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The creditworthiness on credit agreements for consumers (art. 124 *bis* T.U.B.): civil remedies and some doubts

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## **The creditworthiness on credit agreements for consumers (art. 124 bis T.U.B.): civil remedies and some doubts**

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### **Abstract**

The rule contained in art. 124 bis T.U.B. on credit agreements for consumers, coming from art. 8 of directive 2008/48/EU, provides that the creditor has to assess the consumer's creditworthiness. This provision is quite mysterious, because it does not tell what are the remedies in favor of consumer, whenever the creditor does not (or does not correctly) this kind of control, regarding potential solvency of debtor.

Concerning the loan contract, could the scholar imagine the remedy of voidness? Or the contract is still valid, but the only tool is the recovery of damages? In that case, what kind of liability is this? and what kind of damages are suitable? Over all, which party has the burden of proving that the creditworthiness's control was really and correctly done? The consumer or the creditor?

This essay tries to give some first answers, moving from general categories of contract-law.

**Keywords:** credit agreements for consumers; creditworthiness; liability for *culpa in contrahendo*; voidness of contract; burden of proof.

INDEX: 1. Introduction. – 2. Distinctions and frontiers between «rules of liability» and «rules of voidness». – 3. Creditworthiness control and liability for *culpa in contrahendo* – 4. Two interesting issues: some clarifications – 5. The burden of proof. – 6. Reversal of the burden of proving with a standard term.

1. The rule now provided by art. 124 bis T.U.B. (Testo Unico Bancario), on credit agreements for consumers, is depending from the comply with directive 2008/48/EU (art. 8) in Italy: namely – before the conclusion of the credit agreement– the creditor has to assess the consumer's 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» <sup>(1)</sup>.

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<sup>(1)</sup> In italian literature see and compare: MAZZEO, *La verifica del merito di credito*, in *Obbl. contr.*, 2010, p. 861 ss.; SIMIONATO, *Prime note in tema di valutazione del merito creditizio del consumatore nella direttiva 2008/48/CE*, in DE CRISTOFARO (a cura di), *La nuova disciplina europea del credito al consumo*, Torino, 2009, p. 183 s.; FALCONE, *L'indebitamento delle famiglie e le soluzioni normative: tra misure di sostegno e liberazione dai debiti*, in FALCONE and BONFATTI, *La ristrutturazione dei debiti civili e commerciali*, Milano, 2011, p. 191 ss.; CATERINI, *Controllo del credito, tutela del risparmio e adeguatezza nel finanziamento «finalizzato»*, in V. RIZZO, CATERINI, DI NELLA, and MEZZASOMA (a cura di), *La tutela del consumatore nelle posizioni di debito e credito*, Napoli, 2010, p. 49 ss.; E. MINERVINI, *Il sovraindebitamento del consumatore e la direttiva*

In other words, the creditor has a special and circumstanced duty, to make a sort of «check-up activity» on potential solvency of debtor on the future <sup>(2)</sup>: it's a kind of control that creditor normally does; or, at least, a control that creditor would have interest to consider, before the conclusion of a credit agreement <sup>(3)</sup>.

This rule, by the way, may be well placed in a larger bow of european law policy: in order to contrast the last (world's) economical crisis, the target is to introduce a new concept of «responsible lending», and so, with this kind of legal provisions, the attempt is to reduce the risk of «over-indebtedness», regarding consumers and, more generally, not-professional investors <sup>(4)</sup>. This tendency gains an easy confirmation

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2008/48/CE, *ivi*, p. 65 ss.; S. LA ROCCA, *L'obbligo di verifica del merito creditizio*, *ivi*, p. 233 ss.; MODICA, *Profili giuridici del sovraindebitamento*, Napoli, 2012, p. 233 ss.; ID., *Concessione «abusiva» di credito ai consumatori*, in *Contr. impr.*, 2012, p. 492 ss.; R. NATOLI, *Il contratto «adeguato». La protezione del cliente nei servizi di credito, di investimento e di assicurazione*, Milano, 2012, p. 141 ss.; PIEPOLI, *Sovraindebitamento e credito responsabile*, in *Banca Borsa tit. cred.*, 2013, p. 38 ss.; IURILLI, *Merito creditizio, causa in concreto e nullità del contratto di mutuo: profili di responsabilità civile*, in *Studium iuris*, 2014, p. 419 ss. and p. 546 ss.

<sup>(2)</sup> In this sense, see for instance SIMIONATO, *Prime note in tema di valutazione del merito creditizio*, *cit.*, p. 184 s.; GORGONI, *Spigolature su luci (poche) e ombre (molte)*, *Resp. civ. prev.*, 2011, p. 765; MODICA, *Il contratto di credito ai consumatori nella nuova disciplina comunitaria*, in *Eur. dir. priv.*, 2009, p. 829

<sup>(3)</sup> FALCONE, *Prestito responsabile e sovraindebitamento del consumatore*, in *Dir. fall.*, 2010, p. 642 ss. But, for some different clarifications, see PONCIBÒ, *Credito al consumo e collegamento negoziale*, in CALLIANO (a cura di), *Informazione e trasparenza nei contratti asimmetrici bancari, finanziari e assicurativi e rimedi del diritto privato europeo*, Torino, 2013, p. 182: we have also to consider that sometimes, in practice, the creditor could be guaranteed for the sum given to the consumer (with pawn, mortgage, or with a suretyship contract coming from a third party); or the credit could be immediately sold to a third party: in this cases, obviously, the creditor has no interest to make this control of consumer's creditworthiness. The same idea is also expressed by SIMIONATO, *Prime note in tema di valutazione del merito creditizio*, *cit.*, p. 186 s.; GORGONI, *Spigolature su luci (poche) e ombre (molte) della nuova disciplina dei contratti di credito ai consumatori*, *cit.*, p. 765; MODICA, *Concessione «abusiva» di credito ai consumatori*, *cit.*, p.519. Se also PIEPOLI, *Sovraindebitamento e credito responsabile*, *cit.*, p. 41 s., who notices that consumer's credit agreements are normally qualified by little sums given to debtor: consequently the cost of creditworthiness control is usually higher than every single instalment of the debt.

<sup>(4)</sup> See for instance FALCONE, *L'indebitamento delle famiglie e le soluzioni normative: tra misure di sostegno e liberazione dai debiti*, *cit.*, p. 191 R. NATOLI, *Il contratto «adeguato»*, *cit.*, p. 139. A confirm of this european law policy may be easily found in *Whereas* n. 26 of 2008/48/EU: «Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the specific features of their credit market. Those measures may include, for instance, the provision of information to, and the education of, consumers, including warnings about the risks attaching to default on payment and to over-indebtedness. In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so». A part of italian literature fa hardly criticized the duty to control the creditworthiness: in this sense see CARRIERO, *Disciplina comunitaria del credito al consumo*, in *Scritti di diritto dell'economia*, Milano, 2010, p. 156, who thinks that the text of the rule is too vague. An other critic comes from COSMA e COTTERELLI, *La direttiva sul credito ai*

into the new directive 2014/17/EU, on «credit agreements for consumers relating to residential immovable property». This kind of lending, in Italian law, is now excluded from the provisions of art. 124 *bis* T.U.B., as we deduce from the provision of art. 122, comma 1, lett. e) T.U.B. In every case, this new European directive – that has still to be complied with effects in Italy – provides more strict rules regarding creditworthiness's control (art.18), in the special case that consumers ask a sum (generally high) to buy this kind of goods <sup>(5)</sup>.

