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Mortgage credit in Portugal

I. Introduction

On 23 June 2017, more than one year after the deadline, Decree Law 74-A/2017 was published in the Portuguese Official Journal, transposing 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. It will come into force on 1 January 2018.

According to the preamble of Decree-Law 74-A/2017, the Directive “embodies the first regulatory initiative of the European Union with regard to credit market for immovable property”, aiming to create a common regulatory framework within the European Union in order to ensure an appropriate level of protection of the interests of consumers entering into mortgage credits by promoting the development of a more transparent, efficient and competitive credit market within the internal market, while, at the same time, promoting the stability of the banking system financial stability. The Portuguese legislator opted to transpose the provisions relating to credit intermediation and financial advisory services independently.

As stated in the preamble, the transposition act took the opportunity to gather many rules previously scattered through various legislative acts, consolidating them in a single act. However, the truth is that Decree-Law 349/98 of 11 November 1998 remains in force, so the new rules must be combined with the provisions of this regime.

Furthermore, the legislator regulated the activity of credit intermediaries, enacting Decree-Law 81-C/2017 of 7 July 2017 which establishes the requirements for access to and exercise of the activity of credit intermediaries and the provision of advisory services in relation to credit contracts.

II. Framework of the mortgage credit regime

The contract commonly referred to, in Portugal, as “home credit” (*crédito à habitação*) or “real estate credit” (*crédito imobiliário*) is characterized by being an active banking transaction which translates into a long-term credit contract (the agreed term is more than five years) granted to individuals (not to companies) with the provision of a guarantee, usually a mortgage on the property whose acquisition is financed.

There are several rules regulating mortgage credit, including Decree-Law 349/98 (with various amendments), which establishes the regime for credit granting for the acquisition, construction and execution of works in permanent, secondary or leasehold housing, as well as for the acquisition of land for the construction of owner-occupied housing. This legislation, as mentioned above, was not repealed (only some provisions were), so the analysis of Decree-Law 74-A/2017 will always have to take it into account.¹

Decree-Law 74-A/2017 begins by defining its scope, stating that it applies to the granting of mortgage credit or other property rights, irrespective of whether or not the property is intended for residential use, and to leasing contracts of immovable property for permanent, secondary or leasehold housing. The scope of this new law differs from the scope of Decree-Law 349/98 mentioned in the previous paragraph. It is broader since it applies to all mortgage credit, regardless of

whether the property is intended for housing. Credit contracts without mortgage collateral, whose purpose is to carry out works on residential properties, are now under the provisions of Decree-Law 133/2009 of 2 June 2009, which deals with consumer credit.

Articles 5 and the following enshrine a set of rules, applicable to creditors, relating to the remuneration policy of employees and the knowledge, training and competence requirements they need to fulfil in order to be able to draw up, market and conclude the credit contracts regulated by the statute.

It should be noted that housing credits in Portugal tend to be used for the acquisition or construction of permanent housing. At present, it is only possible to have access to the general credit regime, since the rules that regulated the subsidised regimes were revoked by Decree-Law 305/2003 of 9 December 2003.

Let us take a brief look at what characterizes mortgage credit in Portugal by comparing the two laws.

In Decree-Law 349/98 no maximum limit is established for credit granting. The banks usually limit the granting of credit to around 85 % or 90 % of the acquisition value. Decree-Law 74-A/2017 establishes that the credit must be granted taking into account the credit worthiness assessment that needs to be carried out, based on criteria specified in article 16, that include not only the evaluation of the property but also the analysis of the financial and economic circumstances of the consumer.

Decree-Law 74-A/2017 therefore restricts the contractual freedom of the parties in this matter. It should be noted that, with regard to the effort rate, neither of the two instruments sets a limit. Therefore credit institutions must set the effort rate for each contract. Usually it is set between 35 % and 50 %.

