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HEALTH CRISIS, EMERGENCY LEGISLATION AND ACCESS TO CREDIT: A FEW OBSERVATIONS

ABSTRACT. *Access to credit, with its multiple implications in terms of financial and social inclusion (the latter especially when consumers are involved), has been subject to important interventions at the outbreak of the COVID-19 pandemic crisis. The paper examines the impact of these 'emergency' measures on the existing framework of private law regulating loans and the opposition of interests which follow from the adoption of these policies. It also evaluates more in general the role of financial institutions as actors, often on behalf of the State, in the governance of emergency situations.*

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1. Introduction

As we hit the two-year anniversary of the outbreak of the COVID-19 pandemic, the legal issues raised by the measures and new legislation adopted by governments worldwide and the surrounding debates are as present as the medical and scientific data which are part of our daily newsfeed. This brief contribution would like to focus on a very specific aspect of the emergency regulations that have been implemented over the past two years, namely those measures that within the wider framework of provisions in support of the economy, have affected access to and availability of credit. The perspective of interest here is the legal one, with special attention to the impact that these measures have on existing (and future) loan contracts.

It is of course needless to recall that access to credit is a foundational issue under a multiplicity of aspects. It is the object of studies and specific regulations not only within economic and legal policies, but also an object of sociological, cultural and historical research, given the impact that a change in availability of credit has on societies.

Indeed, policies aiming at ensuring, promoting or restricting access to credit have characterized the regulation of economic activities through different eras and different macro and micro economic (and legal) policies. If one restricts the analysis to the second half of the past century and the first two decades of the present, there are at least two trends that can be discerned – albeit with a certain degree of over-simplification – regarding credit to individual borrowers in what can be considered as 'ordinary' conjunctures.

The first consists in a wave of strategies promoting easy credit, strongly tied to the so-called 'lending revolution' or 'democratization of credit', with policies emphasizing the inclusive effect of access to credit.[1] This is followed by a more cautious

[1] This 'revolution', beginning in the late 1970s, was based on the promotion of financial liberalization, the deregulation of interest rates, the process of securitization, the development and use of (computer-based) credit scoring, and the increase in use of all-purpose credit cards. See I. Ramsay, T. Williams "The Crash that launched a thousand fixes – Regulation of Consumer Credit after the Lending Revolution and the Credit Crunch", in A. Kern, N. Moloney, *Law Reform and Financial Markets* (Cheltenham: Edward Elgar Publishing 2011), at p. 221. For a reconstruction of 'democratization of credit' see J. Niemi-Kiesiläinen, I. Ramsay, W.C. Whitford (Eds), *Consumer Bankruptcy in Global Perspective*, (Oxford: Hart Publishing 2003); D. Burton, *Credit and Consumer Society,*

approach emerging at the eve of the 2007-2008 financial crisis with the growing awareness of the effects of consumer over-indebtedness, and fully affirming itself in the aftermath of the crisis and its ensuing credit crunch with the realization of the larger systemic impact of consumer debt on financial stability.[2] Hence the introduction of several regulatory measures of banking activities and credit contracts and the rising importance of the concept of 'responsible credit.'

If access to credit is a delicate topic in conjunctures of relative economic stability, it becomes critical in contexts of systemic emergency as a vital instrument both for the management of crises, and, under certain circumstances, for the mitigation and/or prevention of their effects.

Even a quick glimpse at the two major crises that have distressed the global economy over the past fifteen years, namely the global financial crisis of 2007-2008 and the crisis provoked by the COVID-19 pandemic in 2020, immediately evidences that one of the first policies to be affected and which calls for an intervention in times or in the aftermath of emergencies concerns access to credit.

The case of the 2020 COVID-19 pandemic is at point. Among the priority measures approved by governments, alongside health provisions of various nature, there were important regulatory measures having the scope of ensuring that the restrictive orders affecting economic activities adopted in many States due to the health emergency would

(Abingdon: Routledge 2008). The reference to 'democratization' derives from the U.S. context in which these policies were applied to the mortgage and housing market, allowing low income citizens to access private home-ownership; hence the emphasis on financial and social inclusion (see G. Comparato, *The Financialisation of the Citizen*, (Oxford: Hart 2018), at p. 41). This discourse naturally also brought to the fore the problem of ensuring access to credit on a non-discriminatory basis (see Ramsay, "Consumer Credit Law, Distributive Justice and the Welfare State", in 15 *Oxford Journal of Legal Studies*, 177, 1995, at pp. 177 and 193 and ff.; A.D. Taibi, "Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights and Substantive Racial Justice", in 107 *Harvard Law Review* 1465, 1994).

