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Consumer Over-Indebtedness, Credit Contracts and Responsible Lending

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Abstract:
The paper considers the position of overindebted persons in the national and comparative perspective. A specific focus is dedicated to the interference between credit contracts and responsible lending, with reference to the role of professional creditors (banks and other financial institutions) in setting both the cost of credit and the conditions for repayment. In addition, the experience of the Arbitro Bancario Finanziario – the ADR system in force in Italy – is examined with reference to the topic.

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1 Consumer over-indebtedness, a global phenomenon?

It is a well known perception that over-indebtedness is not only a problem of States and companies but of households as well. As statistics show, in the majority of the cases over-indebtedness is the consequence of accidents of life (loss of work, family crisis, illness) and, in less numerous cases, the result of deliberate dissolution of assets, also depending on addiction to gambling and other deviating behaviours; in other cases, over-indebtedness derives from the inability of the individual to properly manage her own finance and, ultimately, from information and planning failures that lead the consumer to disadvantaged or excessively costly credit operations.[1]

The comparative analysis shows that two main models exist for dealing with consumer over-indebtedness. The first one is the opening of a *bankruptcy procedure* on the charge of the consumer. This model has been typical of the United States of America for long; it is also applied today even if some partial amendments to the rules have been introduced with the Bankruptcy Consumer Protection Abuse and Prevention Act 2005.[2] Other countries are more leaning towards *debt mitigation* solutions, which are characterized by a different cultural approach to over-indebtedness: this implies not only a partial discharge from debts but also a rehabilitative program for the debtors, based on education and financial literacy. The analysis of this last approach has also pointed out that social exclusion is quite often connected to over-indebtedness; for all these reasons, the systems applying *debt mitigation programs* avoid the use of the word "bankruptcy" when referring to consumers to reduce the social stigma.

The attention of legal literature towards consumer over-indebtedness owes to the global spread of such phenomenon, which is rising in Europe as well as in emerging countries and economies in transition, especially in Brazil, India and China.[3] The trend is ignited by the influence on European state legislators of the supranational dialogue between scholars navigating and juggling with such complex topic. Even where individual bankruptcy is not completely ruled out,[4] legislators have *ad hoc* disciplined this subject since the latest 20th-century decades.[5] Only in recent times has Italy joined this group, when Law 3 dated 27 January 2012 introduced a specific regulation for this topic, and the adopted model is namely a composition of the debt crisis with limited application of discharge procedures. Let us clarify that, paradoxically, the Italian Bankruptcy Law, in particular the Royal Decree 267 dated 16 March 1942, which comprehensively regulated the matter (*Legge Fallimentare*), had excluded "individuals" not involved in business (the idea of "consumers" being at that time inexistent) from the application of the bankruptcy procedure to protect them and to avoid the stigma of bankruptcy; this approach has then proved to be inefficient and, contrary to the expectations, has led to a negative discrimination of consumers, who – in case of insolvency or excessive indebtedness – were not eligible for any discharge procedure.[6] In addition, over-indebted consumers, as much as creditors, were exposed to significant structural inefficiencies ensuing from the malfunctioning of costly and long enforcement procedures. In a few words, what lacked more was a true attention for the position of the over-indebted consumer, both on the side of the existing legislation and on that of the judicial approach; this, together with a progressive

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reduction of the safety net and a more and more aggressive credit market, have inevitably made the problem worse.

Under these conditions, Italy's legislative ostracism was very surprising, at least until December 2011 when a first intervention of the Government (Law Decree 212/2011), then overcome by the provisions set by Law 3/2012, was passed. The recalled recent acts, in particular Law 3/2012, have substantially changed this panorama by introducing special procedures for the treatment of over-indebted subjects (both consumers and non-consumer debtors), provided that they are not able to activate another insolvency procedure and that they acted according to good faith – or, said in other words, as good debtor - before and after the access to the procedure, which under strict conditions provides for a fresh start.

2 The "Italian way" and the new legislation on consumer over-indebtedness: Is that enough?

As already stated, until very recently Italy was one of the very few countries in Europe not having a specific procedure to deal with the problems of over-indebted consumers. The comparison with other EU states as well as the emergency raised by the increased economic crisis together affecting consumers and families have then lead to overrule this situation. The call for new procedures for consumers was also determined by the fact that the Bankruptcy Law (Regio Decreto 16 March 1942 no. 267, or "*LeggeFallimentare"*), applicable to business entities but not to individuals, was reformed in 2005 and in 2012in order to introduce more spaces for negotiations between debtors and creditors, as well as for the definition of more tolerant restructuring agreements (here included financial intermediaries) and tax settlements, so that it seemed quite discriminating that only consumers would not have any chance to benefit from a (total or partial) discharge system.[7] As a consequence, since 2009 a series of government acts and laws (not always effectively coordinated) were approved: at first, a series of economic provisions tending to face contingent situations of excessive indebtedness connected to mortgage credit. Then it was once again the government, acting on surrogated legislative powers, to take action by approving the Law Decree 212 dated 22 December 2011. This act aimed at reforming both the procedure against over-indebted consumer and the law on usury.[8] Simultaneously, a since then silent Parliament reacted: Law 3 dated 27 January 2012,[9] titled *Disposizioni in materia di usura e di estorsione, nonchè di composizione delle crisi da sovraindebitamento* was promulgated by the Parliament, and it practically reproduced many of the provisions of the Law Decree 212/2011; this last text was consequently "let die", so that actually the sole reference is the procedure set by Law 3/2012 (as it results after the substantial amendments by another decree approved in October 2012 (Law Decree 179/2012) converted into law by Law 221/2012).