With regard to the repayment term of the credits, it is freely agreed between the parties, and may be changed over time. Usually it is set between 25 and 50 years, hardly ever exceeding the 75 years of age of the consumer. No Portuguese law lays down any restrictions on this matter.

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1 In addition to Decree-Law 349/98, the following acts also remain in force: Decree-Law 255/93 of 15 July 1993, which allows for the transmission of residential immovable property by private document in its own model, when accompanied by a credit contract, with or without a mortgage, where the lending entity is a credit institution; Decree-Law 103/2009 of 12 May 2009 (with amendments) which creates an extraordinary line of credit destined for the protection of own permanent housing in the event of unemployment of, at least, one of the mortgage lenders, granted by the State for a maximum period of 24 months, through the lending institution, having the client to reimburse the State at the end of that period, through the credit institution where the credit is granted; Decree-Law 58/2013, of 8 May 2013, which establishes the rules applicable to the classification and counting of the term of credit operations, remuneratory interest, capitalization of interest and default of the debtor; Law 63/2014 of 26 August 2014, which lays down the conditions applicable to credits for the acquisition or construction of owner-occupied housing for disabled persons of the Army; Law 64/2014 of August 26 approving the system for granting subsidised housing credits to persons with disabilities.

Interest rates are freely negotiated between the credit institution and the client. A variable interest rate can be agreed on, where the interest rate is the sum of two components: the indexer (the reference interest rate – 3, 6 or 12-month EUR-IBOR, depending on the consumer's option) and the spread (the bank's profit margin, freely negotiated for each contract, taking into account the credit risk of the client and the relation between the value of the credit and the value of the property or used as commercial strategy of the bank). As an alternative, the interest rate can be fixed, where the instalment remains constant during the period established in the contract. The fixed rates applied by the banks are generally based on swap rates, plus a spread. In any case, Article 21 of Decree-Law 74-A/2017 provides that creditors must ensure that information on the applicable interest rate is provided to the consumer.

Regarding early repayment, it should be noted that it was already regulated by Decree-Law 349/98 (article 29). However, articles 23 and 24 of Decree-Law 74-A/2017 provide for new limits on the amounts to be paid to the creditor in case of total or partial early repayment: the commission must not be higher than certain percentages and it must be clearly and expressly stated in the contract; the parties can also agree on the absence of a commission or on the payment of a lower amount than that provided for by law.

The law also establishes a prohibition concerning the charging of commissions for early repayment in case of death, unemployment or professional displacement (where there is a need for a change of the permanent residence of the household due to the displacement of the workplace of the consumer or another member of the household to a location further than 50 km in a straight line from the property). The solution is fully justified since, in such cases, the repayment is due to exceptional circumstances and partially unrelated to the will of the consumer.

Concerning the renegotiation of the credit agreement, article 25 of Decree-Law 74-A/2017 prohibits the charging of commissions for the renegotiation of credit conditions, in particular the spread or the duration of the contract. Furthermore, the creditors cannot increase the spread of a mortgage credit agreement in case of lease of the property, where the lease occurs as a result of a change of the consumer's place of work, unemployment or, under certain circumstances, in case of divorce, termination of the partnership or death of one of the spouses. This provision corresponds with slight changes to article 28-A of Decree-Law 349/98, which was repealed by Decree-Law 74-A/2017.

Finally, regarding the performance and non-performance of the contract, article 27 of Decree-Law 74-A/2017 establishes that the creditor can only terminate the credit agreement if the consumer fails to comply with at least three successive instalments. Before terminating the contract the creditor shall grant the consumer an additional period of at least 30 days to pay with express warning about the effects of the non-payment.

Article 28 stipulates that, during the enforcement proceedings, the consumer is entitled to bring the credit agreement back into force. If the consumer brings the credit agreement back into force, its termination is considered to be ineffective and it remains in effect in the exact same terms and conditions as the original agreement.