[2] Indeed, one of the effects of the lending revolution – albeit not deriving solely from it – was an increase in consumer debt and in consumer over-indebtedness. In this sense, some have highlighted that democratization of finance has an "inherent contradiction": it needs to promote the access to financial products, and thus indebtedness, but on the other hand it has to avoid over-indebtedness (Comparato, *The Financialisation of the Citizen*, cit., at p. 72). See F. Ferretti, D. Vandone, *Personal Debt in Europe. The EU Financial Market and Consumer Insolvency*, (Cambridge: Cambridge University Press 2019). See also G. Rojas Elgueta, "Profili sistematici dell'esdebitazione: dalla limitazione di responsabilità dell'imprenditore alla protezione sociale del consumatore", in *Rivista di diritto privato* 2/2014, pp. 261, at 269 and ff. for an analysis of the economic and cultural models of bankruptcy discharge.

not interrupt access to credit for firms, households and individual borrowers (see *infra*).

The urgency of these interventions lies in the need to ensure that the flow of capital for businesses and economic activities and for individuals is not disrupted – or worse interrupted – by a sudden change in the economic conjunctures. This is vital so as to allow both the continuation of production processes and the consumption for individuals through access to different forms of credit, such as consumer credit or mortgage credit. This simple ascertainment induces a few additional considerations on the characteristics of these policies.

2. Expansive and restrictive policies

The first consideration is that interventions on access to credit, whether through temporary executive orders or through vaster reforms of lending activities, are not necessarily expansive interventions. The comparison between the 2008 global financial crisis and its aftermath, and the 2020 COVID-19 crisis is once again emblematic.

On the one hand, the global financial crisis triggered in 2008 introduced vast reforms of the banking system, characterized by strengthened capital requirements for banking institutions, mechanisms of prudential oversight, changes in banking governance and in credit risk management.[3]

On the other hand, during the first phase of the COVID-19 crisis, interventions aiming at ensuring that credit flow would not be interrupted have acted upon two fronts: uplifting or easing of the prudential capital requirements for lending institutions (allowing for example the strict parameters in terms of non-performing loans (NPLs) to be momentarily suspended), and simplifying the processes of creditworthiness assessments for undertakings and individual borrowers. If policies intervening on access

[3] One can recall for example the approval of the Basel III Accords in 2010; the creation of macroprudential authorities (MPAs) in several jurisdictions and the establishment of the Financial Stability Board in 2009; the foundation in the European Union of the European Systemic Risk Board, of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority and the ensuing framework for the creation and implementation of the European Banking Union as of 2012; and the adoption of the vast reform in US law contained in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.

to credit do not immediately imply easier access, gate-lifting, or promotion of loan-taking, it is interesting to note that changes in policies are often triggered as a counter-reaction to a prior excessively strict or excessively lax policy.

Whilst the measures enacted after 2008 and previously recalled were undoubtedly a move in the sense of tightening the parameters through which certain types of loans could be granted (the well-known case of the 'NINJA' – no income, no job and no assets – loans in the United States and their role in the subprime crisis), it should also be recalled that the crisis was in part provoked by two decades of the so-called 'lending revolution'. Under the latter, recourse to credit had received strong impulse not only as an instrument to fuel the production of consumption goods, but also as a means to access on the private market services no longer provided for by the State. The gradual re-dimensioning of the Welfare State in many countries entailed the private purchase (often financed through loans) of health plans, retirement plans, insurance or higher education for example.[4]

3. Public interventions and the role of banking institutions

The second observation is that interventions regulating access to credit in emergency situations, whether as a key instrument to avoid an increase in spirals of debt both for firms and individuals or as to avoid dangerous interruptions in the flow of

