

LUIGI BUONANNO*, FRANCESCO MEZZANOTTE**

THE IMPLEMENTATION OF THE MORTGAGE CREDIT DIRECTIVE IN ITALY: SOME PROBLEMATIC ISSUES

ABSTRACT. *This article critically examines the implementation of Directive 2014/17/EU (Mortgage Credit Directive, MCD) in Italy, highlighting key legal and regulatory challenges. Transposed via Legislative Decree No. 72/2016 and integrated into the Italian Banking Law (TUB), the MCD aimed to harmonize credit practices and enhance consumer protection. The study explores five core areas: pre-contractual information duties, creditworthiness assessment, foreign currency mortgage loans, early repayment rights, and the evolving impact of artificial intelligence on credit scoring. It reveals tensions between EU consumer protection goals and Italy's traditional private law framework, particularly regarding remedies for breaches of information and assessment duties. The article also discusses the influence of landmark ECJ rulings, such as 'Lexitor' and 'Bank Millenium', and anticipates future regulatory shifts driven by AI and digitalization. Ultimately, it calls for a more integrated approach to consumer credit regulation that aligns national legal traditions with evolving European standards.*

CONTENT. 1. Introduction. – 2. Pre-Contractual Information. – 3. Creditworthiness Assessment. – 4. The Unfairness of the Indexation Clause in Foreign Currency Mortgage Loans. – 5. Early Repayment and Reduction in the Total Cost of the Credit. – 6. Instead of a Conclusion, Looking Ahead.

* Assistant Professor in Private Law at Bocconi University.

** Full Professor in Private Law at RomaTre University.

1. *Introduction*

The 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 (MCD) was transposed in Italy by the Decreto legislativo (legislative decree) of 21 April 2016, no. 72. The implementing regulation of domestic law was included in the general regulatory framework of banking and financial services set by the Decreto legislativo of 1 September 1993, no. 385 ('Testo Unico Bancario', TUB, Chapter I-*bis*, Title VI). Eight years have elapsed since the implementation of the MCD in Italy, and one may well argue that the European regulation has certainly marked the strengthening of a classical perspective linking property (i.e. ownership of residential property) to credit (i.e. loan contracts); however, such dyad was put into a regulatory dimension entwined with consumer law and this intersection had a significant impact on the evolution in the understanding of property rights when combined with credit contracts concluded by parties who are not on the same footing.

It has often been pointed out that the MCD was aimed at fostering two regulatory objectives relating to this realm of law, namely, (i) the well-functioning of the market and (ii) to combat risks of consumer over-indebtedness.¹ However, the triggering point stimulating the adoption of the MCD has been symbolised by a growing awareness of the existence of divergent legal approaches among Member States in considering the conduct of business when granting credit agreements that specifically relate to residential immovable property as well as in the regulation and supervision of credit intermediaries and non-credit institutions which provide credit agreements for these purposes.² As widely known, it was a response to the crisis caused by subprime

¹ On the objective underlying the MCD, see Pietro Sirena and Dario Farace, 'I contratti bancari del consumatore' in Ernesto Capobianco (ed), *I contratti bancari* (Utet 2021) 269. The twofold protective nature that characterizes the MCD proves in line with the rationale underlying the rules established in the United States by means of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301, §§ 5481-5603, and in laws amended at Title X. An analysis of the American regulatory intervention is provided by Howell E Jackson, 'Loan-Level Disclosure in Securitization Transactions: A Problem with Three Dimensions' in Nicolas P Retsinas and Eric Belsky (eds), *Moving Forward: The Future of Consumer Credit and Mortgage Finance* (Brookings Institution Press 2011) 189.

² See Recital 2 of the MCD. The historical root of the MCD can be traced back to the White Paper of 18 December 2007 on the Integration of EU Mortgage Credit Markets presented by the Commission COM (2007) 807 final, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l24487>> accessed 4 September 2025.

mortgages in the United States.³

The MCD rests mainly on two tools for pursuing the goal of responsible lending, and they are fully embraced by the Italian legislature: (i) a precontractual creditworthiness assessment of the consumer (Arts 18 and 20 MCD; Art. 120-*undecies* TUB); (ii) an appropriate evaluation of residential immovable property for the purpose of granting mortgage-backed credit (Art. 19 MCD; Art. 120-*duodecies* TUB).⁴

Interestingly, this Directive deals with the governance of the credit process, in which the MCD rules are designed to conform and discipline parties' initiatives, with the end of forging effective tools for offering services on the market.⁵ In this respect, the decision of the European legislature to specifically regulate this area was triggered by an acknowledged lack of relevant norms at supranational level.⁶ Hence, the adoption of the MCD hinged on the assumption that the irresponsible behaviour of lenders was determined by the absence of a regulation of this sector and not by the violations of rules of conduct by lenders themselves.⁷ From a more general perspective, this could also be deemed an oddity if one considers the deep connection between consumer credit and fundamental rights.⁸

Compared to the time when the MCD was implemented, the current Italian scenario, as is the case elsewhere, appears to be influenced by the well-known emergence of new technologies, artificial intelligence (AI) and digitalisation, which can play a pivotal role on how European standards, as duly transposed in Italy, are to be interpreted and should work. By way of example, in continuity with an ongoing debate in several EU Member States, scholars and institutions are paying growing attention to the intersection between artificial intelligence and credit scoring, as testified by a number

³ On this point, see recently Pietro Sirena, 'Tutela dei clienti e regolazione del mercato trent'anni dopo l'emanazione del Testo unico bancario' [2024] Quaderni di Ricerca Giuridica della Consulenza Legale - Banca d'Italia 123 130.

⁴ Sirena, 'Tutela dei clienti e regolazione del mercato' (n 3) 130-131.

⁵ See Amedeo Valzer, 'La disciplina del credito ai consumatori. Un approccio critico' [2021] Banca, borsa, titoli di credito 894 896.

⁶ Recital 4 of the MCD.

⁷ See Valzer (n 5) 898.

⁸ See Olga O Cherednychenko, 'The EU Charter of Fundamental Rights and Consumer Credit: Towards Responsible Lending?' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) 139; Federico Ferretti and Daniela Vandone, 'Credit Risk Analysis and Creditworthiness in Relation to EU Data Protection Legislation' in Federico Ferretti and Daniela Vandone (eds), *Personal Debt in Europe. The EU Financial Market and Consumer Insolvency* (CUP 2019) 156.

of studies published on this topic;⁹ and it is worth stressing how, even beyond creditworthiness, Italian courts started to be confronted with problems posed by the interplay of algorithms and reputational rating.¹⁰ As mentioned, this reflects a tendency that can already be observed in Europe, where studies on how machine learning are used in the context of Internal Ratings-Based (IRB) models are increasing significantly.¹¹ And also the interest showed by the EBA is illustrative in this regard.¹²

Notwithstanding the incidence of AI and new technologies on the credit sector, the main problematical issues addressed at domestic level by Italian courts and scholars remain anchored to the traditional skeleton of the MCD and its junction with the Directive 2008/48/EC on consumer credit agreements (CCD 2008)¹³ which was transposed in Italy, becoming part of the TUB (Arts 121 ff.), and that will soon be completely repealed with the implementation of the Directive 2023/2225/EU (CCD 2023).¹⁴

⁹ See Emilia Bonaccorsi di Patti and others, 'Intelligenza artificiale nel credit scoring. Analisi di alcune esperienze nel sistema finanziario italiano' (2022) *Questioni di Economia e Finanza* – Banca d'Italia <https://www.bancaditalia.it/pubblicazioni/qef/2022-0721/QEF_721_IT.pdf> accessed 4 September 2025.