These are measures of special protection and had already been adopted in the context of the economic crisis. In practice, these measures had little impact. The problem is usually the lack of financial capacity of the consumer to solve the situation.

III. Conclusion of the contract and reflection period(s)

Directive 2014/17/EU allows each Member State the option of adopting, alternatively, a reflection period prior to the conclusion of the contract, a right of withdrawal subsequent to the conclusion of the contract, or a combination of the two (article 14-6). The minimum time period imposed by the Directive is seven days, regardless of the solution adopted.

The same provision also determines that “where a Member State specifies a reflection period before the conclusion of a credit agreement [...] the offer shall be binding on the creditor for the duration of the reflection period”. Member States can, however, “provide that consumers cannot accept the offer for a period not exceeding the first 10 days of the reflection period”.

We can find two different rules here:

- One imposed on the Member States, while allowing a transposition by different means (period of reflection or right of withdrawal, with a minimum period of seven days); *and*
- An optional one (the possibility of preventing consumers from accepting the proposal for a certain period of time, which may not exceed 10 days).

Let us see how these rules were transposed into the Portuguese legal system.

Decree-Law 74-A/2017 imposes on the creditor, at the moment in which he approves the credit agreement, the delivery (i) of a standardized information sheet incorporating the conditions of the credit agreement and (ii) of a draft of the credit agreement (article 13-2).

In accordance with article 13-4, “the creditor remains bound by the contractual offer made to the consumer for a period of at least 30 days, so that the consumer has sufficient time to compare offers, assess their implications and make an informed decision”. The duration of the contractual offer issued by the creditor may not therefore be less than 30 days. This period may be extended by agreement, but it cannot be reduced.

Article 13-4 does not explicitly state when the 30 days begin. However, the articulation with paragraph 2 of the same article suggests that the beginning of this period shall correspond to the moment of delivery of the standardized information sheet and the draft of the credit agreement, provided that they contain all the information relating to the contract. It is only at this moment that the consumer has all the necessary elements to make his assessment of the proposed contract. If only one of these elements is delivered, the time limit does not start, but the creditor is already bound by the terms he has defined.

The stipulation of this period means that the consumer has 30 days to consider the conclusion of the contract. Article 14-6 of the Directive provides that Member States shall give consumers the right to a minimum period of reflection of seven days (or, alternatively, a right of withdrawal with the same minimum period). The option in Portugal was to establish a reflection period prior to the conclusion of the contract, which is attributed by binding the lender to his contractual proposal for a minimum period of 30 days. The period indicated in the Directive has thus been considerably extended in Portugal.

The possibility of preventing consumers from accepting the contractual offer for a certain period of time has been used in Portugal. Consumers cannot accept the offer within the first seven days from the date of delivery of the standard information sheet and the draft of the credit agreement

(article 13-5).² We designate this period as a *mandatory period of reflection*, which cannot be confused, as we have seen, with the *period of reflection* imposed by the Directive.³ Under the Directive, this period, if established by Member States, could not exceed 10 days. The period of seven days provided for in Portuguese legislation, therefore, complies with the Directive.

In short, the contractual offer issued by the creditor is valid for a period of 30 days from the date of delivery of the standard information sheet and the draft of the credit agreement, but the consumer cannot accept the offer within the first seven days of this period. Between the 8th and the 30th day, the consumer has the right to accept the offer, and then the credit agreement is concluded.

If there is a guarantee agreement associated to the credit agreement, the guarantor also has a *mandatory period of reflection* of seven days before being bound by the guarantee agreement (article 13-6). This period starts counting from the date on which the guarantor has received both the copy of the standard information sheet and the draft contract. The creditor is also required to provide the appropriate explanations to the guarantor.

IV. Duty to commit to consumer ADR entities

Article 39-1 of Directive 2014/17/EU requires Member States to ensure that dispute resolution mechanisms are available for disputes arising from mortgage credit agreements, establishing that “Member States shall ensure that such procedures are applicable to creditors and credit intermediaries and cover the activities of appointed representatives”. Recital (77) of the Directive is clearer as regards legislative intent: “Member States should ensure that participation in such alternative dispute resolution procedures is not optional for creditors and credit intermediaries”.