Examining now the art. 124 *bis* T.U.B., this provision is not explainable in the only sense of a measure of public law <sup>(6)</sup>: namely in the sense that every non-compliance of the duty can involve administrative sanctions against the creditor. Actually also this point is, however towards, doubtfully: a part of literature thinks that art. 124 *bis* T.U.B. does not have a specific administrative sanction: the provision is not included among those, whose non-compliance could lead from Bank of Italy an administrative penalty against creditor <sup>(7)</sup>; an other part of literature, contrariwise, has noticed that the non-compliance of the duty consist into a «unfair business-to-consumer commercial practice»: namely the missing (or incorrect) control of creditworthiness is supposed to be able «to materially distort or is likely to materially distort the economic behaviour» of consumer (art. 5, § 1, directive

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*consumatori: alcune implicazioni giuridiche e economiche*, in *Banca impr. soc.*, 2008, p. 291 ss.; MAZZEO, *La verifica del merito di credito*, cit., p. 864: namely, the duty to control the creditworthiness could reduce consumer's possibilities to obtain micro-credits in legal ways.

<sup>(5)</sup> About directive 2014/17/EU, see in Italian literature: PELLECCCHIA, *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.; 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 ss.; 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.; RUMI, *Profili privatistici della nuova disciplina sul credito relativa agli immobili residenziali*, in *Contratti*, 2015, 70 ss. and spec. p. 80 ss. For some briefs see also 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 ss.

<sup>(6)</sup> See R. NATOLI, *Il contratto «adeguato»*, cit., p. 141; PIEPOLI, *Sovraindebitamento e credito responsabile*, cit., p. 55 s.

<sup>(7)</sup> In this sense G. DE CRISTOFARO, *La nuova disciplina dei contratti di credito ai consumatori e la riforma del t.u. bancario*, in *Contratti*, 2010, p. 1052; R. NATOLI, *Il contratto «adeguato»*, cit., p. 141; MODICA, *Concessione «abusiva» di credito ai consumatori*, cit., p. 496; PIEPOLI, *Sovraindebitamento e credito responsabile*, cit., p. 61. A dissenting opinion seems to be lead by DE POLI, *Gli obblighi gravanti sui «creditori» nella fase anteriore e posteriore al contratto e le conseguenze della loro violazione*, in DE CRISTOFARO (a cura di), *La nuova disciplina europea del credito al consumo*, cit. p. 70; MIRONE, *L'evoluzione della disciplina sulla trasparenza bancaria in tempo di crisi: istruzioni di vigilanza, credito al consumo, commissioni di massimo scoperto*, in *Banca Borsa tit. cred.*, 2010, p. 592: they think that Bank of Italy can impose an administrative sanction.

2005/29/WE, complied with effects in Italy on art. 20, comma, 2, c. cons.)<sup>(8)</sup>: consequently every «unfair business-to-consumer commercial practice» can be sanctioned in Italy (not by Bank of Italy, but) by the Antitrust Authority.

But – made this premise – the most interesting topic concerns civil law. Questions are: *a)* the breach of this duty, before the conclusion of contract, has any influence on the loan agreement? *b)* can the scholar imagine some remedies against this breach? *c)* And of which remedies are we talking about?

The original art. 8 of european directive 2008/48/UE does not give any answer: so the literature has primarily taught that the problem was going to be solved when the italian lawgiver had to adopt and publish the provisions necessary to comply with this directive<sup>(9)</sup>. This suggestion, unfortunately, was not followed by italian lawmaker, which has simply used a technique of «copy out» of european directive; however the same technique of law-making was used also by other lawgivers of Member States, reproducing the same text of art. 8 without any reference about remedies in favour of consumer<sup>(10)</sup>.

A particular solution is provided in french law<sup>(11)</sup>: if creditor has infringed the duty of creditworthiness's control (art. L. 311- 9, *code de consommation*), the rule contained in art. L. 311-48, *code de consommation*, specifically provides that «*il est*

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<sup>(8)</sup> In this sense G. DE CRISTOFARO, *La nuova disciplina comunitaria del credito al consumo. La direttiva 2008/48/CE e l'armonizzazione completa delle disposizioni nazionali concernenti "taluni aspetti" dei contratti di credito dei consumatori*, in *Scritti in onore di Marco Conforti*, I, Milano, 2008, p. 910. A dissenting opinion is coming from DE POLI, *Gli obblighi gravanti sui «creditori» nella fase anteriore e posteriore al contratto*, cit., p. 70: he thinks that no one could know the repayment ability of the consumer better than the same consumer; so that, even if the credit rating is not rated, ha to be excluded the suitability of such behavior to distort the economic behavior of the consumer. See also some doubts expressed from GORGONI, *Spigolature su luci (poche) e ombre (molte)*, cit., p. 769.

<sup>(9)</sup> G. DE CRISTOFARO, *La nuova disciplina comunitaria del credito al consumo. La direttiva 2008/48/CE e l'armonizzazione completa delle disposizioni nazionali*, cit., p. 910

<sup>(10)</sup> For interesting comparative details see R. NATOLI, *Il contratto «adeguato»*, cit., p. 143 s., nt. 25 ss. For instance see, in Germany, § 18(2) of *Kreditwesengesetz*; in U.K. see art. 55B of *Consumer Credit Act*, where there are no remedies provided: but, concerning english law, someone has suggested that can be applied artt. 140B (*Unfair relationship between creditors and debtors*) and 140B (*Powers of courts in relation to unfair relationship*). These two provisions give a great power to the judge: he can change the content of the contract, forcing the creditor to repay the instalments received, or even reduce (or exclude) interest. If this solution is right, we can imagine in U.K. a very similar rule to the french one.

<sup>(11)</sup> See for details MODICA, *Concessione «abusiva» di credito ai consumatori*, cit., p. 507

*déchu du droit aux intérêts, en totalité ou dans la proportion fixée par le juge»* <sup>(12)</sup>.

So we think that this french remedy has a clear «punitive function», leaving aside the necessity to prove a real damage suffered from consumer: obviously, in french provision, this function does not work with the mechanism (proper of common law) of «punitive or exemplary damages», namely with condemn of an other sum in addition to actual damages; but, otherwise, this described «punitive function» seems to be equally found in reduction of the total amount due by consumer.

In french law has also to be noted a judgement coming from Court of Justice (Fourth Chamber), which was called upon to assess a systemic problem, originated from the general french legislation relating to statutory rate: the European judgment has stated that - after deletion of contractual interests – the consumer can not be forced to any interest at statutory rate: namely, interest that would be normally payable from the date of delivery of a court decision, ordering that borrower has to pay the outstanding sums; nor can be applied a specific rule on increase of such interest legal, rule which is provided under art 313-3 *Code monétaire et financier*. <sup>(13)</sup>.

