protection by providing information that allows borrowers to compare offers, consumers do not always understand the meaning of such information (eg on the APRC), and that they may be overloaded by information or receive it too late, all of which makes it more difficult to compare products. Moreover, the ESIS does not appear to be well suited for digital delivery of information. Stakeholders also stressed that complying with advertising and pre-contractual information duties in digital contexts is difficult and generates problems and costs that perhaps outweigh the benefits to consumers. The challenges posed by digitalisation are addressed in the next chapter of this volume and, in Chapter 4, the issue of transparency is analysed from an economic point of view. Therefore, here it suffices to briefly touch upon four issues.

First, the EU legislature is well aware of the risks attached to information overload for consumers. Nevertheless, the CCD 2023 not only maintains the approach according to which the provision of adequate information allows consumers to compare and make reasonable decisions, but it also increases the amount of information to be conveyed to the borrower.<sup>13</sup> It would be a surprise if the revised MCD did not follow a similar path, especially bearing in mind that, as already stated, peer-to-peer lending and other digital platforms do not appear to be establishing themselves at high speed as relevant actors in the mortgage/immovable security market. However, deferring the decision on the regulation of these situations will probably result in the need to review the MCD again sooner rather than later.

Second, the APRC, which is not put into question by the legislature, may not play such a stellar role towards the protection of borrowers as anticipated. This is mainly because consumers may not understand that the APRC is only relevant to compare offers of the same type of credit and for the same duration, and even then, factors such as the addition of insurance premiums may affect

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more than 50 days there is credit and the CCD 2023 applies – although Member States may opt out as per Art 2(8)(b).

<sup>13</sup> Arroyo Amayuelas (2024) 7-8.



the APRC, as explained in the chapter dedicated to Belgium in this volume. It is clear, for instance, that an interest-only mortgage is more expensive, in the long term, than a regular mortgage where the principal is being repaid monthly and thus ceases to yield interest, and yet the APRC will be lower for the former. Moreover, there are other factors to be considered. For instance, the costs that may be payable up front are often understood to be part of the down payment by the consumer, who has saved an amount to that effect. Once the initial costs are covered, the consumer wants to know how much the monthly instalments will amount to, and the creditor is also interested in the consumer's ability to meet them, as part of any responsible borrowing/lending operation.

Third, it is worth mentioning that a higher level of consumer protection would be desirable with regard to the reflection period and/or the right of withdrawal (Article 14(6) MCD), given the duration of mortgage credit agreements and the consequences for the consumer in the event of default. Curiously, the evaluation report found that consumers felt they are not given enough time to reflect, more so even than prior to the implementation of the MCD. Perhaps one of the problems is that the MCD merely states that the pre-contractual information needs to be provided 'in good time' before the consumer is bound by the contract (Article 14(1)(b) MCD),<sup>14</sup> which is a very loose expression. Unfortunately, it has been copied into a number of domestic pieces of legislation, perhaps for fear of not adequately respecting the mandatory harmonisation.

Finally, it is striking to note the very different perception and application of the Unfair Contract Terms Directive (UCTD)<sup>15</sup> to mortgage credit agreements across Member States. For more than two decades, there was very little litigation in this respect. Somehow, mortgage loans were not viewed in the same light as other consumer loans, probably because they appertained to the (untouchable) realm of banking law. This was, of course, a misconception. The effects of the 2008 financial crisis, especially in Spain, led to an array of ECJ decisions dealing with unfair contract terms in mortgage agreements. As a result, the duration of enforcement proceedings has more than doubled and the legislature has put in place mandatory rules on default interest and on early acceleration, and has ensured the notary's involvement prior to the conclusion of the contract, all of which is aimed at barring future claims based on unfair terms. This process, however painful, has contributed to 'sanitise' Spanish mortgage contracts, without prejudice to new unfair terms arising in the future. By contrast, in other systems, it is recognised that legislation on unfair terms may provide better remedies for the consumer than the MCD itself. This is the case in the Netherlands, with regard in particular to compensation for early repayment, especially where the MCD and implementing legislation are not applicable because of when the payment took place. From a completely different point of view, the experience in Poland also shows the courts' reluctance to apply the UCTD in the context of foreign currency loans, and a similar result is found

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<sup>14</sup> See now, also, Art 10(1) CCD 2023.