In Portuguese law, article 38-2 of Decree-Law 74-A/2017 establishes that creditors must commit “to at least two entities that allow for the alternative dispute resolution” of consumer disputes, referring to Law 144/2015, of 8 September, which transposed Directive 2013/11/UE on consumer ADR into Portuguese law.

Law 144/2015 regulates consumer ADR in Portugal, imposing that all traders must provide information on the consumer ADR entities to which they are bound by a contractual offer addressed to the public or by legal imposition (article 18).⁴ In Portugal, the trader is bound by law to consumer ADR, in particular to consumer arbitration, in disputes related to services of general interest (such as water and energy supply or electronic communications). The trader is also bound to consumer arbitration if he has previously accepted the Centre’s jurisdiction for any future dispute in a given subject-matter (contractual offer addressed to the public).⁵ In this case, the arbitration agreement is concluded with the explicit or tacit acceptance by the consumer.

What is now required is that creditors are bound to arbitration proceedings (provided that consumers initiate such proceedings) in at least two consumer arbitration centres. This solution is in line with the rules applying to payment service providers and electronic money issuers (article 92-2 of Decree-Law 317/2009) and has also been imposed, by means of the amendment introduced by Decree-Law 74-A/2017, to creditors in the general consumer credit regime (article 32-2 of Decree-Law 133/2009). Portuguese law therefore imposes, in these cases, the participation of the creditors in consumer ADR proceedings.

However, this rule does not seem to take into account the Portuguese consumer ADR system, which includes, essentially, consumer arbitration centres with rigid territorial jurisdiction. Thus, if the centres have their jurisdiction defined according to the territory, committing to two centres means that only consumers who enter into mortgage credit agreements in those two places will benefit from the commitment of the creditors. For example, if a creditor is bound to arbitration proceedings in a centre with competence in Madeira and another with competence in the Algarve, he fulfils the duty imposed by the Portuguese law, but consumers who enter into contracts in other parts of the Portuguese territory – e.g. Lisbon or Oporto – will not, in principle, be able to see their disputes settled in these centres. We would argue that a system which allows for such discrimination on the basis of the territory is inappropriate, leaving it to the creditor to decide which regions to favour. It is also doubtful that this solution is compatible with European law, taking into account article 39-1 of Directive 2014/17/EU, read in conjunction with recital (77) of the Directive.

V. Conclusion

Directive 2014/17/EU was transposed in Portugal more than one year after the deadline. The socio-economic relevance of mortgage credit, the absence of a similar legal regime and the consequent hesitation about some of the needed policy options may justify this delay.

Prior to the Directive, in the midst of the economic crisis, the regulation of mortgage credit in Portugal was essentially based on the adoption of exceptional consumer safeguards. Decree-Law 74-A/2017 must therefore be articulated with previous legislation, which mainly regulates aspects not covered by the Directive.

Concerning the conclusion of the mortgage credit agreement, the contractual offer issued by the creditor must be

2 This *mandatory period of reflection* is only implied as article 13-5 literally only determines that the creditor must inform consumers of the existence of that *mandatory period of reflection*, which is not enshrined in any other provision. However, article 13-5 is to be interpreted as meaning that it imposes a *mandatory period of reflection*.

3 In Greece, this period of mandatory reflection is of five days, with a period of reflection of 10 days – Eleni Kaprou, “Mortgage Credit in Greece” (2017) 3 EuCML 135, 137. In Hungary, there is also a deadline during which the consumer cannot accept the offer (three days), with a reflection period of 15 days – Andrea Fejos, “Mortgage Credit in Hungary” (2017) 3 EuCML 139, 141. In the Netherlands there is only a reflection period of 14 days within which the consumer “can accept the offer and acquire the mortgage” – Jurgen Braspenning, “Mortgage Credit in the Netherlands” (2017) 4 EuCML 180, 183.