2. Now it is time to examine italian law experience: we have already said that the lawmaker, providing art. 124 bis T.U.B., has preferred to be silenced, making no choice about remedies and giving no textual clues. In order to find an answer, a

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<sup>(12)</sup> A similar remedy can be found also in Belgian law: see for details MEUCCI, *La destinazione di beni tra atto e rimedi*, Milano, 2009, p. 398.

<sup>(13)</sup> See Corte giust., 27 marzo 2014, n. 565, C-525/2012, in *Corriere giur.*, 2014, p. 860, with comment of CONTI, *Contratti di credito ai consumatori*. The judgement may be read in english at this internet address: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0565>. This is the official «operative part» of judgement: « Article 23 of 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 must be interpreted as precluding the application of a national system of penalties under which, in the event of failure on the part of the creditor to comply with its obligation, prior to conclusion of an agreement, to assess the borrower's creditworthiness by consulting the relevant database, that creditor forfeits its entitlement to contractual interest but is automatically entitled to interest at the statutory rate, payable from the date of delivery of a court decision ordering that borrower to pay the outstanding sums, which is further increased by five percentage points if, on expiry of a period of two months following that decision, the borrower has not repaid his debt in full, where the referring court finds that — in a case such as that in the main proceedings, in which the outstanding amount of the principal of the loan is immediately payable as a result of the borrower's default — the amounts which the creditor is in fact likely to receive following the application of the penalty of forfeiture of entitlement to contractual interest are not significantly lower than those which it could have received had it complied with its obligation to assess the borrower's creditworthiness».

serious investigation of civil remedies has to begin moving from general contract-law categories.

In this field the provision under art. 124 *bis* T.U.B. is easily linked with a well-known scholar debate, about distinctions and frontiers between «rules of liability» and «rules of voidness». The traditional opinion explains that there are two different groups of rules, both concerning – using a figurative language – a sort «disease» of contractual relationship: some of these rules involve a «contractual liability» for debtor, but contract is still valid; some other rules involve «voidness» or «avoidance» of contract. But the two groups would have no relevant interferences: in this sense, for example, the duty of good faith or fairness (artt. 1175 e 1375 c.c.) indicate how much can be asked from debtor and the extent to which he must exert himself in performance, to prevent non-execution of contract: but a behaviour against good faith or fairness, following the classic teaching, could never involve «voidness» of contract <sup>(14)</sup>.

But some contrariwise signals have come from case law: first of all, in a few very curious decisions, italian judges have held that a behaviour against good faith (or fairness) could be potentially able, sometimes, to involve the «voidness» of contract. On details, these are the used arguments: *a*) good faith is not only a simple general rule, but it is also a strong principle, that can not be subject to contrary agreement; *b*) therefore, good faith could be sometimes assessed as a kind of «mandatory rule»; *c*) so that the contract could be void under the provision of art. 1418, comma 1, c.c. <sup>(15)</sup>.

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<sup>(14)</sup> See in this sense, in traditional italian literature, SANTORO-PASSARELLI, *Dottrine generali del diritto civile*, 9<sup>a</sup> ed. (rist.), Napoli, 1997, p. 171; CARIOTA FERRARA, *Il negozio giuridico nel diritto italiano*, Napoli, 1966, p. 28 ss.; DI MAJO, *L'esecuzione del contratto*, Milano, 1967, p. 381; MENGONI, *Spunti per una teoria delle clausole generali*, *Riv. crit. dir. priv.*, 1984, p. 9; PIETROBON, *Errore, volontà, affidamento nel negozio giuridico*, Padova, 1990, p. 104 ss. For more references see the book of G. D'AMICO, *Regole di validità e principio di correttezza nella formazione dei contratti*, Napoli, 1996, *passim* and spec. p. 44 ss.; ID., *Nullità virtuale - nullità di protezione: variazioni sulla nullità*, in PAGLIANTINI (a cura di), *Le forme della nullità*, Torino, 2009, p. 1 ss., and spec. p. 8, where is confirmed the traditional opinion: a behaviour against good faith or fairness can never involve «voidness» of contract; FESTI, *Il divieto di «venire contro il fatto proprio»*, Milano, 2007, p. 166 ss.

<sup>(15)</sup> See Cass., 26 ottobre 1995, n. 11151, in *Giur. comm.*, 1996, p. 329, concerning shareholder resolutions. This decision was looked upon favorably by GALGANO, *Squilibrio contrattuale e mala fede del contraente forte*, in *Contr. impr.*, 1997, p. 423 s. See also Cass., 2 novembre 1998, n. 10926, in *Foro it.*, 1998 I, c. 3081, concerning a leasing contract. The decision has a positive comment from RICCIO, *La clausola di buona fede è, dunque, un limite generale all'autonomia contrattuale*, in *Contr. impr.*, 1999, p. 21 ss. But, for some critics to both decisions, see NANNI, *La clausola generale di buona fede*, Padova, 1998, p. 333 ss.; VETTORI, *Giustizia e rimedi nel diritto europeo dei contratti*, in *Eur. dir. priv.*, 2006, p. 63; A. ALBANESE, *Violazione di norme imperative e nullità del contratto*,



The complex theme has now a new refresh in studies, engaging law scholars in the specific field of litigation between investors and financial intermediaries: that in order to find the right civil remedy for infringement of duty contained on art. 21 T.U.F. (Testo Unico Finanza) <sup>(16)</sup>: on details, this provision requires a number of important disclosure and behavior duties binding for intermediaries, but it also tells that these duties take place (also) for protection of a public interest to «market integrity». A part of literature has considered this final formula as a clue of the relevance of principle of «public order» (art. 1343 c.c.): so that it is suggested that the break of this rules has to lead contract to voidness, finding also a possible link between this provision and art. 47 of Italian Constitution (where is declared the protection of «popular savings») <sup>(17)</sup>.

But the «voidness thesis» has been recently abandoned by the highest Italian Supreme Court: namely the Court of Cassation – in two famous leading cases of

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Napoli, 2003, p. 346 ss. Regarding this theme, it is very interesting the comparison with art. 1:102 PECL (Principles of European Contract Law): the provision tells that: «Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles». The text, in fact, seems to find a relevant link between «good faith» and «mandatory rules», because both are intended as limits of freedom of contract. But, to find an other sense of this provision, see specially CASTRONOVO, *Il contratto nei Principi di diritto europeo*, in S. MAZZAMUTO (a cura di) *Il contratto e le tutele*, Torino, 2002, p. 49 s.; DI MAJO, *Buona fede e nullità*, in *Festschrift für Peter Schlechtriem zum 70. Geburtstag*, Tübingen, 2003, p. 457 ss. and spec. p. 461. Both writers, following the classic teaching, think that a behaviour against good faith can never lead contract to voidness.

<sup>(16)</sup> See ROPPO, *La tutela del risparmiatore fra nullità, risoluzione e risarcimento danno (ovvero l'ambaradan dei rimedi)*, in *Contr. impr.*, 2005, p. 896 ss. and spec. p. 903.