¹⁰ See *Corte di cassazione*, 10 October 2023, no. 28358, examined by Elena Falletti, 'Reputazione, proiezione di sé e diritto all'oblio: le diverse sfumature del caso Mevaluate' [2024] *Foro italiano* 251 and Nicola Brutti, 'Mito del consenso e rating reputazionale' [2024] *Nuova giurisprudenza civile commentata* 402.

¹¹ See Nikita Aggarwal, 'Machine Learning, Big Data and the Regulation of Consumer Credit Markets: The Case of Algorithmic Credit Scoring' in Nikita Aggarwal and others (eds), *Autonomous Systems and the Law* (Beck 2019) 37-45; Katja Langenbucher, 'Responsible A.I.-based Credit Scoring – A Legal Framework' (2020) 31 *EBLR* 527; Laura Ammannati and Gian Luca Greco, 'Piattaforme digitali, algoritmi e big data: il caso del credit scoring' [2021] *Rivista trimestrale di diritto dell'economia* 290 305; Julie Goetghebuer, 'AI and Creditworthiness Assessments: the Tale of Credit Scoring and Consumer Protection. A Story with a Happy Ending?' in Jan De Bruyne and Cedric Vanleenhove (eds), *Artificial Intelligence and the Law* (Intersentia 2021) 429; Katja Langenbucher and Patrick Corcoran, 'Responsible AI Credit Scoring – A Lesson from Upstart.com' in Emiliós Avgouleas and Heikki Marjosola (eds), *Digital Finance in Europe: Law, Regulation, and Governance* (De Gruyter 2022) 141; Maria Lillà Montagnani and Carolina Paulesu, 'Towards an Ecosystem for Consumer Protection in the Context of AI-based Credit Scoring' (2022) 33 *EBLR* 557; Gerald Spindler, 'Algorithms, credit scoring, and the new proposals of the EU for an AI Act and on a Consumer Credit Directive' (2023) 15 *LFMR* 239; Maddalena Rabitti, 'Credit scoring via machine learning e prestito responsabile' [2023] *Rivista di diritto bancario* 175.

¹² EBA, 'Machine Learning for IRB Models. Follow-up Report from the Consultation on the Discussion Paper on Machine Learning for IRB Models' (2023) <https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2023/1061483/Follow-up%20report%20on%20machine%20learning%20for%20IRB%20models.pdf> accessed 4 September 2025.

¹³ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133/66 of 25 May 2008).

¹⁴ Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agree-

Accordingly, in the light of the domestic background that has just been depicted, this chapter is structured as follows: sections II and III, respectively, illustrate the relevant issues related to the national implementation of the MCD's rules on pre-contractual duties of information and effective creditworthiness assessment; section IV analyses foreign currency loans; and section V is dedicated to the topic of consumers' rights in case of early repayment, which has undoubtedly been one of the issues that has attracted the most attention in case law and academic writing over the past five years.

2. *Pre-Contractual Information*

Pre-contractual information, addressed by Chapter IV of the MCD, has been transposed by the Italian legislator within Chapter I-*bis* of the TUB and, specifically, in Articles 120-*novies* and 120-*decies*.

The regulation of the pre-contractual phase, with the aim of enabling the appropriate formation of the consumer's will, was already provided for in the CCD 2008. The reason for this is that the underlying purpose of European interventions is to create and preserve a transparent, competitive and ultimately efficient credit market. However, whilst the intervention of 2008 had opted for a high level of harmonisation, in the MCD the EU legislator considered the peculiarities of national laws, providing for full harmonisation only for the regulation of personalized pre-contractual information and the Annual Percentage Rate of Charge (APRC).¹⁵

It should also be noted that credit agreements for consumers relating to residential immovables are often complex for the average consumer to understand. Hence, pre-contractual information plays a crucial role, in the sense that it is the means through which the consumer can come to a comprehension of the rights and obligations arising from the contract.

Moreover, pre-contractual information relates to the creditworthiness assessment in a double perspective. First it is the creditor who must provide the preparatory information on the contract that will be offered, while at a later stage it is up to the

ments for consumers and repealing Directive 2008/48/EC (OJ L 2023/1 of 30 October 2023). The deadline for the transposition of the CCD 2023 is 20 November 2025.

¹⁵ Alessandra Pischedda, 'Art. 120-*novies*' in Francesco Capriglione (ed), *Commentario al Testo Unico delle leggi in materia bancaria e creditizia* (Cedam 2018) 2000; for a history of EU regulation on the topic of consumer credit, see Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) 217-219.

consumer to provide the information necessary to enable the counterparty to make the creditworthiness assessment.¹⁶

With regard to the information that the lender is required to outline, Italian law follows the distinction between standard and personalized information.¹⁷

Standard information, described in para. 1 of Article 120-*novies* TUB, shall be made available to the consumer at any time, so that the latter can understand and compare offers. In particular, the lender is required to make available to the consumer a document containing clear and understandable information, on paper or on another durable medium, that indicates the requirements to be provided by the consumer for the purpose of creditworthiness assessment, a warning that credit may not be granted if the consumer fails to submit the documents necessary to verify creditworthiness, the consultation of a database and the possibility of receiving advisory services. Article 120-*novies* TUB then refers to regulatory legislation for further details related to standard information. In particular, reference should be made to the Bank of Italy Order of 30 September 2016 (Chapter VI-*bis* of this Order, para. 5.2.1).¹⁸

Personalised information is instead addressed by the second paragraph of Article 120-*novies* TUB. This information fulfils its function in a phase subsequent to the one covered by standard information, and implies an active behaviour of consumers, who, on the ground of the first information received, can give details to the lender on their specific needs or preferences, as well as their financial situation, in order to obtain a retail offer.¹⁹

In view of the aim of enabling a pondered and informed decision by the consumer, personalized information must also be provided on paper or on another durable medium, through the delivery of the form known as the ‘European Standardised Information Sheet’ (ESIS). ESIS must be drawn up as described in Annex 4E to the aforementioned Bank of Italy Order of 30 September 2016, where a sample of ESIS is

¹⁶ Maria M Semeraro, ‘Informazioni adeguate e valutazione del merito creditizio: opzioni interpretative nel credito ai consumatori’ [2021] *Rivista di diritto civile* 687; Adriana Addante, ‘La sostenibilità del credito immobiliare fra meritevolezza del consumatore e responsabilità del creditore’ [2022] *Giustizia civile* 925.

¹⁷ Stefano Pagliantini, ‘Statuto dell’informazione e prestito responsabile nella direttiva 17/2014/UE (sui contratti di credito ai consumatori relativi a beni immobili residenziali)’ [2014] *Contratto e impresa Europa* 523.

¹⁸ Bank of Italy, ‘Trasparenza delle operazioni e dei servizi bancari e finanziari. Correttezza delle relazioni tra intermediari e clienti’ (2019) <www.bancaditalia.it/compiti/vigilanza/normativa/archivio-norme/disposizioni/trasparenza_operazioni/testo-disposizione-2019/Disposizioni_Testo_integrale.pdf> accessed 4 September 2025.