Consequently, for the first time in Italy, Law 3/2012 introduced a specific procedure for the treatment of over-indebtedness of the individuals not submitted to the general bankruptcy procedure set by the Bankruptcy Law. The new rules are accompanied by specific provisions referring to the crimes of usury (*usura*) and extortion (*estorsione*), as well as by additional rules concerning the civil consequences of those crimes: In theory, this confirms the aim to deal with the problem of over-indebted consumers in a systematic way, also taking into consideration preventing measures to protect debtors in economic crisis, even if not many practical positive consequences have been yet registered.

Law 3/2012 sets subjective as well as objective limits for the access to the new procedures meant to facilitate a partial agreement for the partial discharge of debts and to release the actions of creditors. The legal scheme identified above has been completed by the Ministry Decree 202 dated 24 September 2014.[10] This is an essential act to give effectiveness to the over-indebtedness procedure, as identifies the rules concerning the creation and functioning of the *Organismo di composizione della crisi* (shortly "OCC"), or body for the composition of the economic crisis. In fact the said body has numerous functions: It has to assist the debtor in the creation of the restructuring plan for the creditors; it also assumes functions that are parallel, or ancillary, to the rule of the judge for the preliminary definition of the agreement with the creditors.

It has to be clarified that the proceedings provided for the treatment of consumers'over-indebtedness by Law 3/2012 are three: first, the agreement for the composition of the crisis ("*accordo di composizione della crisi*") – Article 7; second, the so called consumer's plan ("*piano del consumatore*") – Articles 7, para.1-*bis* and 8; third, the liquidation of assets ("*liquidazione del patrimonio*") – Article 14-*ter* which provide for a partial fresh start. Discharge is allowed by art. 14-terdecies under recurrance of specific requirements, in particular, discharge is granted to the debtor if he has cooperated in the regular and effective conduct of the proceedings, providing for all the information and useful documentation, as well as working for the successful conduct of operations; and if he had a good behaviour. This rule makes the pair with the necessity to analyse the state of mind and behaviour of the debtor both before the access to the procedures and during the duration of the procedures and the execution of the plans with creditors. In particular, the Court, with the support of the OCC, will have

to consider if the debtor has acted in good faith and without fault when asking for credit in the past and that she is performing her duties in good faith. In other words, Law 3/2012 seems to propose an idea of responsible borrowing on the charge of the debtor who wants to have access to the procedures for the treatment of over-indebtedness and it is up to the court, together with the assistance of the OCC, to assess if this duty has been satisfied.

Left apart legislative procedures for the treatment of over-indebtedness, as provided by the Law 3/2012, a number of government actions have been approved to provide parachutes for households in economic difficulties connected to the loss of employment because of the financial crisis that strangled Italy from 2007.[11] In particular, in 2009 *ad hoc* government funds have been created in order to temporarily support families with exposures towards banks for house mortgages[12]; in addition, state subsidies have been provided for families. Nevertheless, those measures maintain their "exceptional" character, as they are intended to alleviate the crunch of debt in very specific situations and within strict limits. That is, the restriction only to mortgages for the house where the debtor lives and the fact that those safeguard measures do not apply to other credit contracts.

In conclusion, the Italian legal system does not seem to efficiently protect the consumer debtor: this is especially true with reference to the case where the consumer is only a surety within a debtor–creditor relation. In particular, it should be remarked that individuals are often called to be sureties for other family members in case of debts and activities connected to businesses, especially because Italian economy is still characterized by a significant presence of small and medium-size businesses. In all these cases, the individual risks to be over-indebted because of debts of others.[13] The Italian law does not provide specific rules for the case where the grantor is a member of the family or more generally a consumer. Even the general clauses of good faith in contract negotiations and execution have not been significantly used. The lack of a specific protection of the consumer grantor is particularly evident with reference to the pre-contractual information duties as well as in course of the duration of the relation: In fact, there is no specific duty in the Civil Code to inform the consumer with reference to the guarantee contract (*fideiussio*). Some additional rules of law can be found in the Legislative Decree No.205 of 6 September 2005 no. 206 titled *Riassetto delle disposizioni vigenti in materia di tutela dei consumatori – Codice del consumo*,[14] which sets out general duties to inform on the side of the professional dealing with a consumer in all transaction; in addition, provisions of the Legislative Decree 385 dated 1 September 1993 (also named *Testo Unico Bancario* or shortly "TUB", that is to say the Bank Code) may be of some help even if it only provides for very general duties to inform, regardless of the *status* of the grantor.

