

The Responsible Lending Principle in the Spanish Proposal of the Mortgage Credit Act

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Abstract : The Mortgage Credit Directive 2014/17/UE should have been transposed the 21st of March of 2016. However, in Spain not only we did not meet the deadline, but currently we just have a preliminary draft of the so-called Mortgage Credit Act. Before we analyze the preliminary draft from the standpoint of the responsible lending principle, we should point out that this preliminary draft is not a consumer law statute. Through the text of the preliminary draft we cannot see any reference to the consumer, but we see references to the borrower. Furthermore, and more important, the application of this statute would not be, according to its text, circumscribed to borrowers who address the credit to a personal purpose. Instead, it seems that the preliminary draft aims to be one more of the rules of banking transparency that already exists in the Spanish legislation. In this sense, we can also mention that the sanctions contained in the preliminary draft are referred to these laws of banking ordination and oversight - where the rules of banking transparency belong -. This might be against the spirit of the Mortgage Credit Directive, which allows the extension of its scope to credits aimed to acquire other immovable property beyond the residential one. However, the borrower has to be a consumer accordingly with the Directive. It is quite relevant that the prospective Spanish Mortgage Credit Act might not be a consumer protection statute; specially, from the perspective of the responsible lending principle. The responsible lending principle is a consumer law principle, which is based on the structural weakness of the consumer's position in the relationship with the creditor. Therefore, it cannot surprise that the Spanish preliminary draft does not state any of the pre contractual conducts that express the responsible lending principle. We are referring to the lender's duty to provide adequate explanations; the consumer's suitability test; the lender's duty to assess consumer's creditworthiness; the consultation of databases to perform the creditworthiness assessment; and the most important, the lender's prohibition to grant credit in case of a negative creditworthiness assessment. The preliminary draft just entitles the Economy Ministry to enact provisions related to those topics. Thus, the duties and rules derived from the responsible lending principle included in the EU Directive will not have legal character in Spain, being mere administrative regulations. To conclude, the two main questions that come up after reading the Spanish Mortgage Credit Act preliminary draft are, in the first place, what kind of consequences might arise from the Mortgage Credit Act if finally it is not a consumer law statute. And in the second place, what might be the consequences for the responsible lending principle of being developed by administrative regulations instead of by legislation.

Keywords : consumer credit, consumer protection, creditworthiness assessment, responsible lending

Conference Title : ICCPLR 2017 : International Conference on Consumer Protection Law and Regulations

Conference Location : London, United Kingdom

Conference Dates : May 25-26, 2017