¹⁹ See again Pischedda (n 15) 2006.

given.²⁰

The Italian rules also provide that before the conclusion of the credit agreement, the consumer is entitled to a reflection period of at least seven days to compare the different credit offers on the market, assess their implications and take an informed decision. During this reflection period, the offer is binding on the lender and the consumer may accept it at any time.²¹

Further rules on pre-contractual information are set out in Article 120-*decies* TUB, which, with respect to credit intermediaries, not only includes provisions similar to those in Article 120-*novies* TUB, but also lays down some more specific indications. The reference is, *inter alia*, to the obligation to clarify whether the credit intermediary is subject to a mandate or works exclusively with one or more lenders, the fee to be paid by the consumer to the intermediary and the procedures through which consumers or other interested parties may lodge complaints against the intermediary.²² The aim is therefore to ensure the transparency of the transaction from a subjective point of view, i.e. regarding the identification of the counterparty in the negotiation.²³

None of the aforementioned provisions of the TUB specify the legal consequences triggered by non-compliance with information obligations by the lender. This legislative option has given rise to an intense debate on the remedies available to the consumer, exacerbated by the fact that while European law assumes that this party is in a physiological position of asymmetry compared to the contractual counterparty, the rules of the Italian Civil Code mainly relegate this case to a pathological phase, on the implicit assumption that private parties negotiate on an equal playing field.²⁴

²⁰ Daniele Maffei, 'Direttiva 2014/17/UE: rischi di cambio e di tasso e valore della componente aleatoria nei crediti immobiliari ai consumatori' [2016] Banca, borsa, titoli di credito 190; Antonio Las Casas, 'Informazioni generali e informazioni personalizzate nella nuova direttiva sui mutui ipotecari ai consumatori' [2015] Persona e mercato 251.

²¹ Art. 120-*novies* TUB, para. 3.

²² The Italian 'Organismo per la gestione degli Elenchi degli Agenti in attività finanziaria e dei Mediatori creditizi', in its Communication no. 14/17, with reference to Art. 120-*decies* TUB, clarifies that the intermediary, before the signing of the contract, is obliged to provide the consumer (for comparative purposes) with information as close as possible to reality, especially on the amount of the commissions relating to each lender's range of products.

²³ See Michela Cordeddu, 'Art. 120-*decies* TUB' in Francesco Capriglione (ed), *Commentario al Testo Unico delle leggi in materia bancaria e creditizia* (Cedam 2018) 2011 2012.

²⁴ On the information obligations in Italian and European contract law, see, *ex multis*, Stefan Grundmann, 'L'autonomia privata nel mercato interno: le regole d'informazione come strumento' [2001] Europa e diritto privato 257; Vincenzo Roppo, 'L'informazione precontrattuale: spunti di diritto italiano e prospettive di diritto europeo' [2004] Rivista di diritto privato 747; Giuseppe Grisi, 'Informazione (obblighi di)', *Enciclopedia del diritto, Annali IV* (Giuffrè 2011) 595; Rosalba Alessi, 'Gli obblighi di informazione tra regole di protezione del consumatore e diritto contrat-

In abstract terms, two areas of general contract law are called into question by a violation of information duties: rules on pre-contractual liability, protecting the party's freedom of contract in case of a breach of good faith and fair dealing in negotiations (Arts 1337, 1338 Italian Civil Code), and rules on defects of consent (relevant, in particular, in the form of mistake and fraud).²⁵ While the latter remedies are explicitly presented as a ground of contractual invalidity (Art. 1427 Italian Civil Code), the former norms impose of duty of conduct whose infringement has been traditionally sanctioned with a claim for pecuniary damages granted to the non-breaching party.²⁶

This outcome reflects the consolidated view that Italian law affirms a rigid separation (so called 'non-interference') between 'rules of validity' (*regole di validità*), which pertain to the structure and content of the contractual agreement, and whose violation leads to nullity or voidability of contract, and 'rules of behaviour' (*regole di comportamento*), for which a general compensatory liability is provided, and that cannot lead to the invalidity of the contract except when expressly provided for by law.²⁷ This distinction is firmly rooted in the Italian legal tradition, which ultimately dictates that rules of validity cannot be derived by the interpreter by a concretisation of the general clause of conduct, such as that of good faith.²⁸

According to this principle, still adhered to by the majority, it is excluded that the breach of pre-contractual information obligations by the lender may affect the

tuale europeo uniforme e opzionale' [2013] *Europa e diritto privato* 311. For a wider overview on the obsolescence of the Italian Civil Code rules on these contractual aspects, see Andrea Zoppini, 'Contratto ed economia comportamentale', *Enciclopedia del diritto, Tematici I. Contratto* (Giuffrè 2021) 313.

²⁵ Italian literature is particularly broad on this topic. See, for classic references, Giuseppe Stolfi, 'In tema di responsabilità precontrattuale' [1954] *Foro italiano* 1108; more recently Mauro Orlandi, 'Responsabilità precontrattuale', *Enciclopedia del diritto, Tematici I. Contratto* (Giuffrè 2021) 996.

²⁶ Giovanni D'Amico, *Regole di validità e principio di correttezza nella formazione del contratto* (ESI 1996); Giuseppe Vettori, 'Le asimmetrie informative tra regole di validità e regole di responsabilità' [2003] *Rivista di diritto privato*, 241 249; Enrico Scoditti, 'Regole di comportamento e regole di validità: i nuovi sviluppi della responsabilità precontrattuale' [2006] *Foro italiano* 1107; Claudio Scognamiglio, 'Regole di validità e di comportamento: i principi e i rimedi' [2008] *Europa e diritto privato* 599 619.

²⁷ The leading cases are *Corte di cassazione*, Sezioni Unite, 19 december 2007, no. 26724 and no. 26725; for comments, see Aurelio Gentili, 'Disinformazione e invalidità: i contratti di intermediazione dopo le Sezioni Unite' [2008] *Contratti* 393; Ugo A Salanitro, 'Violazione della disciplina dell'intermediazione finanziaria e conseguenze civilistiche: *ratio decidendi* e *obiter dicta* delle Sezioni Unite' [2008] *Nuova giurisprudenza civile commentata* 445.

²⁸ For a recent analysis of the non-interference principle in Italian case law, see Antonia Grimolizzi, 'L'evoluzione della distinzione tra regole di comportamento e regole di validità nella giurisprudenza. I parte' [2023] *Responsabilità civile e previdenza* 1946 1946-1956.

validity of the contract, allowing the consumer to obtain (only) compensation for damages resulting from the erroneous, incomplete, or false information rendered in the negotiation stage.²⁹

At the same time, it must be stressed that according to several commentators and doctrinal orientations, the distinction between *regole di comportamento* and *regole di validità*, as rigidly enforced by Italian case law, is to be considered outdated, especially in the light of European-derived law, which, with a view to rebalancing the relationship between parties with different contractual power and levels of information, often provides for behavioural rules which are eventually associated with provisions of invalidity, as in the case of information obligations associated to the formalities imposed in the formation of consumer contracts.³⁰

This observation, according to different scholars, calls into question the exceptional nature of the validity rules, and opens to a possible valorisation of the general clause of good faith³¹, which could give legal relevance to certain conducts that, although not directly laid down in the contract, shall be considered binding and capable of rendering the unfair contract invalid.³²

3. *Creditworthiness Assessment*

The creditworthiness assessment is crucial to ensure compliance with the responsible lending parameter, which represents a seminal point of intersection between private law and market regulation.³³

²⁹ See *Corte di cassazione*, 8 October 2008, no. 24795 [2009] *Foro italiano* 440; *Corte di cassazione*, 17 September 2013, no. 21255 [2013] *Europa e diritto privato* 1097.

³⁰ Francesco Galgano, 'Squilibrio contrattuale e mala fede del contraente forte' [1997] *Contratto e impresa* 418; Giovanni Perlingieri, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (ESI 2013); Cristiano Cicero, 'Regole di validità e di responsabilità', *Digesto delle discipline privatistiche IX* (Cedam 2014) 539.

³¹ See Vincenzo Roppo, *Il contratto del duemila* (Giappichelli 2020) 83.

³² Angelo Riccio, 'La clausola generale di buona fede è dunque un limite generale all'autonomia contrattuale' [1999] *Contratto e impresa* 21.