[4] See Niemi-Kiesiläinen, Ramsay, Whitford (Eds), *Consumer Bankruptcy in Global Perspective*, cit., at p. 4 also noting that "Democratisation of credit allowed for the privatisation of social insurance, in the form of credit availability, in societies where the public insurance provided by the welfare state has been reduced"; COMPARATO, *The Financialisation of the Citizen*, cit., at p. 41 and ff. on the implications in terms of social and financial inclusion of the 'democratization of finance and credit'; C. CROUCH, "Privatised Keynesianism: An Unacknowledged Policy Regime", in 11 *British Journal of Politics and International Relations*, 382, 2009; RAMSAY, in 15 *Oxford Journal of Legal Studies*, 177, 1995, cit.. For an acknowledgement of the phenomenon, see for example the EU Commission White Paper on Financial Services Policy 2005-2010 (COM (2005) 629) which recognized the gradual withdrawal of the public sector from financing certain aspects of social systems and the need to promote 'good investment choices' (e.g. for pensions) and a direct involvement of citizens in financial issues (White Paper, at 2.6). See also T.A. DURKIN, G. ELLIEHAUSEN, "Consumer Lending", in A.N. Berger, P. Molyneux, J.O.S. Wilson (Eds), *The Oxford Handbook of Banking*, (Oxford: OUP 2d ed., 2015), pp. 312, at 313 on the role of consumer lending in contributing to the growth of durable goods industries.

credit, are public governmental interventions, typically implemented through executive orders and legislative provisions (and in the case of the COVID-19 crisis here examined, accompanied by a framework of supranational soft law in the form of guidelines and recommendations). These are not goals that are left to market forces and their adjustment; on the contrary, the risk that the latter may amplify existing shocks induces authoritative provisions where there are systemic risks on one side, and negative impacts on social and financial exclusion on the other.

Yet – and this leads to the third observation – these interventions adopted in emergency conjunctures more often than not require the use of intermediaries (i.e. banking institutions) for their implementation. The intermediaries, however, are not neutral third parties on the credit market and they need to comply – *inter alia* – with prudential standards and regulations. The implementation, as a *longa manus* of the executive power, of governmental action plans and of specific policies on access to credit, especially when these policies aim at facilitating the access, may not be without consequences on the longer-term solidity of those same lending institutions, with possible systemic repercussions.[5]

Again, a comparison between the global financial crisis and the COVID-19 crisis offers some interesting observations. In both cases, governmental policies have centered around banks and their lending practices. During the 2008 subprime crisis and the following 2011 sovereign debt crisis, banks were put on the watch list and attracted strong criticism for their role in originating the crisis. Ensuing reforms, as previously recalled, acted on credit risk management of the lending institutions and on prudential standards required from them. This entailed, among other consequences, stricter parameters of evaluation before loans could be granted, with a growing importance of procedures of creditworthiness assessments of borrowers (evident also in the case of consumers, with the provisions contained for example both in the EU Consumer Credit Directive[6] and in the Mortgage Credit Directive,[7] and in the US

[5] See A. Brozzetti, E. Cecchinato, E. Martino, "Supervisione bancaria e Covid-19", in U. Malvagna, A. Sciarrone Alibrandi (Eds), *Sistema produttivo e finanziario post Covid-19: dall'efficienza alla sostenibilità. Voci dal diritto dell'economia,* (Pisa: Pacini giuridica 2021), at pp. 170-171; 174.

[6] Directive 2008/48/EC of the European Parliament of 23 April 2008 on credit agreements for consumers, in *OJ*

Dodd-Frank Act[8]).

Furthermore, and in close relation to the consequences that the previous lending revolution had had on consumers and households, policies aiming at preventing consumer over-indebtedness and at introducing special procedures of consumer bankruptcy were implemented and the notion of 'responsible lending' (declined both as responsible lending and as responsible borrowing) began to circulate, though rarely finding legislative implementation.

During the COVID-19 crisis banks were once again at the center of policies, but this time as the preferred (though not the only) intermediaries for the implementation of the emergency measures.[9] As the Chair of the ECB Supervisory Board declared, "Unlike in the 2008 financial crisis, banks are not the source of the problem this time. But we need to ensure that they can be part of the solution."[10]

The measures concerning the banking sector in Europe, under the aegis of the EU Institutions (i.e. the Commission's 'Temporary Framework for State aid measures to support the economy during the current COVID-19 outbreak'[11]) and governed by guidelines of the European Central Bank, the European Banking Authority and the Basel Committee, were adopted along with a series of other economic policy decisions aiming at four macro-objectives: "dealing with health emergency needs; supporting economic activity and employment; preserving monetary and financial stability; and preparing the ground for recovery.[12]" These include the temporary suspension of the

*L*133, 22.5.2008, p. 66, Article 8; See also Article 18 of the Proposal for a Directive on Consumer credits of 30.6.2021 (COM (2021) 347 final).