<sup>(17)</sup> The remedy of voidness was primarily held by some judgments coming from regional courts: for all the references of this case law, see for instance MERUZZI, *La responsabilità precontrattuale fra regole di validità e regole di correttezza*, in *Contr. impr.*, 2006, p. 947 s., nt. 4. In Italian literature the thesis of voidness was held at first from MAFFEIS, *Conflitto di interessi nel contratto e rimedi*, Milano, 2002, pp. 489-491, specially in case of break of the rule that avoids conflicts of interests coming from intermediaries; in the same sense SARTORI, *Il conflitto di interessi fra intermediari e clienti*, in *Riv. dir. civ.*, 2002, p. 210 (but see also ID., *Le regole di condotta degli intermediari finanziari. Disciplina e forme di tutela*, Milano, 2004, p. 371, where is describe an other solution). Concerning the general break of art. 21 T.U.F., the remedy of voidness is held in literature by GENTILI, *Disinformazione ed invalidità, i contratti di intermediazione dopo le Sezioni unite*, in *Contratti*, 2008, p. 393; MAFFEIS, *Discipline preventive nei servizi di investimento: le Sezioni unite e la notte (degli investitori) in cui tutte le vacche sono nere*, in *Contratti*, 2008, p. 405, (specially in relation of operations «inadequate» and conflicts of interest); and specially, with very strong arguments, by CALVO, *Il risparmiatore disinformato fra poteri forti e tutele deboli*, in *Riv. trim. dir. proc. civ.*, 2008, p. 20 ss.; ID., *Nullità e obblighi di informazione*, in PAGLIANTINI (a cura di), *Le forme della nullità*, cit., p. 155 ss.; ID., *Il fondamento etico della nullità*, in PAGLIANTINI (a cura di), *Abuso del diritto e buona fede dei contratti*, Torino, 2010, p. 228 ss.; on new see also G. PERLINGIERI, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo*, Napoli, 2013, p. 33 ss. and spec. p. 63 ss., in the sense of voidness.; for more references about this debate see DI DONNA, *I rimedi nella fase precontrattuale*, in *Rass. dir. civ.*, 2012, p. 1068; VALONGO, *Profili di tutela individuale dell'investitore tra nullità e responsabilità civile*, Milano, 2012, *passim* and spec. p. 85 ss.

2007 – has distinguished the moment when the intermediary breaks the rule contained in art. 21 T.U.F. : *a*) if the break happens before the conclusion of contract, there is a «precontractual liability» (so called *culpa in contrahendo*), even though the contract remains still valid; *b*) if the break of this rule happens during performance (for example in execution of single orders of investment,) there is a normal «contractual liability» of the intermediary. So, in both cases, the contract is considered still valid and investor has a recovery of damages; but, over all, the highlighted point is that the traditional teaching seems to be strongly confirmed: all the «behavior duties» – or expressly written in rules (art. 21 T.U.F), or descending from the general clause of good faith – can never lead a contract to voidness <sup>(18)</sup>.

3. The same coordinates are supposed to be useful when scholar has to choose the right remedy in case of break of the (other) provision contained in art. 124 *bis* T.U.B.: the duty to assess the consumer's creditworthiness is expressly provided «before the conclusion of the credit agreement»; therefore, the majority position in literature thinks that this duty is a sort of specification of general obligation that binds parties to conduct negotiation in good faith, namely during the «precontractual phase» (art. 1337 c.c.): consequently this rule is considered a «behavior duty», whose

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<sup>(18)</sup> See Cass., Sez. un. 19 dicembre 2007, n. 26724, in *Foro it.*, 2008, I, c. 784, with comment of SCODITTI, *La violazione delle regole di comportamento dell'intermediario finanziario e le sezioni unite*; in *Danno resp.*, 2008, p. 525, with comment of ROPPO, *La nullità virtuale del contratto dopo la sentenza Rodorf*; in *Nuova giur. civ. comm.*, 2008, p. 432, with comment of SALANITRO, *Violazione della disciplina dell'intermediazione finanziaria e conseguenze civilistiche: ratio decidendi e obiter dicta delle sezioni unite*; Cass. sez. un., 19 dicembre 2007, n. 26725, in *Giur. it.*, 2008, p. 347, with comment of COTTINO, *La responsabilità degli intermediari finanziari e il verdetto delle Sezioni unite: chiose, considerazioni e un elogio dei giudici*; in *Resp. civ. prev.*, 2008, p. 547, with comment of GRECO, *Intermediazione finanziaria, violazione di regole comportamentali e tutela secondo le Sezioni Unite*. See also the comments of GALGANO, *Il contratto di intermediazione finanziaria davanti alle sezioni unite della Cassazione*, in *Contr. impr.*, 2008, p. 1 ss.; MARICONDA, *L'insegnamento delle sezioni unite sulla rilevanza della distinzione fra norme di comportamento e norme di validità*, in *Corr. giur.*, 2008, p. 230 ss.; VETTORI, *Regole di validità e responsabilità di fronte alle Sezioni unite. La buona fede come rimedio risarcitorio*, in *Obbl. contr.*, 2008, p. 104 ss. The same idea was already held by Cass. 29 settembre 2005 n. 19024, in *Danno e resp.*, 2006, p. 25, with comment of ROPPO e AFFERNI, *Dai contratti finanziari al contratto in genere: punti fermi della Cassazione su nullità virtuale e responsabilità precontrattuale*. See also Cass. ord., 16 febbraio 2007 n. 3683, in *Nuova giur. civ. comm.*, 2007, I, p. 999, with comment of SALANITRO, *Violazione delle norme di condotta nei contratti di intermediazione finanziaria e tecniche di tutela degli investitori: la prima sezione della cassazione non decide e rinvia alle sezioni unite*; Cass., 25 giugno 2008, n. 17340, in *Foro it.*, 2009, I, c. 189, with comment of SCODITTI, *Intermediazione finanziaria e formalismo protettivo*.

violation involves a liability of creditor to pay damage <sup>(19)</sup>. It is entirely in minority the opposite opinion, that considers this provision as a «mandatory rule», whose violation involves voidness of credit contract <sup>(20)</sup>.

On details, the lack of creditworthiness control (or the incorrect assessment) allocates on creditor a «precontractual liability» (so called *culpa in contrahendo*), even though the credit contract is still (and entirely) valid <sup>(21)</sup>: by the way, it has to be mentioned that the largest part of Italian literature thinks that *culpa in contrahendo* is conceivable not only in the typical case of contract's invalidity (as textually provided by art. 1338 c.c.), but also when a contract is still valid, arguing on the basis of the general provision of good faith under art. 1337 c.c.<sup>(22)</sup>: that is just like the case at issue here

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<sup>(19)</sup> See in this sense SIMIONATO, *Prime note in tema di valutazione del merito creditizio*, cit., p. 192; S. MAZZAMUTO, *Il contratto di diritto europeo*, Torino, 2012, p. 397 s. e p. 402 s. (also the new 2<sup>nd</sup> ed., of the book, Torino, 2015, p. 447); R. NATOLI, *Il contratto «adeguato»*, cit., p. 148 s.; PIEPOLI, *Sovraindebitamento e credito responsabile*, cit., p. 62 s.