<sup>15</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.



in Romania, where the UCTD lacks effectiveness due to procedural barriers. Thus, whilst some jurisdictions have made significant progress in the level of consumer protection thanks to the UCTD and the ECJ decisions, in others reluctance to interfere with banking practices seems to endure despite developments at EU level.

### 3 Bundling and Tying Practices

The MCD generally allows bundling, but not tying, although there are a few cases where the latter is accepted (Article 12).

One of these exceptional cases where tying is possible concerns opening or maintaining ‘a payment or a savings account, where the only purpose of such an account is to accumulate capital to repay the credit, to service the credit, to pool resources to obtain the credit, or to provide additional security for the creditor in the event of default’. This is probably reasonable, but the standard requirement of maintaining a servicing account may entail costs for the consumer although its main purpose is to facilitate the lender’s job. For this reason, prior to the MCD, the supervising authority in Spain had provided that such accounts should be free of charge. Paradoxically, as a result of the MCD, this has ceased to be the case. Instead, the Polish legislation still guarantees that these accounts should not entail costs for the consumer. Although it would lead to a loss of income for the lenders, if the review of the MCD aims at enhancing consumer protection, stating that accounts required by lenders should be free of charge would be a step forwards in the right direction (see, however, Recital 41 CCD 2023).

Another instance where tying is allowed concerns payment protection insurance (PPI). On paper, products designed to protect consumers from defaulting in the event of retirement, death or job loss should be beneficial to both parties. However, in practice, it may be the case that PPI products do not cover situations considered at ‘high risk’, such as psychological illness or illness due to pre-existing medical conditions or unemployment after a certain age. As stated by consumer associations during meetings carried out in the context of the review of the MCD, this results in an over-priced product with limited or no value in terms of insurance coverage. This explains, for instance, why Poland has not allowed tying practices as per Article 12(2)(b)(c) and (3) MCD, and the information requirements for bundled products can be deemed to gold plate the EU provisions. Also, it appears that pre-ticked boxes and aggressive sales practices are a frequent occurrence, even if an insurance product, for example, is presented as bundled (and not tied). This is most likely prompted by the high commissions that banks receive as a percentage of the insurance premium if this is provided by a third party, the incentives for staff to place such products and the fact that sometimes lenders design mortgage loans that would not be profitable without the bundled products.<sup>16</sup>

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<sup>16</sup> On such matters, see the thematic review by the European Insurance and Occupational Pensions Authority and the warning it issued to insurers and banks <<https://www.eiopa.europa.eu/publications/>>



These are all indicators of bad business practices, which the MCD could contribute to eradicating. Perhaps unsurprisingly, the evaluation report found that bundling practices had increased in a similar proportion as to that in which tying practices had decreased as a result of the MCD.<sup>17</sup>

#### 4 Responsible Lending and Promoting the Uptake of Green Mortgages

One of the goals of the MCD was to enhance responsible lending, and it endeavoured to do so by laying down provisions on the creditworthiness assessment and its effects on granting credit. Whilst more stringent conditions in this respect may have excluded some sectors from accessing credit (and thus, perhaps, from adequate housing), it is still obvious that lending only when there is a reasonable expectation that the borrower will be able to meet the obligations arising from the contract is beneficial to both consumers and lenders, and that it facilitates financial stability. This is still an ongoing debate, while other pressing matters need to be addressed: the energy renovation of the very obsolete European building stock is one of the EU priorities when it comes to mitigation and adaptation to climate change. Taking the energy efficiency of the collateral into account within the creditworthiness assessment is one of the possibilities when considering the potential role of the MCD in promoting the uptake of green mortgages.

##### 4.1 The Creditworthiness Assessment under Review?

A *pièce de résistance* of the MCD is Article 18 and, more specifically, the prohibition to grant credit if the creditworthiness assessment is negative, ie if there is not a reasonable expectation that the consumer will be able to meet the obligations arising from the credit agreement. It appears that the MCD may have forced Member States to change their legislation to this effect (eg Portugal and Spain). Although the rule raised criticism because more stringent solvency controls may exclude consumers, particularly young home buyers and vulnerable sectors of the population, from access to credit (this appears to be the perception in Ireland, Lithuania, Portugal and the United Kingdom, for instance), for others it does not seem to have as relevant an impact as housing affordability itself (the Netherlands).<sup>18</sup>

The MCD does not explain what consequences derive from lack of compliance with this provision. It certainly does not lay down private law remedies,

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<sup>17</sup> Directorate General for Financial Stability, Financial Services and Capital Markets Union (European Commission) & RPA (2020) 123 ff.