³³ This topic came progressively to be ascribed to private law, despite being originally understood as a duty rooted in administrative law: see Nikolai Badenhoop, 'Private Law Duties Deriving From EU Banking Regulation and its Individual Protection Goals' (2020) 16 *ERCL* 233.

It is not happenstance that the lender's duty to carry out a creditworthiness assessment is regarded as a tenet of this area of law, which revolves around the need to forge more responsible markets and to avoid endemic risks of over-indebtedness of European consumers. This is the reason why the creditworthiness assessment of any borrower is carried out by financial intermediaries, banks and creditors, who are therefore responsible for consumer lending.³⁴ The notion of responsible lending is rooted in the CCD 2008, and has been transposed in Italy, as part of the TUB (Arts 121 ff.). Its Art. 124-*bis*, which mirrors Art. 8 of the CCD 2008, expressly states that, prior to the conclusion of the credit agreement, the lender shall assess the consumer's creditworthiness on the basis of adequate information; relevant data can be provided by the consumer and may be accessed by consulting public or private databases or a credit reporting agency (CRA),³⁵ which, in the Italian context, can be either private or public.³⁶ Private CRAs are underregulated in Italy (and in Europe), since they are commonly understood to be little more than vessels storing customer data that has been furnished by specific suppliers, such as banks, intermediaries and also consumers. Generally CRAs are deemed to play a 'neutral' role in the credit market, and the domestic approach tends to exempt them from liability in case of data errors impacting on the financing.³⁷ Yet, the typical features of CRAs show how they are provided with

³⁴ Recently, Noah Vardi, *Creditworthiness and 'Responsible Credit': A Comparative Study of EU and US Law* (Brill 2022).

³⁵ On a possible typological distinction between credit bureaus and private credit reporting agencies see Antonella Sciarrone Alibrandi, 'La rilevazione centralizzata dei rischi creditizi: ricostruzione evolutiva del fenomeno e crescita degli interessi' in Antonella Sciarrone Alibrandi (ed), *Centrali dei Rischi. Profili civilistici* (Giuffrè 2005) 4, fn. 8; from a different perspective, Federico Ferretti, 'The Legal Framework of Consumer Credit Bureaus and Credit Scoring in the European Union: Pitfalls and Challenges - Overindebtedness, Responsible Lending, Market Integration, and Fundamental Rights' (2013) 46 *Suffolk UL Rev* 791 798.

³⁶ On the difference between the activities of public and private reporting agencies, see Aldo A Dolmetta, 'Il "credito in sofferenza" nelle istruzioni di vigilanza sulla centrale dei rischi' [2004] *Banca, borsa, titoli di credito* 533. From a more general perspective, the two categories of credit bureaus represent a distinctive element characterising the Italian legal background, since a comparative analysis shows that public and private rating agencies do not always coexist in other Member States. The credit bureau set up at the Bank of Italy ('Centrale Rischi') is a national credit agency, which is regulated through primary sources: see Antonella Sciarrone Alibrandi, 'Centrali dei rischi creditizi e normativa di privacy: informazione e controlli dell'interessato' [2003] *Rivista diritto civile* 423.

³⁷ Tribunale Salerno, 22 April 2002 [2003] *Giurisprudenza commerciale* 210. Historically, this tendency appears similar to that which occurred outside Europe. Taking a cue from the US legal background, see Robert M McNamara Jr, 'The Fair Credit Reporting Act: A Legislative Overview' (1973) 22 *JPL* 67 71: 'during the period of their phenomenal growth, credit bureaus have somehow escaped the focus of both state and federal inquiry and regulation in spite of the existence of serious abuses'.

a quasi-regulatory function,³⁸ being essential both for the well-functioning of the market and for the parties to a credit agreement.³⁹ The urgency to reflect upon their actual role in the market is crucial for effectively reaching those objectives connected to the creditworthiness assessment that are carefully taken into consideration by the European legislature.

Beyond this aspect, it has been pointed out already that the need to further strengthen the duty of creditworthiness assessment was pursued by the MCD. In addition to its above-mentioned objectives, the TUB embraces all the tools for reaching the regulatory aims of the MCD.⁴⁰

Furthermore, pursuant to Art. 120-*undecies* TUB, the creditworthiness assessment is made on (necessary, sufficient and proportionate) information regarding the consumer; however, this article should not be understood as meaning that information is *primarily* collected and obtained by the consumer, since it may well be furnished by other sources. This interpretation is grounded on Art. 20 MCD, which clarifies how creditors should base their assessment on internal and external sources, including the consumer.⁴¹ The lender shall not terminate the credit agreement concluded with the consumer or make any changes thereto that are unfavourable to the consumer on the grounds that the creditworthiness assessment was carried out incorrectly or that the information furnished by the consumer prior to the conclusion of the credit agreement proved incomplete; however, the possibility to terminate the contract comes into play if the consumer is involved in the conveying data process and has intentionally withheld such information or has supplied false information (Art. 20 MCD; Art. 120-*undecies* TUB).

As to the advisory service that is required in this ambit, the intermediary is not

³⁸ On this topic, see Francesco Mezzanotte, 'Centrali rischi private e "diritto di preavviso" alla segnalazione' [2017] *Nuova giurisprudenza civile commentata* 303; Luigi Buonanno, 'Un modello giuridico europeo di credit reporting industry' [2022] *Banca, borsa, titoli di credito* 582.

³⁹ It is worth emphasising that, even though financial intermediaries or banks may be regarded as parties highly interested in the data accuracy, owing to which they can make correct credit-based decisions, it is quite apparent how the direct beneficiaries of that accuracy coincide with the customers (i.e. consumers and businesses, whose credit data are processed). On this aspect, see Austin H Krist, 'Large-Scale Enforcement of Fair Credit Reporting Act and the Role of State Attorneys General' (2015) 115 *Colum L Rev* 2311 2314.

⁴⁰ It is the case of the pre-contractual creditworthiness assessment of the consumer (Arts 18 and 20 MCD, which are implemented by Art. 120-*undecies* TUB); moreover, there is the need to make an evaluation of residential immovable property for the purpose of granting mortgage-backed credit (Art. 19 MCD; Art. 120-*duodecies* TUB). See above, I.

⁴¹ See also Recital 58 MCD.

obliged to guarantee assistance to the consumer as to the most convenient credit contract that, based on the latter's interest, could be concluded (Art. 22 MCD).⁴² Moreover, this contract can also be stipulated relying solely on the information obtained by consumer, on the proviso that it is sufficient;⁴³ in this respect, there is no obligation on the intermediary to provide an advisory service to the consumer nor to carry out systematic checks pertaining to veracity of the information given by the consumer.⁴⁴ Yet, one may doubt the full validity of the latter assumption since the intermediary is often involved in the process of data transmission; even when the information is given to the intermediary by the consumer, the law currently in force does not exempt the former from monitoring the formal and substantive aspects of data itself. As already emphasised, this does not mean that the intermediary must advise clients as to the contract that best suits their interests,⁴⁵ nor is a credit institution under a duty to refrain from entering into a credit agreement which is inappropriate in light of the consumer's interests.⁴⁶ Significantly, this has also been the view taken by the Italian Banking and Financial Ombudsman ('Arbitro Bancario e Finanziario',

ABF) in this regard.⁴⁷ Nonetheless, the ECJ has now overturned these deeply ingrained principles when it considers that the creditor has to refrain from concluding a contract if the creditworthiness assessment is negative, and this conclusion is based on a certain interpretation of the (not any more in force) CCD 2008, which, unlike

⁴² See Francesco Petrosino, 'Debt advice quale strumento preventivo del rischio da sovraindebitamento. Analisi del fenomeno e potenzialità applicative' [2021] *Rivista di diritto bancario* 417; Pagliantini, 'Statuto dell'informazione e prestito responsabile nella direttiva 17/2014/UE' (n 17) 532.