<sup>(20)</sup> In all Italian literature that we have found, the thesis of voidness seems to be expressly held only by IURILLI, *Merito creditizio, causa in concreto e nullità del contratto di mutuo*, cit., p. 546 ss.; ID., *Il credito ai consumatori*, in FIORUCCI (a cura di), *La disciplina dei rapporti bancari*, Padova, 2012, p. 431 ss. For some references (but also doubts) see MODICA, *Profili giuridici del sovraindebitamento*, cit., p. 252 ss. (the author, at the end, follows an other solution).

<sup>(21)</sup> See R. NATOLI, *Il contratto «adeguato»*, cit., p. 151; MAZZAMUTO, *Il contratto di diritto europeo*, cit., p. 397; MODICA, *Concessione «abusiva» di credito ai consumatori*, cit., p. 516.

<sup>(22)</sup> In this sense (about the *culpa in contrahendo* in case of a valid contract), see for example: MENGONI, *Sulla natura della responsabilità precontrattuale*, in *Riv. dir. comm.*, 1956, p. 370; F. BENATTI, *La responsabilità precontrattuale*, Milano, 1963 (reprint, Napoli, 2012), p. 13; RAVAZZONI, *La formazione del contratto*, II, *Le regole di comportamento*, Milano, 1974, p. 14; PIETROBON, *Errore, volontà, affidamento nel negozio giuridico*, cit., p. 105; P. RESCIGNO, voce *Obbligazioni (nozioni)*, in *Enc. dir.*, XXIX, Milano, 1979, p. 198; S. PATTI e G. PATTI, *Responsabilità precontrattuale e contratti standards*, in *Il c.c. Comm. diretto da Schlesinger*, Milano, 1993, p. 99; M. MANTOVANI, «Vizi incompleti» del contratto e rimedio risarcitorio, Torino, 1995, p. 135 ss., pp. 155 ss. and p. 160; G. PERLINGIERI, *Regole e comportamenti nella formazione del contratto. Una rilettura dell'art. 1337 c.c. del codice civile*, Napoli, 2003, p. 58 ss.; SACCO, in SACCO and DE NOVA, *Il contratto*, in *Tratt. dir. civ. Sacco*, 3<sup>rd</sup> ed., Torino, 2004, p. 625; MERUZZI, *La responsabilità precontrattuale fra regole di validità e regole di correttezza*, cit., p. 956; ROPPO, *Il contratto*, in *Tratt. dir. priv.* a cura di Iudica e Zatti, 2<sup>nd</sup> ed., Milano, 2011, p. 176. The opposite (older) thesis thinks that – when a valid contract is concluded – the violation of good faith during the «precontractual phase» (art. 1337 c.c.) has to be «absorbed» into the contract: so there is not a *culpa in contrahendo*, but, at least, there could be only a contractual liability, if debtor does not execute his obligations: see TRABUCCHI, *Il dolo nella teoria dei vizi del volere*, Padova, 1937 (reprint Napoli, 2010), p. 336 ss.; V. FRANCESCHELLI, *Pubblicità ingannevole e culpa in contrahendo*, in *Riv. dir. civ.*, 1983, II, p. 275 ss.; G. D'AMICO, *Buona fede in contrahendo*, in *Riv. dir. priv.*, 2003, p. 351 ss.; ID., *Regole di responsabilità e regole di validità nella formazione del contratto*, in *Riv. dir. civ.*, 2002, p. 41; F. GRECO, *Informazione precontrattuale e rimedi nella disciplina della intermediazione finanziaria*, Milano, 2010 p. 90.

This solution means that creditor has to pay damages to consumer <sup>(23)</sup>; considering that loan contract keeps his effects, we think that this sum can be offset with the other sum due from debtor, for the duty to repay back the amount (and the interest) of the lending .

On the other hand, if scholar chooses the different hypothesis of voidness of loan contract (arguing the violation of a «mandatory rule» contained in art. 124 *bis* T.U.B), the first consequence is that the debtor is forced to return immediately the amount of the loan; and that, surely, is not positive for consumer <sup>(24)</sup>; but, secondly, it's very doubtful if damages would be compensable to consumer, again for *culpa in contrahendo*. The answer of this last question seems to be negative in the field of the so-called «law in action», but the reason of this limit is quite hard to find on theory (on the so-called «law on books») <sup>(25)</sup>. Let's get a focus of this issue

The provision under art. 1338 c.c. – a special kind, already described, of *culpa in contrahendo* – tells that: «party who know, or ought to know, of any impediment which would make the contract void, and does not inform the other party, is liable to pay damages for loss incurred by another party who through no fault of his own has put trust in the validity of contract» <sup>(26)</sup>. At the first read, it seems that in every case of voidness of contract, the party with no fault in causing voidness has to be compensated by the party which instead is with fault. But, what about the allocation of fault between parties in this described situation, when the reason of voidness consists into infringement of a «mandatory rule», under provision of art. 1418, comma 1, c.c.?

Case law does not agree with the almost uncontested opinion of literature (that so we believe to share), which is open-minded to normally admit the compensation of

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<sup>(23)</sup> The measure (and the kind) of damages is very doubtful: PIEPOLI, *Sovraindebitamento e credito responsabile*, cit., p. 64 ss., thinks that has to be compensable a sort of a «damage by chance lost», considering the other possible consumer credit agreement on the market; R. NATOLI, *Il contratto «adeguato»*, cit., p. 152 ss. thinks instead that should be compensated more, namely should be also payable every economic indirect loss, arising from over-indebtedness of consumer. For instance are considered the distraint and foreclosure of the house inhabited from the consumer, and the report as bad payer to the Banking Central risks.

<sup>(24)</sup> See in this sense R. CALVO, *Le regole generali di condotta dei creditori, intermediari e rappresentanti*, cit., p. 827

<sup>(25)</sup> See the well-known essay of ROSCOE POUND, *Law in books and law in action*, in *America Law Review*, 44, 1910, p. 12 ss.

<sup>(26)</sup> For this translation in english of art. 1338 c.c., see ALPA and ZENO-ZENCOVICH, *Italian private law*, New York, 2007, p. 218.

damages to a party not with fault; the most part of judgments (perhaps all decisions) tells instead that both parties of the agreement ought to know the existence of any «mandatory rule», because this kind of rule can not be ignored: so, if a contract is void for infringement of «mandatory rule», the result is that both parties are assessed to be with fault (the oldest latin maxim says *ignorantia legis non excusat*): consequently there is no *culpa in contrahendo* of anybody <sup>(27)</sup>.

4. So, the major idea is that an infringement of art. 124 *bis* T.U.B. does not lead credit agreement to voidness, despite creditor has to pay damages to consumers, under the general provision contained on art. 1337 c.c.

But this is not all: after exstablishing that first fixed point of research, scholar can still make some others clarifications: an interesting issue, well examined in literature, is when creditor has rightly and adequately assessed the creditworthiness, but, by this control's tool, it results that consumer would not reasonably be solvent, in proportion to the sum of money that he asks to borrow. Questions are easy to be supposed; namely: *a*) the consumer credit agreement can still be concluded? *b*) therefore, is the only consequence that creditor consciously accepts a wider risk <sup>(28)</sup>, because debtor will not probably be able to repay back the sum of money entirely due?