[7] Directive 2014/17/EU of the European Parliament of 4 February 2014 on credit agreements for consumers relating to residential immovable property, in *OJ L*60, 28.2.2014, p. 34, Article 18.

[8] Title XIV, Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 1639(c) - Dodd-Frank Act § 1411.

[9] It is interesting to note that in the case of the Italian emergency plan, the so-called *Decreto cura Italia* (d.lgs n. 18/2020), contains a Chapter (*titolo III*) entitled 'measures for the support of liquidity through the banking system'.

[10] Andrea Enria, Chair of the Supervisory Board of the ECB, Opinion piece published on 1 April 2020 (available at <https://www.bankingsupervision.europa.eu/press/interviews/date/2020/html/ssm.in200401~c19a2ad1ed.en.html>.

[11] Commission Communication of 20 March 2020 (2020/C 91 I/01).

[12] See C.V. Gortsos, "The response of the European Central Bank to the current pandemic crisis: monetary policy

Stability Pact, flexibility in State Aid allowances and the approval of instruments like the temporary Support to mitigate Unemployment Risks in an Emergency (SURE) Plan and the Recovery Fund.

With reference more specifically to lending activities and access to credit as measures supporting the financing of productive activities, the banking regulatory and supervisory authorities emitted financial-stability related measures allowing, within set limits, for the derogation of many of those same rules that had been adopted in the aftermath of the global financial crisis; these include flexibility in the application of micro-prudential banking regulations and the authorization of exceptional uses of prudential capital buffers.[13]

Indeed, the COVID-19 crisis hit when a series of measures approved in May 2019 and known as the 'new Banking Package,' further tightening some of the parameters in terms of capital requirements and banking resolution, were meant to enter into force.[14] It has been noted that the choice of implementing the measures with the aid of banking institutions was made possible precisely because those same banking

and prudential banking supervision decisions", *EBI Working Paper Series* n. 68/2020, p. 3.

[13] The ECB, making use of the 'flexibility' allowed on the basis of the Regulation EU 575/2013 on prudential requirements for credit institutions and investment firms (CRR) and of the Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV) adopted measures on temporary capital and operational relief (relaxing some buffers and adapting the composition of specific capital requirements); allowed flexibility in the treatment of NPLs and transitional rules on the international accounting standard (IFRS 9); recommended a temporary ban on payment of dividends by credit institutions. See GORTSOS, "The response of the European Central Bank to the current pandemic crisis: monetary policy and prudential banking supervision decisions", cit. at p. 15 and ff. For an overview, see ECB, "Our response to the coronavirus pandemic" (accessible at <https://www.ecb.europa.eu/home/search/coronavirus/html/index.en.html>) and the details of the single measures; EBA, "Our response to Coronavirus (Covid-19)" <https://www.eba.europa.eu/coronavirus>) and EBA "Guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis" (April 2020); see also the measures adopted by the Basel Committee to alleviate the impact of COVID-19 <https://www.bis.org/press/p200403.htm>.

[14] The EU 'new banking package' (including new rules approved by the Basel Committee) was approved in May 2019 with amendments on the Capital Requirements Directive and the Capital Requirements Regulation (via the so-called CRD5/CRR2 (Directive 2019/878 and Regulation 2019/876), on the Bank Recovery and Resolution Directive (via Directive 2019/879), and on the Single Resolution Mechanism (via Regulation 2019/877); the entry into force of this package (along with that of new Basel III rules) was however suspended due to outbreak of the COVID-19 pandemic in 2020. See BROZZETTI, CECCHINATO, MARTINO, "Supervisione bancaria e Covid-19", cit., at p. 165 and ff.

institutions had been strengthened by important (and ongoing) reforms following the global financial crisis.[15]

The emergency provisions adopted in the first phase of the COVID-19 pandemic impacted access to credit principally by allowing forbearance (although not to be classified as such[16]) measures towards debtors through moratoriums on existing payments and simplified procedures – including creditworthiness assessments – for the granting of new loans (with the State stepping in as a guarantor); and with subsidized interest rates.[17] The content of these measures, to be carried out by intermediaries, brings to a fourth and conclusive observation.

4. The role of private law

The implementation of the policies recalled above is principally entrusted to private contract law. Indeed, the different norms and recommendations enacted to ensure credit flows to businesses and households directly affect the pre-contractual phase and the substantive content of loan contracts yet to be concluded and, introduce derogations on existing loan contracts.