⁴³ See ECJ 18 December 2014, *CA Consumer Finance SA v. Ingrid Bakkaus, Charline Bonato and Florian Bonato*, Case C-449/13, EU:C:2014:2464, para. 45: '[t]he creditor is in a position to give the consumer explanations based solely on information which the consumer supplies to him, so that the consumer may make a decision with regard to a type of loan agreement, without the creditor being required to assess the consumer's creditworthiness beforehand. However, the creditor must take account of the assessment of the consumer's creditworthiness in so far as that assessment means that the explanations provided need to be adapted'.

⁴⁴ This is the principle elaborated by the ECJ in the ECJ 18 December 2014, *CA Consumer Finance SA v. Ingrid Bakkaus, Charline Bonato and Florian Bonato*, Case C-449/13, EU:C:2014:2464, para. 50(2), analysed by Matteo Francisetti Brolin, 'Ancora sul c.d. "merito creditizio" nel credito al consumo. Chiose a margine di una recente decisione comunitaria' [2015] *Contratto e impresa Europa* 357.

⁴⁵ On the way by which the creditor may give certain assistance to the consumer, see Tribunale Napoli, 27 October 2020 [2020] *Diritto fallimentare* 237.

⁴⁶ See for references Sirena, 'Tutela dei clienti e regolazione del mercato' (n 3) 132.

⁴⁷ See ABF Milano, 3 November 2016, no. 9786.

the MCD, did not expressly recognize this duty (see now Art. 18 CCD 2023).⁴⁸

Also, in the light of the very nature of this duty, one of the most problematical issues that had to be addressed at national level pertains to the consequences stemming from the infringement of that obligation. EU law does not govern the relevant penalties, the identification of which is normally left to Member States (Art. 23 CCD 2008).⁴⁹ In the Italian context, the widespread approach traditionally hinged on the idea that, once the disproportion between the principal disbursed by the creditor and the consumer's financial situation is ascertained (based on Art. 124-*bis* TUB), this violation can justify the decision to award damages to the client, who must therefore be compensated since the pre-contractual obligation to protect debtor's interest has not been complied with. It is a rule of conduct that is tied to the good faith principle; as such, if a gross violation of that rule occurs, this may give rise to an award of damages. In this case the consumer must provide evidence of the breach of the good faith duty and the causal link between the allegedly irresponsible lending and the damage suffered.⁵⁰ This was the traditional position of the ABF and some domestic courts: the characterisation of that duty as a rule of conduct cannot lead to the contract being declared null and void.⁵¹

However, in the light of the recent ECJ judgments stressing how the creditor is obliged not to enter into the contract when the creditworthiness assessment is negative,⁵² this must be understood as a mandatory rule. Consistently, the respect of that duty can be examined by national courts of their own motion.⁵³ The ECJ had already emphasized

⁴⁸ ECJ 6 June 2019, *Michel Schyns v. Belfius Banque SA*, Case C-58/18, EU:C:2019:467, paras. 49 and 50(2): 'Article 5(6) and Article 8(1) of Directive 2008/48 must be interpreted as not precluding a national rule, such as that at issue in the main proceedings, which obliges the creditor to refrain from concluding the credit agreement if he cannot reasonably take the view, following the check of the consumer's creditworthiness, that the consumer will be able to fulfil the obligations arising from the proposed agreement'.

⁴⁹ ECJ 10 October 2014, *Monika Kušionová v SMART Capital*, Case C-34/13, EU:C:2014:2189, para. 59; ECJ 16 November 2021, *Ultimo Portfolio Investment (Luxembourg) SA v. KM*, Case C-303/20, EU:C:2021:479, para. 30; ECJ 11 January 2024, *Nárokuj v. EC Financial Services*, C-755/22, EU:C:2024:10, para. 40: 'as regards the system of penalties applicable in the event of infringement of the national provisions adopted pursuant to Article 8 of Directive 2008/48, it is important to remember that, in accordance with Article 23 of that directive, that system must be defined in such a way as to ensure that the penalties are effective, proportionate and dissuasive'.

⁵⁰ See ABF Napoli, 16 January 2018, no. 1067.

⁵¹ See ABF Napoli, 18 May 2020, no. 9178; ABF Roma, 20 August 2013, no. 4440.

⁵² ECJ 6 June 2019, *Michel Schyns v. Belfius Banque SA*, Case C-58/18, EU:C:2019:467, para. 49.

⁵³ ECJ 5 March 2020, *OPR-Finance v. GK*, C-679/18, EU:C:2020:167, para 34.

that if the credit agreement is concluded without observing the obligation to make such an assessment, the sanction of forfeiture of the creditor's right to the agreed interest proves fully appropriate.⁵⁴ The way to nullity of the contract was expressly paved in the *Nàrokuj* case decided by the ECJ: if the obligation to assess the consumer's creditworthiness is not duly fulfilled, the creditor can be penalised, in accordance with national law; in this respect the sanction may be based on the nullity of the consumer credit agreement and forfeiture of agreed interest, even though that contract has been fully performed by the parties and the consumer has not suffered any harmful consequences as a result of the breach of that obligation.⁵⁵

Its violation represents the most appropriate ground for the recognition by Italian courts of the nullity of the contracts, pursuant to Art. 1418(1) cod. civ. In Italy, this type of nullity is commonly referred to as '*nullità virtuale*', being inferred from an assessment based on any possible violation of mandatory rules in force in the national legal system.

4. *The Unfairness of the Indexation Clause in Foreign Currency Mortgage Loans*

A further relevant intersection between the rules of the MCD and general principles of Italian private law is to be identified in the issues raised by the unwinding of mortgage loans indexed to a foreign currency.⁵⁶ It is widely known how the triggering point underlying the legal issue at stake has been represented by changes of the exchange rate between the national currency and foreign currency over time to the detriment of borrowers.⁵⁷

⁵⁴ ECJ 5 March 2020, *OPR-Finance v. GK*, C-679/18, EU:C:2020:167, para. 30.

⁵⁵ ECJ 11 January 2024, *Nàrokuj v. EC Financial Services*, C-755/22, EU:C:2024:10, para. 52.

⁵⁶ In case of loans indexed to a foreign currency, the principal is expressed (and disbursed) in national currency, but the borrower's debt is nonetheless calculated by the lending bank in a foreign currency; in doing so, the lending bank applies the rate at which, according to its own rate table, it buys the foreign currency on that date. On these points, see Pietro Sirena, 'The Unwinding of Annulled Contracts of Loan Due to the Unfairness of the Indexation Clause' in Pietro Sirena (ed), *Unfair Contract Terms and Restitution in European Private Law: The National and ECJ Litigation on House Loans Indexed in a Foreign Currency* (CUP 2024) (forthcoming); Federico Pistelli, *L'indicizzazione del regolamento contrattuale* (ESI 2023) 36-37; Federico Pistelli, 'Finanziamenti in valuta estera e rimedi: oltre la conversione' [2022] Osservatorio del diritto civile e commerciale 241 250-252.