The real problem is that all these rules can be applied in favour of persons who are sureties only under the condition that the individual may be qualified as consumer. In practice, this possibility is quite limited: The recalled form of protection is insufficient, especially in the light of the fact that Italian courts are generally quite prudent in the application of general clauses and provisions and tend to interpret the notion of consumer in a very strict sense and to exclude the *status* of consumer for those who become surety as collateral to business activity, even if they are not directly involved in the business.

Even in the case of consumer credit contracts, the Banking Code (part of which implemented directive EC/48/2008) does not provide for a special protection with reference to the consumer grantor. The numerous duties to inform about the credit contract are, in fact, applied only towards the principal debtor.

3 The functioning of ADR in credit contracts: the experience of the Arbitro Bancario Finanziario

Problems connected with over-indebtedness of consumers do not often end up in civil courts or in special proceedings,,[15] even in cases where the consumer could have right to some restitutions with reference to abusive credit contracts in order to alleviate her debt situation: length of civil proceedings and costs of procedures often represent, in fact, a barrier for the consumer access to justice.

The actual procedures as set out by Law 3/2012 in order to treat over-indebtedness, as described above, may in fact be their only chance to try to solve the problem of over-indebtedness and to find a way to escape from a life of indebtedness: nevertheless, being submitted to such procedures can involve all aspects of the financial life of the persons.

In many other cases, even partial reliefs from struggles connected to onerous credit contracts may alleviate the state of indebtedness. These is trues especially when consumer credit contracts were stipulated in violation of the rules provided by the law, or in case of violation of the duty to assess creditworthiness of the borrower as provided by Article 124-bis of the Bank Code For this reason, alternative dispute resolution procedures play an important role. In this regard, it should be recalled that Italy was the first country in Europe to provide for a mandatory ADR proceeding, in the form of *mediation*, as per Legislative Decree no. 28 of 1 September 2010, as modified by Law Decree 69 dated 21 June 2013, transferred into Law 98 dated 9 August 2013. In this

context, it should be considered that, according to Article 128-*bis* of the Banking Code, a specific body only in part comparable to an "ombudsman", has been established and named *Arbitro Bancario Finanziario* or shortly "ABF" (that is banking and finance arbitrator).[16]

ABF is formally and economically dependent in its functioning by the Bank of Italy, but it is completely independent in its judgments. In fact, ABF is not a mediation body, as it delivers *decisions*. Its proceedings, managed according to rules of law, distinguish the role of ABF among the vast landscape of alternative dispute resolution solutions, which are instead mainly built as mediation proceedings. ABF is a collegial body whose members are appointed on the basis of experience, professionalism, integrity and independence to handle disputes relating to the determination of rights, obligations and faculty, regardless of the full value of the relationship to which they relate.[17] The compulsory membership of banks and other financial intermediaries to the ADR managed by the ABF responds to the need to establish new forms of protection of clients, as well as to improve relations between the clients, on one side, and banks and other financial intermediaries, on the other side. Besides, it should be clarified that decisions of the ABF are not legally binding for the banks and other financial intermediaries and, consequently, they are not enforceable in ordinary court of justice. Nevertheless, what strikes the audience is that ABF decisions are generally fully executed by the financial intermediaries: this is a consequence of the fact that the Body has such a strong authority that flows both from reputation and supervisory sanctions of Bank of Italy, on one side,[18] and to the "implied authority" of its decisions, on the other side: those decisions are delivered by very specialized professionals and strengthened by a sort of *stare decisis* model owing to the coordination between the three local courts of the *Arbitro* due to the presence of a "coordination board" (so called Collegio di Coordinamento) set in Rome. The number of cases submitted to the ABF is constantly rising. First years of the functioning of the ABF have been essential to consolidate this position and to give the Body a unique role in the panorama of alternative dispute resolution system in Italy and abroad.

As ABF plays a consistent role in defining the duties of the financial intermediaries as well as the rights of the clients, it is consequently important to see how it intervenes in several matters connected to credit to consumers and, especially, to consumer credit contracts.

On this direction, let us remember first of all that as commonly recognized, consumer credit and the easy access to credit contracts is (only) one of the multiple causes of over-indebtedness. Costs of credit and lack of information about the same costs may in any case aggravate the position of the debtor, especially in those situations where there is a low financial education. That is why lending money to consumers, both in the form of consumer credit contracts (as defined by Directive 2008/48/EU) and mortgage credits (as identified by Directive 2014/17/EU)[19] has been the topic of a partial process of harmonization at the EU level. The EU legislation has tried to increase the level of information to be given to consumers, to introduce some forms of protections and to give more relevance to the role of the lender when assessing the access to credit, even if the idea of full responsible credit solutions have been repealed.[20]

The process of harmonization has been pushed more in the sector of consumer credit contracts, where two directives were approved, a first one in 1987 and the second one, after a long period of preparation, in 2008 (Directive 2008/48/EC): this last act have strengthened the rules on preliminary information and duty to identify all costs of credit; in addition, Directive 2008/48 has introduced a right of withdrawal as well as specific remedies for consumers in case of anticipatory extinction of the credit contract. Beside, many aspects of the applicable rules remain national, frustrating the idea of maximum harmonization as initially expressed since the first draft of the directive (Proposal of Directive COM(2002)443).[21]