Whilst there is nothing unheard-of in this form of contract governance, the specific role of the chosen intermediaries – banks and lending institutions – can lead to additional sources of 'tension' that can be singled if one examines the different components of lending contracts (as will be seen shortly).

[15] Brozzetti, Cecchinato, Martino, "Supervisione bancaria e Covid-19", cit., at p. 167.

[16] See EBA, Guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis (consolidated version 2.12.2020), n. 10-14.

[17] These measures were part of the monetary policy measures adopted by the ECB, including a series of decisions to support bank lending to small and medium-sized enterprises (i.e. ECB Decision 2020/407 of 16 March 2020) and to households and firms (ECB Decision 2020/614 of 30 April 2020), which provided the basis for the national measures cited above. See for a detailed overview of the measures, Gortsos, "The response of the European Central Bank to the current pandemic crisis: monetary policy and prudential banking supervision decisions", cit., at p. 7 and ff.; C. Brescia Morra, "Lending activity in the time of coronavirus" in W.G. Ringe, Gortsos (Eds), *Pandemic Crisis and Financial Stability*, (EBI e-Book Series 2020), at p. 394 and ff.

Indeed whenever measures affecting access to credit are adopted, whether they imply an 'easy' access to credit or, on the contrary, a restriction in the granting of loans, there is often a mismatch between the private contractual autonomy of lenders and borrowers on the one side, and the public sphere (aiming at financial and systemic stability, at the development of credit markets and/or at financial inclusion of consumers) on the other. Contrasts can become particularly exacerbated when new or derogatory measures of existing legislation are taken so as to tackle the economic consequences of an emergency and the proper functioning and stability of the market are challenged. It also explains the attention that policies on access to credit attract not only from operators but also from the mainstream media and public opinion; the policies impact at the very least a) access to capital for firms; b) financial and social inclusion (or exclusion) for individuals and households; c) the banking system.

There are at a minimum three perspectives from which a loan contract can be examined that highlight potential frictions, especially when the borrower is a consumer.

First of all, there is the natural adversarial position between the parties in any (loan) contract. Indeed, a credit contract is first of all a private contractual relationship between a lender and a borrower. Any measure in favor of a debtor aiming at promoting access to credit (even in a temporary, emergency context), gives rise on the one side to an expectation or even a potential 'right' to credit of an applicant borrower (for example one who meets the formal requirements laid down in specific provisions of support for firms or households, or for certain categories of vulnerable or socially excluded borrowers). On the other side, this can come into conflict with the contractual freedom and 'freedom to conduct a business' of the lender (this too recognized as a fundamental freedom in many national Constitutions as well as in international Charters). This is not to speak of the issues related to the substantive content of a loan contract: above all the question of the interest rates and contractual terms applied to the single contract (and not coincidentally consumer loans – i.e. consumer credit and mortgage credit – are highly regulated not only in the pre-contractual phase through the information paradigm, but also as far as the substantive terms of the contract are concerned[18]). It is

[18] At the EU level suffice it to recall for example the two Directives on Consumer Credit (Directive 2008/48/EC)

under this perspective that one of the principal issues when policies of access to credit are analyzed concerns not only 'access to' but rather access to 'affordable' credit or at 'fair terms.'[19]

However, granting a loan or mortgage credit also transcends the mere private contractual sphere of a debt and credit. Extension of credit depends on a previous assessment of the consumer's financial position (creditworthiness, ability to pay, adequacy, and so forth). The compliance with this requirement responds to two related functions: the observance of prudential requirements for lenders and the prevention over-indebtedness of borrowers. The stringency of the requirement and the impact of the assessment on the decision of lenders to grant credit introduce additional elements of potential friction between the contractual counterparties.[20]

There is a second aspect to be considered when looking at individual consumer borrowers. For this category, access to credit is often the only means to access goods and services that are deemed fundamental (suffice it to consider for example access to housing through mortgage credit; access to education through student loans; or access to health paid through private insurance) and that receive recognition at a constitutional level.[21]

and on Mortgage Credit (Directive 2008/48/EC); or the 2010 Dodd Frank Act and the 1968 Truth in Lending Act (15 U.S.C. § 1601 et seq.) in the United States.