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<sup>(27)</sup> See in case law Cass., 11 febbraio 1982, n. 835, in *Foro it.*, 1983, I, c. 1081; Cass., 6 marzo 1998, n. 2519, in *Giust. civ.*, 1998, I, p. 1242; Cass., 16 giugno 1998, n. 6337, *ivi*, 1998, I, p. 2773; Cass. 6 aprile 2001 n. 5114, in *Foro it.*, 2001, I, c. 2185; Cass., 2 marzo 2006, n. 4635, in *Foro amm. (Cds)*, 2006, p. 1723; Cass., 27 marzo 2007, n. 7481, in *Riv. giur. edil.*, 2007, I, p. 1280; Cass., 8 luglio 2010, n. 16149, in *Resp. civ. prev.*, 2011, p. 1065, in *Giust. civ.*, 2011, p. 976. In italian literature, for the same thesis, see only CARRESI, *Il contratto*, II, in *Tratt. dir. civ. comm.* Cicu e Messineo, XXI, Milano, 1987, p. 716 s. The opposite thesis tells that is not fair to use a sort of automatism, because are relevant the *status* of parties and the good faith principles: so, there are a lot of mandatory rules that a party (especially a weak party, as a consumer) is not ought to know: see CUFFARO, voce *Responsabilità precontrattuale*, in *Enc. dir.*, XXXIX, Milano, 1988, p. 1271; C.M. BIANCA, *Diritto civile*, III, *Il contratto*, 2<sup>nd</sup> ed., Milano, 2000, p. 170 ss.; S. PATTI e G. PATTI, *Responsabilità precontrattuale e contratti standards*, cit., p. 171 s. For a focus of both theories see L. ROVELLI, *Contratto concluso e violazione della buona fede precontrattuale*, in *Il contratto in generale*, XIII, t. II, in *Tratt. dir. priv.* Bessone, Torino, 2000, p. 308 ss.; MERUZZI, *La trattativa maliziosa*, Padova, 2002, p. 192 ss. A very interesting approach is coming from LA SPINA, *Destrutturazione della nullità e inefficacia adeguata*, Milano, 2002, p. 179 ss.: it is well highlighted that a list of provisions involves voidness of contract (surely) for violation of a mandatory rule; but the same lawgiver provides also expressly the compensation of damages to the weak party: for example see artt. 100 *bis*, comma 3, T.U.B. and 67 *septiesdecies*, comma 4 and 5, c.cons. (codice del consumo).

<sup>(28)</sup> See DE POLI, *Gli obblighi gravanti sui «creditori» nella fase anteriore e posteriore al contratto*, cit., p. 70; MODICA, *Il contratto di credito ai consumatori nella nuova disciplina comunitaria*, cit., p. 830

Looking for some answers, a first thesis argues on the basis of art. 124, comma 5, T.U.B.: the consumer credit agreement can still be concluded and, in any case, it is not void; but, before the conclusion of agreement, it's also required that creditor well alerts the consumer of failure of its audit and that expressly warns him of risk of over-indebtedness. Conversely, if that information is not given, the contract is still valid, but creditor must pay damages for *culpa in contrahendo*: thus liability depends from a breach of a «disclosure's duty», considering in joint the general provision of good faith contained on art. 1337 c.c. and the special provision contained on art. 124, comma 5, T.U.B. <sup>(29)</sup>.

Following this idea, it must also be disclosed that a part of literature has tried to give a particular qualify of payable damages: namely, in favor of debtor, has been evoked the well-known category of «pure economic losses» for false information <sup>(30)</sup>. This is a very miscellaneous concept, that surely comes from the world of common law and that has a particular interest for scholars of comparative law <sup>(31)</sup>; but this notion it is also strongly examined by italian civilian literature, which has specially debated the theme in relation of various forms and areas of civil liability. Focus is: *a)* someone thinks that this kind of loss is restorable only in case of contractual liability or, at least, in all the cases (in the same way miscellaneous), where works the german figure of the so-called «reliance liability» (*Vertrauenshaftung*); *b)* some other writers think otherwise that «pure economic losses» are recoverable only in case of tort, namely for «extra-contractual liability» <sup>(32)</sup>.

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<sup>(29)</sup> In this sense see R. NATOLI, *Il contratto «adeguato»*, cit., pp. 149-150; MODICA, *Profili giuridici del sovraindebitamento*, cit., p. 254 ss.; PIEPOLI, *Sovraindebitamento e credito responsabile*, cit., p. 58 s.; CALVO, *Le regole generali di condotta dei creditori, intermediari e rappresentanti*, cit., p. 827

<sup>(30)</sup> In this sense see MODICA, *Concessione «abusiva» di credito ai consumatori*, cit., p. 512

<sup>(31)</sup> See, for instance, LAWSON and MARKESINIS, *Tortious liability for unintentional harm in the common law and in the civil law*, I, Cambridge, 1982, p. 80 ss.; MIRANDA, *The negligence saga: irragionevolezza ed ingiustizia del danno nelle pure economic losses*, in *Riv. dir. civ.*, 1992, p. 406 ss.; PALMER and BUSSANI, *The notion of pure economic loss and its setting*, in PALMER and BUSSANI (cur.), *Pure economic loss in Europe*, Cambridge, 2003, p. 3 ss. (but see also the other essays of rest of the book); PALMER and BUSSANI, *Pure economic loss. New horizons for comparative law*, New York, 2009, p. 9 ss.

<sup>(32)</sup> In italian literature see and compare DI MAJO, *Il problema del danno al patrimonio*, in *Riv. crit. dir. priv.*, 1983, p. 333, who thinks that the liability has to be only extra-contractual (using german categorie of *Verkehrspflichten*); CASTRONOVO, *La nuova responsabilità civile*, 3<sup>a</sup> ed., Milano, 2006, p. 108 ss., and spec. p. 110 and p. 316 ss., who thinks thta liability has to be contractual (using

Therefore, switching back to our theme (of creditworthiness in credit agreement), we have obviously to imagine an hypothesis of «pure economic loss», that is linked to the «pre-contractual liability» of creditor<sup>(33)</sup>. By the way, this clarification seems to be easily reconcilable with the strong general debate regarding the nature of *culpa in contrahendo*. Here you can just write down that the literature majority – although not indisputable – believes that this liability is contractual<sup>(34)</sup>, from the same time of its old foundation by Rudolf von Jhering<sup>(35)</sup>, or at least that *culpa in contrahendo* is the archetype of german category of «reliance liability» (*Vertrauenshaftung*)<sup>(36)</sup>; but

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the opposite german categorie of *Schutzpflichten*). For a focus of both theories see MAGGIOLO, *Il risarcimento della pura perdita patrimoniale*, Milano, 2003, p. 88 ss. e p. 276 ss., examining the categorie of *Verkehrspflichten*, categorie that the writer thinks are the best model to restore «pure economic losses».

<sup>(33)</sup> In comparative law, especially in Germany, this clarification seems not to origine any particular doubt: for some cases in Germany, where «pure economic loss» are linked to the pre-contractual liability, see MARKESINIS, UNBERATH and JOHNSTON, *The German Law of Contract: a Comparative Treatise*, 2<sup>nd</sup> ed., Oxford, 2006, p. 96 ss.