One of the main issues left to national legislators refers to the consequences of the violation of the duty to assess the consumer's creditworthiness, as will be discussed in detail later in the chapter. In fact, EC directive 2008/48 makes reference, in its Article 8, to the duty of the lender to assess the creditworthiness of the consumer. This concept is quite limited if compared with the initial draft of the article as expressed in the Proposal COM (2002)443, which referred to the duty to conduct *responsible lending*. The final text of the directive omits to make reference to the duty of the responsible lender. Besides, the Directive states, in the Recital 26, that "Without prejudice to the credit risk provisions of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, creditors should bear the responsibility of checking individually the creditworthiness of the consumer. To that end, they should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a longstanding commercial relationship …"; once again in the end a large autonomy is left to the States: "The Member States' authorities could also give appropriate instructions and guidelines to creditors. Consumers should also act with prudence and respect their contractual obligations." In short, responsible lending remains in undertone, delegating the effective realization of this crucial principle to the strategies and decisions of the single states and to the code of conduct of the single creditors.

Directive 2008/48/EC have been implemented in Italy by Legislative Decree 141 of 13 August 2010, whose provisions are now included within the Banking Code (TUB). In particular, rules set by Article 8, which appear to be a sort of *Generalklausenhalftigkeit*, are translated into Article 124-bis, 1 paragraph of TUB, which states

that before granting credit the creditor has to assess the creditworthiness on the basis of sufficient information, where appropriate, obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database.

It should be immediately clarified that the duty to assess consumer's creditworthiness was not a new concept in the Italian legal system, as it is one of the key principle to which the bank activity, as well as the activity of other credit and financial intermediaries, is bound[22]; equally important is to remember that the assessment of the debtor's creditworthiness has not been introduced in the directive as well as into the national law, primarily to protect in any way the consumer who approaches the credit market, but also to protect the same credit market and to reduce failures that can compromise the economic stability of the financial institutions or can alter fair competition. In this light, undoubtedly the assessment of the debtor's creditworthiness is very far from the notion of responsible lending initially discussed in the Proposal of Directive of 2002. At national level no specific rules, neither coming from the legislation nor coming from the regulations in force, have been adopted in order to better detail the legal perimeter of that duty. In addition, no specific sanctions, public or private, have been introduced in the Italian legal system for the lack of assessment of the consumer creditworthiness: apparently, the duty set by Article 124-*bis* of the Banking Code remains confined to a directive principle. Is this really the case? Or should the interpreter make an effort to coordinate the duty – and the lack of specific consequences in case of non-respect of that duty – with other general principles of the legal system, including the general principle to protect the saving and individual assets (*risparmio)* as per Article 47 of the Italian Constitution[23] and the human dignity? And, moreover, does the duty to act according to good faith (Arts. 1176 CC and 1337 CC), as well as the respect of the principle of precaution on the side of the professionals and the principle of freedom of contract (set by Art. 1322 C.C.), which implies the capability of both parties to fully and freely consent to the contract agreement, can also be relevant in the specific area of credit contract? These general thoughts have to be better analysed, as it has been suggested by many Italian scholars.

At a deeper analysis, as it often happens in period of bad legislative grammar, the interpreter should search in the legal system if there are tools that can be of some help in order to fill in the gaps left by the shy or incautious legislators. It is in fact predominant in the legal doctrine the view that this situation should not, in any case, lead to totally disregard the recourse to general rules to give effectiveness to the duty to assess the creditworthiness of the consumer before granting credit. Legal scholars have debated a lot about the possible remedies for the case where the lender does not comply with the said duty.[24]

One very broad area of law to eventually sanction the irresponsible lending may be found in the unfair commercial practices provisions set by Legislative Decree 146 dated 2 August 2007.[25] This set of rules, of a crucial importance, provide, in fact, specific sanctions on the charge of the professional who violates rule of fair market practices, and there is no doubt that lending irresponsibly violates those duties. Nonetheless, the immediate effect on the credit contract is doubtful, leaving the consumer in debt in the miserable position he finds as a consequence of an irresponsible lending attitude.

Another possible solution is to make reference to general rules on pre-contractual liability (Art. 1337 CC) and by recalling the principle of precaution and protection on the charge of the professional.[26] These last notions, which appeared since not so long ago as "exotic" for the Italian legal system, are now more and more discussed in the legal doctrine and court decisions that seem to recall them as basic principles to orient the activity of the professionals in different areas of law. Following those rules and principle, the idea is that the creditor may be liable for those damages directly derived from the violation of duties of information and of properly assessed creditworthiness; the damage recoverable could be identified according to the rule on pre-contractual liability (as per 1337 CC, *culpa in contrahendo*) or contractual liability, depending on the specific case; nevertheless, this damage may not in any case made equal to the eventual state of over-indebtedness deriving to the debtor but could be linked to the aggravation of the crisis state. Similarly, the proposal of considering the contract void seems far from applicable, both because it is not expressly provided by the legislator and the notion of voidable contract requires the existence of particularly qualified problems of consent (as per Art. 1324 CC ff.) and because the declaration of invalidity of the contract (based on Art. 1418 CC) would oblige the consumer to the immediate restitution of the sum.[27] A further complexity in evaluating those damages derives from the fact that the credit procedure often provides for the activity of a mediators of the credit[28] the role of the mediator(s) of the credit and the lending institutions have to be precisely defined.