4 In its original version, article 18 imposed on all traders a duty to inform consumers about ADR entities even when there was no contractual offer to the public – João Pedro Pinto-Ferreira, “A Resolução Alternativa de Litígios de Consumo no Contexto da Lei n.º 144/2015” in Carlos Ferreira de Almeida *et al* (eds), *Estudo de Direito do Consumo – Homenagem a Manuel Cabeçadas Ataíde Ferreira* (DECO 2016) 310, 327 ff; Sandra Passinhas, “Alterações Recentes no Âmbito da Resolução Alternativa de Litígios de Consumo”, in António Pinto Monteiro (ed), *O Contrato na Gestão do Risco e na Garantia de Equidade* (Instituto Jurídico 2015) 357, 365 f. Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes also states, in art. 14-1, that “traders established within the Union engaging in online sales or service contracts, and online marketplaces established within the Union, shall provide on their websites an electronic link to the ODR platform” – Jorge Morais Carvalho and Joana Campos Carvalho, “Online Dispute Resolution Platform – Making European Contract Law More Effective”, in Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market* (Intersentia 2016) 245, 263 ff.

5 On the legal value of this commitment see Joana Campos Carvalho e Jorge Morais Carvalho, “Problemas Jurídicos da Arbitragem e da Mediação de Consumo” (2016) 1 RED 1, 7 ff.

valid for a period of at least 30 days starting from the date of delivery of the standard information sheet and the draft of the credit agreement, but the consumer cannot accept the offer within the first seven days of this period. Between the 8th and the 30th day, the consumer has the right to accept the offer, and then the credit agreement is concluded.

Directive 2014/17/EU requires Member States to ensure that dispute resolution mechanisms are available for disputes arising from mortgage credit agreements and that participation is not optional for creditors and credit intermediaries. In Portugal, Decree-Law 74-A/2017 stipulates that creditors must be bound to arbitration proceedings in at least two consumer arbitration centres. ■

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Mortgage credit in Sweden

I. Introduction

The Swedish residential housing market has undergone major changes lately. A steadily rising income in Swedish households, a growing migration wave, both urban and inbound, and slightly increased birth rates have led to a rising demand for housing which in turn has forced prices upwards creating thus a need for more money in order to purchase any property. That has led to the fact that more than 60 % of the homeowners in Sweden are now mortgage holders, one of the highest percentages amongst European countries.¹

More specifically, within less than 15 years, prices have more than doubled – in Stockholm the prices have gone from 30 000 SEK/m² in 2005 up to 70 000 SEK/m² in 2017.² There is a historic demand in housing which, however, is not followed by an equivalent supply. Even though construction rates are increasing³ there is a tremendous lack of housing in the whole land and especially in the three largest cities.⁴

Homeownership rates, which were quite low in comparison to other EU countries, have also been increasing steadily for the past 20 years. A main reason for that is the fact that in the 90's and 2000's there was a political decision to promote homeownership.⁵ Tenants were given the opportunity to buy their apartments from the owners, both state and private companies, at a discount. To that we can add that the interest rates in loans have hit a historic low⁶ as well as that until the 1st of June of 2016 banks could provide interest-only loans⁷ and it becomes clear why so many households have decided to loan money in order to buy property.