⁵⁷ Practice shows that when interest rates are high in a national currency, banks are inclined to offer loans pegged to a stable foreign currency, under the obligation to comply with legal and regulatory requirements. On the relevant

From a legal point of view, in the light of the circumstance that loan agreements are grounded on the bank's general terms, the Directive 93/13/EEC on unfair terms in consumer contracts comes into play. Given that clauses dealing with the exchange rate risk generally constitute the main subject matter of these loan contracts, if the indexation clause is unfair, the entire contract may turn out to be null and void.⁵⁸

This outcome paves the way to the issue of restitutionary claims relevant between parties. In Italy, the discussion on this point has been recently inspired by the need to protect weak parties, thereby expanding the traditional safeguard aims of strengthening the consumers' position before the contract is concluded and during its execution.⁵⁹ In case of investment contracts that are null and void, the rationale behind this invalidity has a crucial impact on the discipline of restitutionary effects which arise from the judicial declaration of nullity: the weak party can claim that undue payment be returned, whereas the business is not entitled to do so. Although in a different sector, this very principle, referred to as 'protective *condictio indebiti*', has been already adopted by the Italian Supreme Court,⁶⁰ so that Italian scholars have proposed to extend its application to the case of mortgage loans declared invalid because of unfair indexation clauses.⁶¹

legal implications, see Radosveta Vassileva, 'Monetary Appreciation and Foreign Currency Mortgages: Lessons from the 2015 Swiss Franc Surge' (2020) 28 ERPL 173.

⁵⁸ This is what the ECJ recently stated in *Dziubak v. Raiffeisen Bank*, Case C-260/18, EU:C:2019:819, that has been examined by Aneta Wieworowska-Domagalska, 'Unfair Contract Terms in CHF Mortgage Loans. Case C-260/18 – where do we go from here?' (2020) 9 EuCML 206, and F. Esposito, 'Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection' (2020) 16 ERCL 538. On the power of national courts when assessing the unfairness of a clause relating to the main subject matter of a financing contract, see ECJ 31 March 2023, *Lombard Pénzügyi és Lízing Zrt. v. PN*, Case C-472/20, EU:C:2022:242.

⁵⁹ See Stefano Pagliantini, 'Trent'anni di direttiva 93/13, postvessatorieta restitutiva ed il vuoto di un'interpretazione conforme a tutto tondo' [2023] Accademia 11; Stefano Pagliantini, 'La nullità selettiva quale epifania di una deroga all'integralità delle restituzioni: l'investitore è come il contraente incapace?' [2019] Persona e mercato 123; Aldo A Dolmetta, 'All'essenza della nullità di protezione: l'operatività "a vantaggio". Per una critica costruttiva di Cass. SS.UU., n. 28314/2019' [2020] Rivista di diritto bancario 89; Giovanni D'Amico, 'Sul carattere c.d. "selettivo" della nullità di protezione' [2020] Nuovo diritto civile 7; Daniele Imbruglia, 'Nullità e restituzioni' [2020] Giurisprudenza italiana 1533. The same problems have recently been addressed from a comparative law point of view: see, e.g. John D Mc Camus and Francesco Delfini, 'Ineffective contracts, restitution and the change of position defence. About a recent decision rendered by the High Court of Justice of London' [2023] MLR 19 20.

⁶⁰ See *Corte di cassazione, Sezioni Unite*, 4 November 2019, no. 28314.

⁶¹ See recently Francesca Corletto, 'Towards a Protective *Condictio*? The *Bank M* Case in the Prism of Restitutory Remedies: A Reconstructive Proposal' (2024) 20 ERCL 155.

In the light of what has been pointed out, one may wonder whether the borrower is bound (i) to return the loan principal and, in addition, (ii) to make an allowance for the usage of it, as well as (iii) to remunerate potential recurring and up-front services carried out by the lender; likewise, it is dubious that the lender must (i) give back the instalments that have been collected but also (ii) make an allowance for the usage thereof, (iii) besides reimbursing any expenses incurred by the borrower.⁶²

These doubts had found a controversial clarification in the Bank Millenium judgment rendered by the ECJ: the lending bank is obliged to return to the borrower the total amount of the monthly instalments and all expenses (regarding the performance of the agreement) incurred by the borrower, plus default interest at the statutory rate from the day on which repayment is demanded; conversely, the consumer should return to the lending bank only the principal, without being obliged to pay any interest either for the use of that principal or for arrears.⁶³

This solution appears in contrast with the tenets of the traditional law of obligations,⁶⁴ whose principles should dictate that the performance unduly received by the borrower consists in a financial service encompassing the enjoyment of the value of that sum of money over time, and precisely for the whole duration of the financing. On this ground, the ECJ decision can be better framed within a regulatory perspective, where the prevalence of instances of consumer protection over the stability of financial markets may well justify that asymmetrical law of restitution envisaged by the Italian scholarship.⁶⁵

From a more general point of view, the incidence of the MCD proved largely ineffective in addressing these legal problems. It was deemed to be tardive compared to the time these contracts have historically been concluded in several Member States since, even though consumers hold a right to convert the credit agreement into an alternative currency – typically, the home currency – under specified conditions (Art. 23(1), MCD;

⁶² Pietro Sirena, ‘The Unwinding of Annulled Contracts of Loan’ (n 56).

⁶³ Bank Millenium also claimed that the stability of the financial markets would be threatened if banks were not allowed to seek compensation from consumers. However, the ECJ replied that this argument proves not relevant in the context of the interpretation of Directive 93/13/EEC, on unfair terms which is aimed at protecting consumers. Additionally, ‘it cannot be accepted that sellers or suppliers may circumvent the objectives pursued by Directive 93/13 on the ground of preserving the stability of the financial markets’, since ‘[b]anking institutions are under a duty to organise their activities in a manner which complies with that directive’ (ECJ 15 June 2023, *Szcześniak v. Bank Millenium*, C-520/21, EU:C:2023:478, paras 82-83).

⁶⁴ Sirena, ‘The Unwinding of Annulled Contracts of Loan’ (n 56).

⁶⁵ *Ibid.*

Art. 120-*quaterdecies*, para. 1, TUB), its provisions are not applicable retrospectively;⁶⁶ moreover, it was often considered deprived of effective tools to combat the risk of systemic effects tied to exchange rate risks.⁶⁷

Nonetheless, despite not being formally applicable to loans indexed to foreign currency, as they are not mentioned in the MCD, which only deals with contracts grounded on denomination mechanisms,⁶⁸ it has been claimed that its articles 23 and 24 may well represent a source upon which to base a set of claims in unjust enrichment; furthermore, some scholars held that the MCD could also be applied to old cases.⁶⁹

Considering the similar structure that denominated and indexed contracts share, it would therefore be plausible to argue that the MCD is to be applied by analogy to the second category of agreements and, even if not, article 24 could cover both of them: uncoincidentally it broadly encompasses ‘variable rate credits’ where the foreign currency is used as a reference rate.

5. *Early Repayment and Reduction in the Total Cost of the Credit*

In the recent years, the right of consumers to discharge their obligations early and the consequent reduction in the total cost of the credit have proved to be among the most controversial aspects of the Italian legal discipline on credit contracts, especially after the ground-breaking judgement rendered by the ECJ on September 2019 in the now-famous *Lexitor* case.⁷⁰

More specifically, before that important intervention of ECJ, the reimbursement

⁶⁶ The MCD does not apply to most part of this type of contracts that have been stipulated in Europe since it was adopted in 2014 and had to be implemented in the Member States by 21 March 2016 (see Article 42(1) MCD); in addition, it does not apply retrospectively to loan agreements concluded before that date (Article 43(1) MCD).

⁶⁷ See, on a slightly different issue, Federico Pistelli, ‘I prestiti in valuta fra contratto e concorrenza’ [2022] *Nuova giurisprudenza civile commentata* 108 108.