As the case law is still quite rare on the matter, it could be of some interest for the reader to make reference to cases in which the need to assess the creditworthiness and the connection to responsible lending has been analysed by the *Arbitro Bancario Finanziario*. According to the position specifically submitted to analysis, the ABF has ruled the following. First, the lending institutions has a duty to properly assess the financial position of the client, also by referring to data banks; in case of non-assessment, they may be liable for damages connected to excessive costs or to costs for getting a subsequent credit contract to repay the initial debt. Those damages, according to the general principles, could be pre-contractual damages (that is to say non-contractual damages) if the contract is never entered into, or contractual damages if the contract is then entered into. In

addition, according to the ABF, the contract of credit, in principle, may be declared void only if specific duties of information have been violated as they expressly provide for the possibility to declare the contract void or voidable. On the contrary, the ABF confirmed that the violation of the duty to assess creditworthiness cannot lead to the voidness of the contract as per Article 1418 CC.[29]

If one cannot talk about a structural intervention in the short to medium term, such premises let one assume that in future the ABF should take sharper actions also with reference to creditworthiness or to the consequences of a non-fulfilment.

In many cases, consumers have made recourse to very onerous credit contracts other than mortgage credits to face problems connected to everyday's needs. Considering that the ordinary civil courts have not had the powers, chances, or the ability, to incisively modify the situation (with the exception of the decision of the Court of Cassation concerning the calculation of civil usury)[30] it seems more interesting to focus on the role played since 2009 (the year of its entry into functioning) by the ABF with reference to controversies relating to anticipatory extinction of the credit contract.

It should in fact be specified that the request to anticipate termination of the credit contract may arise when the consumer, who had previously stipulated the contact under very onerous conditions, finds another more convenient contract, or even when, after a period of severe credit crisis, the consumer is then able to pay back the money borrowed and consequently to cut the additional costs initially paid.

In fact, the EC Directive 2008/48 provides at its Article 13 that the consumer may effect standard termination of an opened credit agreement free of charge at any time unless the parties have agreed on a period of notice. Such a period may not exceed one month. If agreed in the credit agreement, the creditor may effect standard termination of an open-end credit agreement by giving the consumer at least two months notice drawn up on paper or on another durable medium. In addition, according to Article 16, "The consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement. In such cases, he shall be entitled to a reduction in the total cost of the credit, such reduction consisting of the interest and the costs for the remaining duration of the contract"; nonetheless, in the event of early repayment of credit the creditor shall be entitled to fair and objectively justified compensation for possible costs directly linked to early repayment of credit provided. Accordingly, Article 125-*sexies* TUB provide for the right of the consumer to have a reduction of the costs of credit comprehensive of the interests paid or to be paid and of all the costs referring to the remaining extension of the credit contract. This rule has to be completed with the general duty of transparency and good faith as set by the Civil Code (Arts. 1175–1337) and stressed by communications of the Bank of Italy and other supervisory autorithies (especially the Italian authority for supervision on insurance – Istituto di Vigilanza sulle Assicurazioni Private, shortly "IVASS"with reference to insurance collaterals). In fact, they distinguish between recurring costs and upfront costs.[31] On this matter, it should be said that in an incredibly high number of cases, the ABF has been very rigorous in the evaluation of the transparency of the costs with reference to both costs to manage the contract and costs for fees or remuneration of other intermediaries[32] as a consequence, a frequent recourse to Article 1370 of the Civil Code, providing the so called *contra proferentem* rule, has been made in order to apply ambiguous or non-fully transparent clauses describing costs in favour of the consumers. In fact, it is useful to remember that art.1370 CC provides that whereas a standard contract term set by a party is unclear or has ambiguities, it has to be interpreted in favour of the other party.[33] Accordingly, the Arbitro Bancario has decided that whereas a cost is described in a contract term which is not fully intelligible or is unclear, it has to be considered a recurring cost, so that in case of prior restitution it has to be proportionally given back to the consumer debtor. It is evident that the rule adopted by the ABF is applied notwithstanding the fact that the contract of credit had formally identified as *fixed* or *lump* the costs and fees initially paid: All the costs have to be reimbursed according to the *pro rata temporis* rule, unless the creditor proves that those costs correspond exactly to already performed activities.[34]

Last but not least, an important rule followed by the ABF refers to the fact that the lending intermediary or, in case of transfer of the contract, the final intermediary has to reimburse all the costs even if they have been paid to other subjects (for example, credit mediators, insurance companies or agents, and so on). In conclusion, the said subject is consider jointly liable for the restitution and the consumer has a right to ask the whole, provided the possibility of recourse of the one who have paid towards other professionals involved in the credit transaction.[35]

In this way, the creditor is pushed to adopt a fair attitude and to avoid conflicts of interest, especially with reference to eventual commission or fees paid by other professionals involved and with whom she may have collateral agreements since the phase of negotiation. It is also a way to invite to a more ethical approach when giving credit.