<sup>(34)</sup> For the thesis that *culpa in contrahendo* is a special kind of contractual liability, see for instance: MENGONI, *Sulla natura della responsabilità precontrattuale*, cit., p. 369; F. BENATTI, *La responsabilità precontrattuale* cit., p. 126 ss.; ID., *Culpa in contrahendo*, in *Contr. impr.*, 1987, p. 303 ss.; G. STOLFI, *Sulla responsabilità precontrattuale del minore*, in *Riv. dir. comm.*, 1968, I, p. 271; GRISI, *L'obbligo precontrattuale di informazione*, Napoli, 1990, p. 74; TURCO, *Interesse negativo e responsabilità precontrattuale*, Milano, 1990, p. 245; STELLA RICHTER, *La responsabilità precontrattuale*, Torino, 1996, p. 124 ss.; VALENTINO, *Obblighi di informazione, contenuto e forma negoziale*, Napoli, 1999, p. 41 ss.; G. D'AMICO, *La responsabilità precontrattuale*, in *Tratt del contr.* Roppo, V, t. 2, Milano, 2006, p. 1107 ss.; CASTRONOVO, *La nuova responsabilità civile*, cit., p. 462. For the opposite thesis that *culpa in contrahendo* is a form of tort, namely a «non-contractual liability», see for instance, BETTI, *Teoria generale delle obbligazioni*, I, *Prolegomeni, funzione economico sociale dei rapporti d'obbligazione*, Milano, 1953, p. 80 ss.; BRANCA, *Istituzioni di diritto privato*, Milano, 1956, p. 446; CARRESI, *In tema di responsabilità precontrattuale*, in *Temi*, 1965, p. 463 ss.; ID., *Il contratto*, II, in *Tratt. dir. civ. comm. Cicu-Messineo*, continuato da L. Mengoni, Milano, 1987, p. 734 ss.; MAGGIOLO, *Il risarcimento della pura perdita patrimoniale*, cit., p. 215 ss. An other part of literature thinks that *culpa in contrahendo* is a *tertius genus*, not even a contractual liability, not even a tort: see in this sense: SACCO, *Culpa in contrahendo e culpa aquiliana, culpa in eligendo e apparenza*, in *Riv. dir. comm.*, 1961, II, p. 86; VISINTINI, *La reticenza nella formazione dei contratti*, Padova, 1972, p. 100 ss.; CUFFARO, voce *Responsabilità precontrattuale*, in *Enc. dir.*, XXXIX, Milano, 1988, p. 1270; LUMINOSO, *La lesione dell'interesse contrattuale negativo*, in *Contr. impr.*, 1988, p. 792; G. AFFERNI, *Il quantum del danno nella responsabilità precontrattuale*, Milano, 2008, p. 8.

<sup>(35)</sup> See R. JHERING, *Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangte Verträgen*, in *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* IV, 1861, p. 1 ss.

<sup>(36)</sup> See MENGONI, *Sulla natura della responsabilità precontrattuale*, cit., p. 364; CASTRONOVO, *La responsabilità precontrattuale*, in CASTRONOVO e MAZZAMUTO, *Manuale di diritto privato europeo*, II, Milano, 2007, p. 334 ss. and spec. p. 336; CASTRONOVO, *La nuova responsabilità civile*, cit., p. 466 ss. e spec. 468; for some critics see CHECCHINI, *Rapporti non vincolanti e regole di correttezza*, Padova, 1977, p. 268; MAGGIOLO, *Il risarcimento della pura perdita patrimoniale*, cit., p. 190 ss. and spec. p. 192.

conversely, italian case law favors mainly the opposite idea, namely that it is a kind of «non-contractual» liability<sup>(37)</sup>.

That said, the solution just proposed is not however the only one that has been hypothesized in the whole literature's panorama: some writers have noticed that the european lawgiver – in issuing this statute of creditworthiness's control (art. 8, directive 2008/48/EU) – had in view a clear and self-evident object (the so called *ratio legis*): namely to avoid the over-indebtedness of consumer. Consequently, they have suggested that, under provision of art. 124 *bis* T.U.B., the lender has an absolute duty to refuse the credit agreement, all times that he has evaluated the possible insolvency of the consumer; therefore, by this opinion, would not be sufficient the weaker tool of «consumer protection» just described, consisting into a simple alert about the «inadequacy» of loan contract and into warning about the risk of over-indebtedness. In other words, there would exist an outright legal prohibition to conclude the credit agreement and to grant the borrowed sum; if the agreement was nevertheless concluded, then the remedy would be the voidness of contractual relationship<sup>(38)</sup>.

So, we think that this strict opinion could gain a little (weak) confirm into the provision contained in art. 18, comma 5, lett. a), of the new european directive

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<sup>(37)</sup> See Cass., 18 giugno 1987, n. 5371, in *Foro it.*, 1988, I, c. 181; Cass., 11 maggio 1990, n. 4051, *ivi*, 1990, I, c. 184; Cass., 29 aprile 1999, n. 4299, in *Giur. it.*, 2000, p. 932; Cass., 4 marzo 2000, n. 3103, in *Corr. giur.*, 2002, p. 909; Cass., 5 agosto 2004, n. 15040, in *Giust. civ.*, 2005, I, p. 669; Cass., 23 dicembre 2004, n. 23925, *ivi*, 2005, p. 669; Cass., 20 marzo 2012, in *Danno resp.*, 2012, p. 1103; Cass., 10 gennaio 2013, n. 477, *ivi*, 2013, p. 754. In european case law: Corte giust., 17 settembre 2002, n. 334/2000, in *Giust. civ.*, 2003, p. 1159. Concerning the theme of the title of liability for *culpa in contrahendo*, some other references to italian literature and to case law are findable in FRANCISETTI BROLIN, *Danno non patrimoniale e inadempimento. Logiche «patrimonialistiche» e valori della persona*, Napoli, 2014, pp. 476-477, and spec. nt. 25 e 26.

<sup>(38)</sup> See G. DE CRISTOFARO, *La nuova disciplina comunitaria del credito al consumo*, cit., p. 909 s. and nt.61, who finds an argument of this tesi into a little part of *Whereas* n. 26 of directive 2008/48/EU, where is written that « it is important that creditors *should not engage* in irresponsible lending». The problem that the simple alert is a too weak «tool of protection», by the way, is well examined also in France: see CRÉDOT e SAMIN, *L'obligation de mise en garde est-elle compatible avec le concept de crédit responsable?*, in *Revue de droit bancaire et financier*, 2010, fasc. VI, p. 82 ss. This thesis is criticized by GORGONI, *Spigolature su luci (poche) e ombre (molte)*, cit., p. 768 s., who thinks that the idea of a legal prohibition to conclude the credit agreement would have a double negative impact: first of all, there is a risk of an excessive lack of responsibility of the debtor; secondly there would be a rise of the costs of credit, for all consumers that are instead creditworthy. In a similar sense, before the directive 2008/48/UE, see Lor. STANGHELLINI, *Il credito irresponsabile alle imprese ai privati*, in *Società*, 2007, p. 395 ss. and spec. p. 402.



2014/17/EU, highlighting a small fragment of the text <sup>(39)</sup>. But we are talking about the (totally) different field of «credit agreements relating to residential immovable property», where the borrowed sums are normally highest; and, over all, the new directive 2014/17/EU is not yet adopted from Italian lawgiver.