⁶⁸ For a general overview, revolving around the connection between the MCD and loans denominated in a foreign currency, see Maffei (n 20) 190; F. Azzarri, ‘I “prestiti in valuta estera” nella direttiva 2014/17/ UE sui “contratti di credito ai consumatori relativi a beni immobili residenziali”’ [2015] *Osservatorio del diritto civile e commerciale* 187 200.

⁶⁹ Stefan Grundmann and Nikolai Badenhoop, ‘Foreign Currency Loans and the Foundations of European Contract Law – A Case for Financial and Contractual Crisis?’ (2023) 19 *ERCL* 1 25.

⁷⁰ ECJ 11 September 2019, *Lexitor Sp. z o.o v Spółdzielcza Kasa Oszczędnościowo - Kredytowa im. Franciszka Stefczyka and Others*, Case C-383/18, EU:C:2019:702.

due to the debtor in case of early repayment was subject to an essentially unambiguous rule in Italy, shared by regulators, case law, and scholars in application of Art. 125-*sexies* TUB (the norm with which the Italian legislator had implemented the provision contained in the ancient Art. 16 CCD 2008, dedicated to consumer credit agreements).⁷¹

With regard to that discipline, the majority of commentators had considered the reduction of the total cost of the credit as a plain corollary of general civil law principles inspiring the rules on undue payments, operating after the exercise of the right to early discharge by the consumer.⁷² It had seemed thus logical to limit the reduction of the costs of credit to burdens and obligations which, at the moment of the early reimbursement, were still to be fulfilled according to the original contractual terms (e.g. interests not already accrued according to the agreed amortization plan), or to fees and sums entirely paid at the time of the conclusion of the deal, but referable to services meant to provide benefits to the consumer over the entire duration of the relationship.⁷³ The text of the original version of the already mentioned Art. 125-*sexies*, paragraph 1, TUB also appeared to be oriented in the same sense, since it was referred to a reduction ‘equal to’ (*pari a*) and not simply ‘consisting of’ (as both Art. 16 CCD 2008 stated and 25 MCD still states verbatim) the interest and the costs for the remaining duration of the contract.⁷⁴

A clear operational rule had thus emerged in Italian law of consumer credit,

⁷¹ For a basic overview, Alessandro Ciatti, ‘La corresponsione anticipata delle somme dovute dal consumatore al creditore’ in Giovanni De Cristofaro (ed), *La nuova disciplina europea del credito al consumo* (Giappichelli 2009) 153.

⁷² For an overall reconstruction of the different theoretical orientations present in Italian doctrine, see Francesco Oliviero, ‘L’anticipato adempimento dell’obbligazione restitutiva nel credito ai consumatori’ [2014] *Nuove leggi civili commentate* 373 394.

⁷³ Lara Modica, ‘Il credito ai consumatori’ in Fabrizio Piraino and Stefano Cherti (eds), *I contratti bancari* (Giappichelli 2016) 267 306; Giovanni De Cristofaro and Francesco Oliviero, ‘I contratti di credito ai consumatori’ in Vincenzo Roppo (ed), *Trattato dei contratti* (vol 5, Giuffrè 2014) 343; Marco Maugeri and Stefano Pagliantini, *Il credito ai consumatori. I rimedi nella ricostruzione degli organi giudicanti* (Giuffrè 2013) 121; Francesco Quarta, ‘Estinzione anticipata dei finanziamenti a tempo determinato e modulazioni del costo del credito (commissioni di intermediazione, oneri assicurativi e penalità)’ [2013] *Rivista di diritto bancario* 1 5. For a different view, contrary to differentiation between categories of costs dependent on the undue payment rationale, see Aldo A Dolmetta, ‘Anticipata estinzione e “riduzione del costo totale del credito”. Il caso della cessione del quinto’ [2019] *Banca, borsa, titoli di credito* 644 649; Aldo A Dolmetta and Antonella Sciarone Alibrandi, ‘La facoltà di “estinzione anticipata” nei contratti bancari, con segnato riguardo alla disposizione dell’Art. 7 legge n.40/2007’ [2008] *Rivista di diritto civile* 523 541.

⁷⁴ Fabrizio Maimeri, ‘Credito al consumo: quali commissioni sono rimborsabili’ (2019) *FCHub* 1 6-7.

based on the distinction between so called ‘up-front costs’, not dependent on the agreed repayment term, and therefore not subject to reduction in the event of early reimbursement; and so called ‘recurring costs’, to be included in the proportional reduction of the cost of credit, since they are aimed at remunerating performances and utilities rendered by the professional throughout the entire contractual relationship.⁷⁵ This rule, constantly applied in ordinary case law and in the far more numerous decisions rendered on the subject by the ABF,⁷⁶ was eventually formalized in the regulatory measures issued by the Bank of Italy.⁷⁷

In light of the almost complete similarity detectable between the text of Art. 16 CCD 2008 and the rule dedicated to early repayment in the MCD (Art. 25), when the Italian legislator had to implement this latter directive it merely inserted, with a new Art. 120-*noviesdecies* TUB, a textual reference to the rule already contained in Art. 125-*sexies* for consumer credit. With this drafting technique, the legislative intention was clearly that of extending also to credit agreements relating to residential immovables the normative treatment based on the distinction between up-front (non-reimbursable) and recurring (reimbursable) costs.

Considering all the above, one can easily understand the disruptive impact assumed in the Italian system by the *Lexitor* ruling, according to which ‘Article 16(1) of Directive 2008/48 must be interpreted as meaning that the right of the consumer to a reduction in the total cost of the credit in the event of early repayment of the credit includes all the costs imposed on the consumer’.⁷⁸

Leaving aside its more direct repercussions on the consumer credit sector,⁷⁹ the

⁷⁵ Andrea Barengi, *Diritto dei consumatori* (Wolters Kluwer 2017).461; Ugo Malvagna, ‘Nel focus del credito al consumo: gli oneri economici della “cessione del quinto”’ [2015] *Rivista di diritto civile* 1532 1551.

⁷⁶ See among others, Tribunale Torino, 24 April 2018; for a complete survey of the orientations of the ABF, see Marco Simeon, ‘Gli orientamenti dell’Arbitro Bancario Finanziario in materia di credito ai consumatori’ [2019] *Giurisprudenza commerciale* 429 436.

⁷⁷ Order on ‘Trasparenza dei Servizi bancari e finanziari. Correttezza delle relazioni tra intermediari e clienti’. See fn. 18, in particular Ch. VI, § 5.2.1, lett. *q*, nt. 3.

⁷⁸ ECJ 11 September 2019, *Lexitor Sp. z o.o v Spółdzielcza Kasa Oszczędnościowo - Kredytowa im. Franciszka Stefczyka and Others*, Case C-383/18, EU:C:2019:702, para. 36.

⁷⁹ For a comprehensive reconstruction of the complex evolution of the Italian consumer credit sector after *Lexitor*, marked by a series of interventions by the Italian legislature, which have even required a ruling by the Constitutional Court, see Marco Martino, ‘Ne nos inducas in tentationem. Effettività, affidamento e qualche chiosa sulla ripetizione di indebito, a valle della vicenda “Lexitor”’ [2023] *Nuova giurisprudenza civile commentata* 698; Stefano Pagliantini, ‘Lexitor atto secondo: il (prezioso) decalogo della Consulta sull’interpretazione euroconforme’ [2023] *Giurisprudenza italiana* 279.

publication of the ECJ's opinion has immediately given rise to an intense debate on whether the principle of law contained therein, though formally referred to the norm contained in the old Art. 16 CCD 2008, should be considered relevant and binding also with regard to the rules on early repayments of mortgage credit agreements.⁸⁰ On this crucial point, two opposing interpretative approaches have emerged in the Italian case law.