4 Conclusion

The rules concerning the treatment of consumer over-indebtedness set by Law 3/2012 will probably help for the future, when the OCC will be fully in force and will also play a role in the assistance of the over-indebted persons. Some criticism can nevertheless be raised to the actual legislation in force.

In fact, many rules of the Law 3/2012 have been judged too "punitive" for the over-indebted consumers and their families. The punitive approach can be detected in several points of the law: From specific rules, i. e. with reference to the possible limitation to use electronic means of payment,[36] as well as with reference to more general solutions adopted, i. e. the impossibility to discharge family sureties, which could be an obstacle to the access to the procedure or in any case frustrate the goals of discharge. In addition, some criminal sanctions are provided for those who abuse of the procedure (see Art. 16), which may be in principle a shareable solution but once again the legislator seem to be more severe with consumers than with professionals who abuse of the bankruptcy procedure according to the Bankruptcy Law.[37] Secondly, the idea of financial education is completely neglected by the legislation in force. At this proposal, one might expect that professional lenders (i. e. banks and other financial intermediaries) can perform a more active role in supporting preventive financial education also in pair with OCC.

It seems, nevertheless, too early to give an analysis on the application of the new rules on over-indebtedness. A few cases have been dealt with since its entry into force and more than that, not so many consumer debtors are yet aware of the possibilities provided by the procedures set by Law 3/2012, in particular with reference to the possibility to obtain, even in the absence of the consent of the creditors, the discharge from obligations. On the other side, it should be considered that the credit market does not have so many rules that can be applied in order to protect indebted or over-indebted consumers. The bad news is in fact that, if creditors are rarely satisfied because of the malfunctioning of the procedural and execution procedures, the debtors, at the same time, do not have a set of proper rules or tools adequate to prevent or reduce the over-indebtedness and to support households in economic crisis. Essentially, the faculty to address an extra-judicial OCC and the presence of a certain degree of discretion are probably a good chance and an opportunity to reach an effective and compromised solution between the over-protection of the interests of over-indebted debtors and creditors, a point that should be the most economically efficient solution and, of course, that could be different from case to case.

Besides, the "risks" of eventual discharge of the debtor as provided by Articles 14-decies of Law 3/2012 may encourage a more cautious attitude of professional lenders when giving credit, in order to find a balance between the idea of responsible lending (on the charge of the creditors) and the *onus* of responsible borrowing (on the charge of the debtors).

In the meantime, the protection of vulnerable subjects, who are a great risks of becoming overindebted, can also be assured thank to the intervention of other institutions. The position of Arbitro Bancario Finanziario happens to be of particular importance in the panel of ADR: during its first years of activity it has confirmed that the pushing for a more fair attitude in credit contracts and in the relation between creditors and debtors can contribute to reduce the role of "bad credit" in the determining more severe cases of overindebtedness.

Notes

[1]For a wide analysis of the problem *see* E. Warren, *American in Debt. The Fragile Middle Class*, Yale University Press, New Haven and London, 2000; T. A. Sullivan, E. Warren and J. L. Westbrook, *As We Forgive Our Debtors. Bankruptcy and Consumer Credit in America*, Oxford University Press, NY and Oxford, 1989.

[2]K. M. Porter, *Misbehaviour and Mistake in Bankruptcy Mortgage Claims*, University of Iowa Legal Studies Research Paper, Number 07–29; Raisa Bahchieva, Susan Wachter and Elizabeth Warren, *Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership*, in Patrick Bolton and Howard Rosenthal, eds., Credit Markets for the Poor, Russel Stage Foundation Press, NY, 2005, p. 73.

[3]*See* N. Huls, J. Niemi kiesilainen and U. Reifner, *Overindebtedness in European Consumer Law. Principles from 15 European States*, 2010; J. Kilborn, *Comparative Consumer Bankruptcy*, Carolina Academic Press, North Carolina, 2009; on BRICS countries the reference goes to A. Feibelman, *Consumer Finance and Insolvency Law in India: a case study*, Tulane Public Law Research Paper No. 1,726,583; C. Lima Marques and R. Lunardelli Cavallazzi in *Direitos do Consumidor Endividado. Superendividamento e crédito*, Biblioteca de direito do consumidor, 29, San Paolo, 2006. For Eastern Europe *see* C. Duenwald, *Too Much of a Good Thing? Credit Booms in Transition Economies: The Cases of Bulgaria, Romania, and Ukraine*, IMF Working Paper, No. 57,128, 2005 on http://ssrn.com/abstract=887998, and J. Lowitzsch, *The Insolvency Law of Central and Central Europe*,online edition of INSOL, Berlin, 2007; S. Vilmalu, *The Overindebtedness Regulatory System in the Light of the Changing Economic Landspace*, in *Juridica International*, XVII/2010, pp. 217. For a comparative view from inside and outside the Western Legal Tradition *see* also D. Cerini, *Sovraindebitamento e consumer bankruptcy: tra punizione e perdono*, Milan, 2012.