[19] See for example *ex multis* G. HOWELLS, "Seeking Social Justice for Poor Consumers", in Ramsay (Ed.), *Consumer Law in the Global Economy*, (Dartmouth: Ashgate 1997), at p. 266 and ff., introducing, even before the devastating impact of the 2007-2008 global financial crisis, arguments on the 'welfare' of borrowers (especially of fragile and/or low income borrowers often targeted by high cost credit) that lenders should take account of.

[20] On the stringency of the creditworthiness assessment and the problem of the so-called 'duty to deny', please see N. VARDI, "Framing Duties of Responsible Credit Policies in EU Law", in *Osservatorio del diritto civile e commerciale*, 2/2019, 471, at p. 494 and ff. and the literature cited therein.

[21] Housing rights for example have received a multilevel constitutionalization not only in national legal systems, but also at a supranational level, (i.e. via the ECHR and EU private law) where it is regulated indirectly through the regulation of other areas of EU private law such as consumer credit, mortgage credit, and unfair contract terms (see I. DOMURATH, C. MAK, "Private Law and Housing Justice in Europe", in 83 *Modern Law Review* 1188, 2020, at p. 1189). The 'right to housing' has been invoked in case law of the CJEU dealing, not coincidentally, with mortgage enforcement proceedings, especially with reference to their compatibility with effective consumer protection under Directive 93/13 on unfair terms in consumer contracts (i.e. whether in mortgage eviction procedures consumers have effective procedural remedies and whether they can invoke the invalidity of certain terms of the underlying mortgage loan agreement). See CJEU Case C-415/11 *Mohamed Aziz* v. *Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa),* 14 March 2013, EU:C:2013:164; CJEU Case C-169/14, *Juan Carlos Sánchez Morcillo*

It ensues that access to credit in these instances has broader implications, or rather, in a reverse perspective, denial of credit impacts access to certain fundamental rights and has further relevance in terms of financial and (consequential) social exclusion of individuals. The effectiveness of policies aiming at ensuring access to credit, as a means to access further rights, becomes of crucial standing. It is within this context that a negative and a positive dimension of access to credit can be envisioned: the negative dimension can be identified with policies against discrimination, whereas the positive dimension refers to policies aiming at financial and social inclusion. Hence the importance and sensitivity of public action which intervenes in regulating access to credit.

If all this means that the decisions to grant or deny a loan impact a wide array of rights that go beyond the individual contract, including the effects that they may have on the community (i.e. once again suffice it to consider impact of shortage on housing), there is a third aspect that requires consideration and that concerns the position and obligations of the lenders. The decisions of the latter, as previously recalled, are not completely unrestrained in that they respond to prudential standards, imposed by concerns of systemic stability. Therefore, if techniques of credit risk management normally answer the need to comply with these regulations, the introduction of special – derogatory – measures in an emergency conjuncture can jeopardize certain mechanisms of balance.

This is evident for example with the cited temporary measures on NPLs adopted under the COVID-19 framework, the exit from which may prove complicated given the risk of an accumulation of NPLs in banks' balance sheets following a period of increase in the demand of credit by firms and households.[22] Whilst an uplifting of

and María del Carmen Abril García v. *Banco Bilbao Vizcaya Argentaria SA*., 17 July 2014, EU:C:2014:2099; CJEU Case C-34/13 *Monika Kušionová* v. *SMART Capital*, 10 September 2014, EU:C:2014:2189; CJEU Case C-407/18 *Aleš Kuhar* v. *Addiko Bank d.d.*, 26 June 2019 and CJEU Joined Cases C-70/17 and C-179/17, *Abanca Corporación Bancaria SA* v. *Alberto García Salamanca Santos* and *Bankia SA* v. *Alfonso Antonio Lau Mendoza*, of 26 March 2019). On the significance of this line of cases of the CJEU in promoting an indirect 'inclusive justice' for consumers and SMEs, see E. NAVARETTA, "Principi dell'Unione europea, politiche economiche e diritto privato", in *Osservatorio del diritto civile e commerciale* n.2/2020, p. 409, at p. 430 and ff. For a reconstruction on the evolution and significance of the right to housing, also with reference to mortgage credit, see also M.C. PAGLIETTI, "Percorsi evolutive del diritto all'abitazione", in *Rivista di diritto privato*, 1/2008, p. 5.