The rate of residential loans has been increasing steadily since 2012. In 2015 only, there was an annual increase of 8.1 % in residential mortgage lending.⁸ Similarly, in 2015 the number of new residential constructions increased by 22 %.⁹ Since more houses will become part of the supply stock it is expected that more people will continue to be led to the doors of the 8 biggest banks that are responsible for almost all loans granted in Sweden in order to get a mortgage loan;¹⁰ and they will probably get a mortgage loan with a length of 30 to 50 years.¹¹

All the above in combination with the fact that the total household debt based on mortgage loans is now estimated at approximately three trillion SEK – an increase from a bit less than one trillion SEK in 2000 –,¹² as well as the fact that the average debt-to-income ratio for households with new mortgage loans has increased from 325 % in 2014 to 402 % in 2016 – meaning that borrowers loan more money with regards to their income –,¹³ have not been overlooked by the Swedish legislator as well as by the financial and consumer

authorities. The importance of the mortgage market in general has been emphasised many times by the Swedish government.¹⁴ Therefore, even before the Mortgage Credit Directive (hereinafter: Directive) came into life, there were already measures taken in order to minimise the systemic and consumer-related risks.

II. The Directive and its transposition

When the Directive was adopted in 2014, in the aftermath of the 2008 crisis, there were two main goals to be achieved: to provide some financial stability and to protect consumers by primarily ensuring that they are informed of the real cost of taking on a mortgage. This would be mostly accomplished by obliging creditors to provide adequate information and adopt best practices.

In order to examine whether the Swedish legal order already had the measures provided by the Directive in place or whether new laws should be introduced, the Swedish government ordered a mortgage credit enquiry in the beginning of

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1 'Hypostat 2016 – A Review of Europe's Mortgage and Housing Markets' (European Mortgage Federation 2016) 15, <<https://hypo.org/app/uploads/sites/3/2017/01/Hypostat-2016-FINAL-lighter-web-version.pdf>> accessed 2 August 2017.

2 'Bostadspriser i Stockholm » Svensk Mäklarstatistik' (*Svensk Mäklarstatistik*) <<https://www.maklarstatistik.se/omrade/riket/stockholms-lan/stockholm/>> accessed 2 August 2017.

3 'Bostadsbyggandet Fortsätter Att Öka' (*Boverket*) <<http://www.boverket.se/sv/om-boverket/publicerat-av-boverket/nyheter/bostadsbyggandet-fortsatter-att-oka/>> accessed 15 August 2017.

4 'Läget På Bostadsmarknaden I Riket' (*Boverket*) <<http://www.boverket.se/sv/boende/bostadsmarknaden/laget-pa-bostadsmarknaden/riket/>> accessed 3 August 2017.

5 Jill Billborn, *From A to Z the Swedish Mortgage Market and Its Role in the Financial System* (Sveriges Riksbank 2014) 9 <http://www.riksbank.se/Documents/Rapporter/Riksbanksstudie/2014/rap_riksbanksstudie_140411_eng.pdf> accessed 14 August 2017. This trend started by deregulating the credit and housing market in the mid 80's.

6 Johannes Holmberg, 'Den Svenska Bolånemarknaden' (*Statistiska Centralbyrån*) <<http://www.scb.se/sv/hitta-statistik/artiklar/den-svenska-bolanemarknaden/>> accessed 14 August 2017.

7 Billborn (n 5) 14; FFFS 2016:16 Finansinspektionens föreskrifter om amortering av bolån.

8 'Hypostat 2016 – A Review of Europe's Mortgage and Housing Markets' (n 1) 93.

9 *ibid.*

10 'The Swedish Mortgage Market' (Finansinspektionen 2017) Ref. 17-5096 <http://www.fi.se/contentassets/2a4665e04627420880e4af1c771a11fe/bolan_2017_eng.pdf> accessed 14 August 2017.

11 'Hypostat 2016 – A Review of Europe's Mortgage and Housing Markets' (n 1) 94.

12 Johannes Holmberg, 'Bolånen I Sverige Fortsätter Växa' (*Statistiska Centralbyrån*) <<http://www.scb.se/sv/hitta-statistik/artiklar/bolanen-i-sverige-fortsatter-vaxa/>> accessed 14 August 2017; Billborn (n 5) 9.

13 'The Swedish Mortgage Market' (n 10).

14 Billborn (n 5).