<sup>18</sup> See, however, in the Netherlands, the rather lax regulation on LTV limits and, for Ireland, the combination of restrictive rules with high property prices that would explain exclusion from the market. The regulation in Lithuania appears to boast some of the strictest LTV and DTI ratios.



which are left to domestic legislation. Some Member States have expressly opted to sanction the lender with loss of interest; in others, there is an ongoing discussion as to what the private law solution should be since nullity of the agreement may leave the consumer in the non-desirable situation of having to return the loan immediately, despite having invested the money. Although perhaps it may be deemed to exceed the EU's powers, clarification in this respect would be advisable. Perhaps the Czech model, where the law in this respect departs from the general rules in the Civil Code and thus nullity of the mortgage loan does not entail immediate restitution of the principal, could be considered.

As for the information upon which the creditworthiness assessment is to be based, Article 18 MCD does not define what data should be gathered by the lender. It merely states that the creditworthiness assessment must rely on factors relevant to verifying the prospect of the consumer meeting the obligations arising from the agreement, which would suggest that only financial information is relevant. Article 20 MCD further confirms that the assessment 'shall be carried out on the basis of information on the consumer's income and expenses and other financial and economic circumstances which is necessary, sufficient and proportionate'. This, together with the fact that the assessment must be carried out in the interest of the consumer, to prevent irresponsible lending practices and over-indebtedness, is now expressly mentioned in Article 18(1) and (3) CCD 2023. The latter also provides examples of data that should be taken into account and excludes special categories of data referred to in Article 9(1) of Regulation (EU) 2016/679, as well as recurring to social networks as external data. During the review of the MCD, the financial sector was in favour of keeping the Directive principle-based in this regard. Hopefully, the revised MCD will at least clarify that the creditworthiness assessment should be carried out in the consumer's interest and adopt the innovations introduced by the CCD 2023. It is less likely for the MCD to go much further. However, the risks of profiling are not limited to information obtained via social networks. The MCD should factor in other possibilities of profiling arising from the use of AI and, if need be, amend the CCD 2023 to this effect.

The CCD 2023 also responds to the uncertainties highlighted by the Commission's report on the review of the MCD as to how the creditworthiness assessment should be carried out when there is more than one borrower, by providing that the assessment should be made on the basis of the consumers' joint repayment capacity. Given how recent the CCD 2023 is and that the consultation was run in parallel, it is to be expected that the revised MCD will adopt the same criteria, also with regard to the already mentioned use of AI and other automated processes, and the right to obtain explanations on the reasons behind the result.

As was already the case in Article 18(6) MCD, the CCD 2023 provides that the consumer's creditworthiness will be reassessed every time there is a significant increase in the total amount of credit granted (Article 18(10)). Perhaps surprisingly, however, according to Article 35(1) CCD 2023, 'creditors



shall not be required to perform a creditworthiness assessment in accordance with Article 18 when modifying the existing terms and conditions of a credit agreement in accordance with the third subparagraph, point (b) of this paragraph, provided that the total amount payable by the consumer is not significantly increased when modifying the credit agreement'. This means that the creditworthiness assessment needs to be carried out when totally or partially refinancing, but not when the terms of the credit agreement are modified in the context of forbearance prior to enforcement, insofar as the amount of the loan does not increase substantially. Leaving aside that it is difficult to determine what a 'significant increase' is, it should be noted that measures such as a change of type of credit agreement or deferred payments or payment holidays or even an extension of the term, may have an impact on the consumer's repayment capacity (in the latter case, for instance, if it takes the consumer into retirement). Curiously, the NPLD introduced in the MCD (Article 27a) and in Directive 2008/48/EC (Article 11a) rules designed to protect consumers if the terms of the credit agreement are amended, precisely because consumers may find themselves in a situation of dependency where their bargaining power is exponentially reduced. Undoubtedly, this will be even more so if they are undergoing financial difficulties that may lead to enforcement. The relaxation of responsible lending rules prior to enforcement, as per Article 35(1) CCD 2023, may determine changes in the approach of supervising authorities in certain Member States, such as Belgium, where the modification of contractual terms is subject to strict conditions, thus rendering it very difficult for the parties to voluntarily reach forbearance agreements, which means that they then revert to informal solutions, leaving borrowers, in effect, at the lenders' mercy.<sup>19</sup> Including more lenient provisions, however, is a matter that requires careful thought since forbearance measures should always be viable (see below 7.2). The review of the MCD certainly provides an adequate space for reflection.