[4]That is the case of Germany, where a specific procedure for individuals has been introduced in 1994 even if, in principle, they could also be submitted to the general bankruptcy law.

[5]See for further analysis J. Kilborn, *Expert Recommendations and the Evolution of the European Best practices for the Treatment of Overindebtedness*, 1984–2010, Working Paper Series, 2010.

[6]*See* C. Gau-Cabee, *"Enchaîné, affranchi, protégé, triomphant". Endettement des particuliers et contrat sur fond de crise: une étude diachronique*, RTDC, 2012, p. 33 ff.; Cerini, *Sovraindebitamento e consumer bankruptcy. Tra punizione e perdono*, Milan, 2012, in particular Chapter IV.

[7]The procedures set for the consumer in financial distress are highly inspired by the more recent amendments to the Italian Bankruptcy Law. The Bankruptcy Law, in fact, was modified – especially with the reforms of 2005 and 2012 – in order to promote settlement with creditors and to allow the business activity to continue. In this direction the Italian Bankruptcy Law provides for the possibility to set plans alternative to the traditinal bankruptcy procedure. In particular, the debotr can enter a pre-bankruptcy agreement (*concordato preventivo*) which refers to the traditional pre-bankruptcy arrangement with creditors, that was – and still is – the sole Italian insolvency procedure allowing a possible cram-down order without a public receiver overruling the board of directors. In addition, art.182-bis, as amended by the Law Decree No.83 of 222 June 2012 (the so called *Decreto Sviluppo* or Development Decree) has regulated the debts restructuring arrangement (*accordo di ristrutturazione dei debiti*), which provides for a pre-insolvency agreement with the creditors under the conditions set by the court. In this case the debtor can benefit from some protection as provided by the Bankruptcy Law even without the necessity of a declaration of bankruptcy. It is not here the case to fully examine the procedure and structure of the pre-bankruptcy agreement and debt restructuring agreement in particular; nevertheless, it is enough to remember that, in general, their main characteristic is to allow more flexibility to the debtor, under the supervision of the competent court. In addition, art.182-septies of the Bankruptcy Law (later introduced by Law Decree 83/2015) has extended the conditions for settlement, especially with reference to debt restructuring agreements with financial intermediaries.

[8]It should be remembered that the path to enlarge the perimeter of application of bankruptcy procedures began with Legislative Decree 98 dated 6 July 2011, which extended the possibility to subscribe restructuring plans with creditors to agricultural businessmen.

[9]OJ 24 January 2012.

[10]See OJ 27 January 2015.

[11]See also the Law Decree n. 07/2007 as converted by Law 40/2007.

[12]*See*, for example, the measures provided by the so-called "*Tremonti Decree*", from the name of the finance ministry in charge.

[13]*See* S. Catanossi, *Le fideiussioni prestate dai prossimi congiunti*, Perugia, 2007. D. Cerini, *Consumer personal securities*, in *Il DCFR: lessici, concetti e categorie nella prospettiva del giurista italiano*, ed. C. Marchetti, Torino, 2012, 225 ff.

[14]O.J. no. 235 of 8 October 2005 – Ordinary Supplement n. 16. The cultural and legal impact of the said *Codice del Consumo* is strong: not only it ideally re-unites in a single text the majority of the rules concerning consumer law, but it has also represented a true revolution in the legislative approach to consumer policies.

[15]If fact, this happens only when the consumer is the defendant, so that the suit is a a judicial execution in order to size her assets. Poor people, in other words, do not often have access to court to enforce their rights. In Italy, the "pro-bono" legal assistance is applicable in very limited cases.

[16]For a masterful analysis *see* V. Varano, *La cultura delle ADR*, in RCDP, 2016, 33/4, 495–535, again V. Varano (ed.), *L'altra giustizia. I metodi alternative di soluzione delle controversie nel diritto comparato*, Milan, 2007.

[17]If the claimant's request relates to the payment of a sum of money for any reason, the dispute falls within the jurisdiction of the arbitrator provided that the amount claimed does not exceed €100,000. Claims for damages that are not an immediate and direct consequence of the failure or violation of the intermediary are excluded from the jurisdiction of the deciding body. Also excluded are matters relating to material goods or services other than those covered by the banking and financial contract between the client and the broker or contracts connected to it (for example, those related to any defects in property leased or provided through consumer credit transactions or those related to supply associated with trade receivables sold as part of factoring transactions)

[18]In fact, in case of multiple violation or non-respect of the ABF decisions, the Bank of Italy can ask information to the financial intermediary as well as promote an inspection to verify if the intermediary is properly organized to performed the activity on the market.

[19]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 and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010.

[20]The role of financial education is so essential that the topic is at the centre of the analysis of public and private institutions at global level. For a broad perspective on the programs developed at academic levels together with private and public players, see in particular the reports of the Organization for Economic Co-operation and Development (OECD), at www.oecd.org/finance/financial-education, and here specifically the Financial Education Database, which serves as as a global clearinghouse on financial education, providing access to a comprehensive range of information, data, resources, research and news on financial education issues and programmes around the globe.