[22] GORTSOS, "The response of the European Central Bank to the current pandemic crisis: monetary policy and prudential banking supervision decisions", cit., at p. 20.

certain mandatory requirements (i.e. on capital and liquidity buffers for banks) does not per se affect contractual freedom of lenders, it can entail, if prolonged, the so-called boomerang effect that many have signaled.[23]

The 'tension' (this time beyond the adversarial position of the parties) is visible once again in the example of the duty to assess the creditworthiness of borrowers. On the one hand this duty responds, as previously highlighted, to prudential credit risk management of banking institutions (systemic stability). On the other, some of the national measures passed with the COVID-19 emergency legislation have provided for a simplified assessment procedure. The Italian emergency *Decreto cura Italia* (d.lgs n. 18/2020) for example introduced in its article 56 a simplified creditworthiness assessment for SMEs meeting certain requirements in order to obtain a moratorium on payments. This specific provision has attracted attention and criticisms regarding what is actually required from banks and the compatibility of these provisions with the (albeit non-binding) Guidelines adopted by the EBA in April 2020 on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis.[24]

The pressure between the need to comply with the emergency measures, the need to maintain solid structure, and the contractual autonomy in the conclusion of every new loan contract applied for under this conjuncture, is clear. This is all the more problematic if one considers that whilst the emergency measures approved are meant to be temporary, the effects on the banking institutions' balance sheets (and stability) deriving from a growth in impaired loans are likely to be long term.[25]

[23] Brozzetti, Cecchinato, Martino, "Supervisione bancaria e Covid-19", cit., at p 170; see also P. Rossi, "La sfida della gestione (condivisa o autogestita?) degli effetti tossici del COVID-19 sul sistema bancario europeo e nazionale", in Malvagna, Sciarrone Alibrandi (Eds), *Sistema produttivo e finanziario post Covid-19: dall'efficienza alla sostenibilità. Voci dal diritto dell'economia*, cit., p. 193 and ff.; and M. Maggiolino, "Le esposizioni deteriorate ai tempi della pandemia", in Malvagna, Sciarrone Alibrandi (Eds.), *Sistema produttivo e finanziario post Covid-19: dall'efficienza alla sostenibilità. Voci dal diritto dell'economia*, cit., pp. 200-201.

[24] See M. Condemi, "Il 'merito creditizio' nel contesto normativo conseguente alla pandemia da Covid-19" in Malvagna, Sciarrone Alibrandi (Eds), *Sistema produttivo e finanziario post Covid-19: dall'efficienza alla sostenibilità. Voci dal diritto dell'economia,* cit., at pp. 237-238 and p. 242; on the role and function required from banks in this contingency, see Brescia Morra, "Lending activity in the time of coronavirus", cit., at pp. 395-396; and at p. 402, highlighting that the emergency measures did not alter the role and activities required from banks (including in assessing the creditworthiness of borrowers).

[25] Brescia Morra, "Lending activity in the time of coronavirus", cit., at p. 396.

5. Conclusive remarks

It is precisely with reference to the long-term effects of the measures so far recalled, that a few conclusive remarks can be made. One can question first of all, whether the choice of intervening through intermediaries is an efficient and sustainable choice on the long term and what trace, if any, of the measures adopted will affect lending activities and credit contracts on the long run. Most of the provisions approved in the immediate concurrence of the outbreak of the pandemic were expressly labeled and intended as temporary measures. On the one side however, the economic crisis is far from over, as the pandemic continues to rage and cause disruption at different levels to many sectors of the real economy and to households. There are strong expectations that many of the provisions will be extended or renewed. Beyond the foreseeable impact that prolonged measures will have from the systemic point of view (i.e. the accumulation of non-performing or unlikely to perform loans), there is a further interesting question from the legal perspective. Namely, if certain simplified mechanisms (in terms of procedure) of access to loans on behalf of firms or individuals, will continue to characterize loan contracts – and if so, how this will be compatible with the regulatory framework painstakingly approved in the decade or so between the aftermath of the global financial crisis and the outbreak of the COVID-19 crisis.

Closely tied, is the issue of whether the provisions adopted in an emergency context may have set the blueprint not for future instability but rather, for a new *modus agendi* – which continues to rely on intermediaries and with all the necessary balancing to avoid distortive effects – for the implementation of access to credit policies aiming at combating financial exclusion. Or, as an opposite scenario, if the long-term effects of the derogation of prudential standards will lead to a credit crunch once the exceptional measures are terminated, impacting first of all and severely the most fragile categories of borrowers.