#### 4.2 Green Mortgages and whether the MCD May Contribute to Decarbonisation Goals

Green mortgages are designed to finance the purchase, construction, or renovation of residential and commercial properties with high energy performance or where this is significantly increased.<sup>20</sup>

Energy efficient mortgages (EEM) are purported to benefit all parties concerned: borrowers, through lower interest rates, reduced energy bills and increased property value, and lenders, by lowering default risks and capital

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<sup>19</sup> See the chapter on Belgium in this volume.

<sup>20</sup> See the Energy Efficient Mortgages Initiative, 'Definition of Energy Efficient Mortgage',

14 November 2018, where a 30% improvement in the energy efficiency of the building is considered significant <<https://energyefficientmortgages.eu/wp-content/uploads/2021/07/EEMI-Definition-14.11.18.pdf>>.



requirements.<sup>21</sup> They also aim to contribute to economic growth and environmental targets, such as those recently established by the new Directive on the energy performance of buildings.<sup>22</sup> The EU embraces EEMs as part of its Renovation Wave<sup>23</sup> within the European Green Deal,<sup>24</sup> comprising multiple legislative and non-legislative initiatives.<sup>25</sup>

The Commission's public consultation within the process of reviewing the MCD expressly included as a preliminary problem the need to support the uptake of green mortgages. The evaluation report had found that although the Directive does not pose barriers to green mortgages, stakeholders believed that there is potential for growth and it is suggested that a possible incentive would be to take energy efficiency considerations into account during the credit-worthiness assessment, because the borrower's income will go further if utility bills are lower and thus, as already stated, the probability of default is lower.<sup>26</sup> The same report, however, mentions that some associations representing creditors do not agree with the inclusion of detailed prescriptions of such nature in the MCD, and that the design of sustainable financing products should be left to the parties concerned. However, the evaluation report also found that the lack of definition of 'green mortgages' and 'energy efficiency' makes data collection difficult and poses the risk of the term being used as a marketing tool (green-washing). In response to the Commission's call for technical advice on the review of the MCD, the European Banking Authority (EBA) considered that the MCD has a neutral effect on the uptake of green mortgages but recommended the adoption of a harmonised European definition thereof.<sup>27</sup>

Although the EEMI describes the green mortgage 'ecosystem' as a 'virtuous circle', ie a win-win scenario for all parties concerned, with a positive impact

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21 Inter alia, see Energy efficiency Data Protocol and Portal (EeDaPP), 'Final report on correlation analysis between energy efficiency and risk (D5.7)', 26 August 2020; Directorate General for Energy (European Commission), 'The quantitative relationship between energy efficiency improvements and lower probability of default of associated loans and increased value of the underlying assets : final report on risk assessment' (Luxembourg 2022, Publications Office of the European Union).

22 See Directive (EU) 2024/1275 of the European Parliament and of the Council of 24 April 2024 on the energy performance of buildings (recast).

23 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Renovation Wave for Europe – greening our buildings, creating jobs, improving lives"', 14 October 2020, COM/2020/662 final.

24 See <[https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en)>.

25 In further detail, on the topic addressed in this subsection, Anderson (2023).

26 Directorate General for Financial Stability, Financial Services and Capital Markets Union (European Commission) & RPA (2020) 15.

27 EBA, 'Opinion of the European Banking Authority on the European Commission request for technical advice on issues related to the Mortgage Credit Directive', 23 June 2022, 23. See also, from the perspective of consumers associations across Europe, BEUC, 'Affordable green loans: getting consumers on board of the green transition', 14 September 2021, 4-6.