[21]See F. Macario, *Il percorso dell'armonizzazione nel credito al consumo: conclusione di un iter ventennale*?, in G. De Cristofaro, *La nuova disciplina europea del credito al consumo*, Torino, 2009, p. 1 ff.

[22]*See* widely R. Costi, *L'ordinamento bancario*, Bologna, 2007; G. Carriero, *Autonomia privata e disciplina del mercato. Il credito al consumo*, Turin, 2007, especially pp. 87 ff.; G. Piepoli, *Sovraindebitamento e credito responsabile*, in BBTC, vol. 1/2013, p. 39.

[23]On the role of general principles of the Constitution, *see* V. Crisafulli, *La Costituzione e le sue disposizioni di principio*, Milano, 1952, nota 5, p. 34; G. De Minico, *La Costituzione difende il risparmio*, in www.associazionedeicostituzionalisti.it, online review, also pretends a direct mandatory character to the principle, where he states, *"Forse ancora una volta stiamo dimenticando l'art. 47 Cost. Se provassimo a leggerlo come precettivo?"*

[24]from a systematic point of view, it is also important to mention the fact that in directive 2004/17/EU on mortgage credit contracts, a stricter rule for the violation of the assessment of the creditworthiness of the consumer is provided, and this may also offer interesting aspects of comparison. *See* for the analysis of responsible lending in mortgage credit contracts E. Pellecchia, *L'obbligo di verifica del merito creditizio dei consumatori: spunti di riflessione per un nuovo modo di guardare alla contrattazione con l'insolvente*, in *Nuova giur. civ. comm.*, 2014, p. 1088 ss.; S. Pagliantini, *Statuto dell'informazione e prestito responsabile nella direttiva 17/2014/UE (sui contratti di credito ai consumatori relativi a beni immobili residenziali)*, in *Contr. impr. eur.*, 2014, p. 537 ff.; R. Calvo, *Le regole generali di condotta dei creditori, intermediari e rappresentanti nella direttiva 2014/17/UE*, in *Corr. giur.*, 2015, 823 ss. and spec. 826.; F. Ferretti, *Contratti di credito ai consumatori relativi a beni mobili residenziali: prime osservazioni sulla direttiva 2014/17/UE*, in *Contr. impr. eur*, 2014, p. 863 ff.

[25]See AA. VV., *La tutela del consumatore contro le pratiche commerciali scorrette nei mercati del credito e delle assicurazioni, Quaderni Cesifin*, Milan, 2011; and here especially the paper by A. Genovese, *Il contrasto delle pratiche commerciali scorrette nel settore bancario. Gli interventi dell'Autorità Garante della concorrenza e del mercato*, pp. 41 ff.

[26]C. Carnicelli, *Risarcimento del danno da responsabilità precontrattuale: qualificazione e quantificazione*, in *Giust. Civ.*, 2011, p. 309 ff; see also Cass. Civ., I sez., 29 December 2011, no. 29,864.

[27]On this point, see M. Francisetti Brolin, *The creditworthiness on credit agreement for consumers (art. 124 bis TUB): civil remedies and some doubts*, Working Paper 1/2015, f Università della Valle d'Aosta, p. 12.

[28]*See* G. Falcone, *L'indebitamento delle famiglie e le soluzioni normative: tra misure di sostegno e liberazione dei debiti*, in S. Bonfatti and G. Falcone (eds.), La *ristrutturazione dei debiti civili e commerciali. Atti*, edition *Quaderni giur. comm.*, 2011.

[29]Reference goes to ABF Decision no. 1440/2013 on <www.arbitrobancariofinanziario.it>.

[30]*See* Court of Cassation, 350 dated 9 January 2013, where the judge set forth the inclusion of late payment interests in the usury rate threshold calculation.

[31]See in particolar *Comunicazione del Governatore della Banca d'Italia del 10 novembre 2009*.

[32]See *ex multis* ABF Decisions no. 1720/2012, no. 3195/2012 and no. 866/2013.

[33]See S. FERRERI, *Chapter 5. Interpretation*, in L. Antoniolli – A. Veneziano (Eds.), *Principles of European Contract Law and Italian Law*, 2005, p. 251 ff.

[34]See also, for a full report on the more recent case law by the ABF, the *Relazione sull'attività dell'Arbitro Bancario Finanziario - Anno 2016*, published on 7.7.2017, in particular with reference to the application of art.1370 CC to consumer credit contracts see pp. 79 ff.

[35]See the document by the Bank of Italy titled *Rapporto sull'attività dell'Arbitro Bancario Finanziario per l'anno 2014*, dated 30 June 2015, Section 4 (also available at www.arbitrobancariofinanziario.it).

[36]Even if it is well known that the use of electronic means of payment may increase compulsive spending behaviours, it is equally known that legislator pushes to privilege electronic means of payment so that consumers who have been submitted to the procedure may have additional difficulties.

[37]It should be considered, in particular, that the process of decriminalization of many behaviours and conducts as per the reform of the bankruptcy law seems in contrast with the solutions set by the position of the civil debtor.