On the one hand, a number of decisions have over time endorsed the extensive, more rigorous, solution, on the ground of the evident continuity between the texts of the Arts 16 CDD 2008 and 25 MCD, and of their common protective nature, necessarily oriented in favour of the weaker party of the credit agreement.⁸¹

On the other hand, other litigations have been resolved proposing a restrictive interpretation of the *Lexitor* ruling,⁸² justified on the grounds of the different nature of the CCD 2008 and the MCD,⁸³ and on the (slightly) different contents of the provisions specifically devoted to early repayment in these two pieces of legislation. In particular, Art. 25(3) MCD depicts the provision of a 'fair and objective compensation' in favour of the creditor, 'for possible costs directly linked to the early repayment' as a purely optional measure for national legislators (and not as a mandatory rule, as it is instead presented in Art. 16(2) CCD 2008). This normative element has been considered apt to mark a relevant difference from the case examined in *Lexitor*, where the ECJ explicitly considered the right of the creditor as a crucial factor to counterbalance the effects of a reduction in the total cost of the credit covering all the costs incurred by the consumer in connection with the agreement.⁸⁴

⁸⁰ See Mario Natale, 'Estinzione anticipata nel credito immobiliare ai consumatori. Novità legislative e spunti comparativi dall'esperienza austriaca' in Adriante Addante and Lucia Bozzi (eds), *I contratti di credito immobiliare fra diritto europeo e attuazione nazionale. Strumenti di prevenzione del sovraindebitamento del consumatore* (Caccuci Editore 2022) 79; Francesco Mezzanotte, 'Il rimborso anticipato nei contratti di credito immobiliare ai consumatori' [2020] *Nuove leggi civili commentate* 65.

⁸¹ ABF Bari, 21 December 2021, no. 23408; ABF Roma, 22 February 2021, no. 4662; ABF Bari, 12 November 2020, no. 20119.

⁸² ABF Napoli, 9 October 2020, no. 17588 [2021] *Foro italiano* 358; ABF Napoli, 21 January 2021, no. 1753; ABF Napoli, 22 January 2021, no. 1887; ABF Napoli, 4 March 2021, no. 5853.

⁸³ As several Italian commentators have observed, the MCD is inspired by a dual soul, where the consumer protection rationale is not autonomous, or pre-eminent, with respect to that aimed at the regulation of the financial market: see Pagliantini, 'Statuto dell'informazione e prestito responsabile nella direttiva 17/2014/UE' (n 17) 523; Federico Ferretti, 'Contratti di credito ai consumatori relativi a beni immobili residenziali: prime osservazioni sulla direttiva 2014/17/UE' [2014] *Contratto e impresa Europa* 863.

⁸⁴ See ECJ 11 September 2019, *Lexitor Sp. z o.o v Spółdzielcza Kasa Oszczędnościowo - Kredytowa im. Franciszka Stefc-*

Evidently aware that persistent reasons of legal uncertainty were inevitably linked to the referral technique by which Art. 25 MCD had been originally transposed into domestic law, in 2021 the Italian legislator formally distinguished the domestic rules on early repayment relevant in case of consumer credit from those applicable to the mortgage credit field. In more detail, Art. 11-*octies*, paragraph 1, Law 23 July 2021, no. 106, has for the first time introduced in the national system a rule specifically dedicated to the reduction of the total cost of the credit valid for consumer agreements relating to residential immovable property, explicitly reaffirming, in this sector, the criterion of reimbursement limited to the recurring costs only (Art. 120-*quaterdecies* TUB).⁸⁵

This solution has been definitively sealed in its compatibility with the superior principles of EU law by the latest judgement of the ECJ rendered on February 2023 in the case *UniCredit Bank Austria*, which has definitively confirmed the peculiarities of the sector regulated by the MCD, clarifying that: ‘Article 25(1) of Directive 2014/17 must be interpreted as not precluding national legislation which provides that the consumer’s right to a reduction in the total cost of the credit in the event of early repayment of that credit includes only interest and costs which are dependent on the duration of the contract’.⁸⁶

Several commentators have criticised the choice to distinguish the legal treatment of the two areas of credit contracts,⁸⁷ especially considering that the principle of law established in *Lexitor* has been confirmed in the new CCD 2023.⁸⁸ At the same time, after the latest ECJ ruling the topic seems to have finally found, at least with respect to mortgage credit, a more stable framework in the Italian legislative landscape.

zyka and Others, Case C-383/18, EU:C:2019:702, para. 34.

⁸⁵ See Davide Achille, ‘Estinzione anticipata del credito (immobiliare) ai consumatori e “riduzione del costo totale del credito”: melius re perpensa’ [2023] *Foro italiano* 134.

⁸⁶ ECJ 9 February 2023, *UniCredit Bank Austria AG v Verein für Konsumenteninformation*, Case C-555/21, EU:C:2023:78, para. 39.

⁸⁷ See Esther Arroyo Amayuelas, ‘A Third Directive on Consumer Credit’ (2024) 20 *ERCL* 1 16; Jochen Hoffmann and Martin Samek, ‘Cost Reduction in the Event of Early Repayment Under the Mortgage Credit Directive: A Surprising U-turn After *Lexitor*’ (2023) 12 *EuCML* 164.

⁸⁸ See CCD 2023, Art. 29, and Recital 70.

6. *Instead of a Conclusion, Looking Ahead*

In more recent times, the Italian scenario on the issues analysed in this chapter has become progressively influenced by the emergence of new technologies and AI. Trying to inspect the relevant future way forward, these processes seem to show a twofold incidence: (i) they will be generating a disruptive impact on the concrete functioning of traditional legal institutions and mechanisms: among many, it is the case of credit scoring (*de facto* incidence); (ii) the rules governing these areas of law are increasingly adapting to the new reality (*legal* incidence).

If the prominence of the former aspect proves to be immediately graspable, the importance of the latter is evidenced by the initiatives of the EU legislature; by way of example, the Regulation on Artificial Intelligence (AI Act),⁸⁹ together with the GDPR, will be representing the bulwark of automated credit scoring, which falls into the category of high-risk systems that has been envisaged by the AI Act itself.⁹⁰

The practical influence that automated systems will unfold in Italy is going to be assessed soon in all likelihood; by way of example, one might wonder whether resorting to artificial intelligence systems to assess credit scoring proves fully in line with the creditor's duty of care towards its clients and, in particular, with the requirement provided for by the above-mentioned Art. 124-*bis* TUB (and in addition Arts 5 and 127 TUB).⁹¹

Apart from potential doubts that may be raised and even beyond the indications inferable from the activity already carried out by the EBA,⁹² the Bank of Italy has already paid attention to AI, automated decision and credit scoring activity on the assumption that such intersection will be playing a pivotal role in this realm of law.⁹³ Furthermore, it is of interest that the trend characterising the activity of supranational and domestic courts becomes increasingly apparent, inasmuch as they are presently called to issue

⁸⁹ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 OJ L 2024/1689.

⁹⁰ Annex III (High-Risk Systems Referred to in Article 6(2) of the AI Act.

⁹¹ See Rabitti (n 11) 178.

⁹² EBA (n 12).

⁹³ See Bonaccorsi di Patti and others (n 9).

decisions regarding the interplay between data protection (GDPR) and credit scoring;⁹⁴ even beyond creditworthiness, Italian judgements have also examined cases based on algorithms and reputational rating.⁹⁵ This seems to be fully consistent with the above-mentioned tendency in Europe, in which analysis concerning the impact of machine learning on the IRB models are increasing significantly.

⁹⁴ ECJ 7 December 2023, *SCHUFA*, Case 634/21, EU:C:2023:957.

⁹⁵ See *Corte di cassazione*, 10 October 2023, no. 28358.