Conversely, as is considered the only provision under art. 124 *bis* T.U.B. (on consumer credit agreements), this thesis of voidness seems at first to be really weakened, by the fact that there is no express prohibition to conclude that kind of loan contract: so we can not imagine that voidness of contract depends from infringement of a «mandatory rule» which has expressly prescribed this remedy (so called «textual voidness», under art., 1418, comma 3, c.c.); neither we can imagine that voidness of contract depends from infringement of a rule which is still a «mandatory rule», despite it does not expressly prescribe this remedy (so called «virtual voidness», under art. 1418, comma 1, c.c.) <sup>(40)</sup>.

But this is not all, because we think that some issues are still remaining: in fact, following a «pure theory», there could be a few other reasons (or other legal provisions), that would lead likewise the credit agreement to be void. For instance, the provision under art. 1322 c.c. tells that parties are free to conclude contracts, provided they are «in pursuit of interests that deserve protection»: so, whenever lender makes the credit available despite a negative assessment of debtor's creditworthiness, are we sure that this kind of interests are «deserving protection» under art. 1322 c.c., considering «the interest of consumer to be over-indebted»? <sup>(41)</sup>;

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<sup>(39)</sup> Namely art. 18, comma 5, of the new European Directive 2014/17/EU, provides that Member States shall ensure that «the creditor *only* makes the credit available to the consumer *where* the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are likely to be met in the manner required under that agreement». So we can suggest that the expression «*only*» indicates *a contrario* that, when the creditworthiness assessment is negative, the credit shall not be available to consumer. In the same sense see also the *Whereas* n. 57 of this directive: «The creditor's decision as to whether to grant the credit should be consistent with the outcome of the assessment of creditworthiness. For example, the capacity for the creditor to transfer part of the credit risk to a third party should not lead him to ignore the conclusions of the creditworthiness assessment by making a credit agreement available to a consumer who is likely not to be able to repay it». But, for another opinion, see PAGLIANTINI, *Statuto dell'informazione e prestito responsabile*, cit., p. 537 ss.

<sup>(40)</sup> But, in this sense, see GORGONI, *Spigolature su luci (poche) e ombre (molte)*, cit., p. 769, with some doubts.

<sup>(41)</sup> See for a negative answer IURILLI, *Merito creditizio, causa in concreto e nullità del contratto di mutuo*, cit., p. 549 ss. e spec. p. 551 s., who coherently chooses the remedy of voidness. But for the opposite opinion, see CALVO, *Le regole generali di condotta dei creditori, intermediari e rappresentanti*, cit., 827.

or what about the possible voidness for infringement of a fundamental principle well-known as «public order economical of protection» (art. 1343 c.c.)<sup>(42)</sup>, arguing also on the basis of art. 47 of Italian Constitution? These questions are both very doubtful, so we think that literature would have more to debate.

That said, we have also to discuss another issue, that consist into the opposite situation of the last one mentioned: what happens when assessment of creditworthiness has been carried out incorrectly and, for this reason, the lender decides not to conclude the contract, because he has mistakenly considered the low solvency of the consumer? The lender has never an obligation to conclude the credit contract and grant the sum (over all, this obligation does not exist neither in case of positive valuation of solvency): so, the only remedies for consumer seem to consist into liability of creditor and recovery of damages: on details, the liability has to be considered as a «pre-contractual» one, arguing (once again) on the basis of art.1337 c.c. and of the general duty of good faith during negotiations<sup>(43)</sup>.

5. In order to give some recapitulations, the focus is that the various infringements of provision under art. 124 bis T.U.B. involve generally a creditor's liability, consisting in duty to pay damages. Considering this choice of legal remedy, we think that there is an other important issue, which has to be deeply examined. Question is: which party of credit agreement must prove in the proceeding that the creditworthiness's control has been really and correctly done?

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<sup>(42)</sup> The category of «public order economical of protection» was born in France, as a sub-partition of the general concept of *ordre public*: see RIPERT, *L'ordre économique et la liberté contractuelle*, in *Etudes Geny*, II, Paris, 1934, p. 347 ss.; ID., *Aspects juridiques du capitalisme moderne*, Paris, 1946, p. 238 ss.; FARJAT, *L'ordre public économique*, Paris, 1963, *passim* and spec. p. 78 ss. In Italian literature, see for instance: G.B. FERRI, *L'ordine pubblico economico (a proposito di una recente pubblicazione)*, in *Riv. dir. comm.*, 1963, now in *Saggi di diritto civile*, Rimini, 1983, p. 341 ss.; BIGLIAZZI GERI, BRECCIA, BUSNELLI, and U. NATOLI, *Diritto civile*, I, 2, *Fatti e atti giuridici*, Torino, 1986, p. 720; G. PANZA, voce *Ordine pubblico*, I, *Teoria generale*, in *Enc. giur.* Treccani, XXII, Roma, 1990, p. 5; BIANCO, voce *Ordine pubblico economico*, in *Dig. disc. pubbl.*, agg. II, Torino, 2004, p. 492 ss.; ANG. FEDERICO, *L'ordine pubblico economico e il contratto*, in DI MARZIO (a cura di), *Illiceità, immeritevolezza, nullità*, Napoli, 2004, p. 61 ss.; P. TRIMARCHI, *Istituzioni di diritto privato*, 19<sup>a</sup> ed., Milano, 2011, p. 203; ROPPO, *Il contratto*, cit., pp. 385-386; G. D'AMICO, *L'abuso di autonomia negoziale nei contratti dei consumatori*, in G. D'AMICO and PAGLIANTINI, *Nullità per abuso e integrazione del contratto. Saggi*, Torino, 2013, p. 36 ss.

<sup>(43)</sup> See in this sense DE POLI, *Gli obblighi gravanti sui «creditori» nella fase anteriore e posteriore al contratto e le conseguenze della loro violazione*, cit., p. 70; SIMIONATO, *Prime note in tema di valutazione del merito creditizio*, cit., p. 190.

We can find a good answer into a new european judgement, coming again from Court of Justice (Fourth Chamber) <sup>(44)</sup>. The Court rules that provisions of Directive 2008/48/EU «preclude national rules according to which the burden of proving the non-performance of the obligations laid down in Articles 5 and 8 of Directive 2008/48 lies with the consumer».

So, creditor is the party that must prove that all his behaviours during negotiations have been in accordance with good faith principle, as provided under art. 1337 c.c. Namely: *a)* first of all, he has to prove that he has provided the consumer with all the pre-contractual information required by law (art. 124 T.U.B.) <sup>(45)</sup>; *b)* but creditor has also to prove that, before the conclusion, he has rightly assessed the creditworthiness of the consumer (124 *bis* T.U.B.).

We think that some justifications of these rules are so interesting, to be expressly mentioned: the Court aims the existence of a «principle of effectiveness» in proceedings on trial: principle that can not be infringed with a national procedural provision that «makes in practice *impossible or excessively difficult to exercise rights* conferred by the EU legal order» <sup>(46)</sup>. Therefore, considering the lender's burden on proof, the Court tells that this increase is justified, «without *disproportionately interfering with the creditor's right to a fair trial*» <sup>(47)</sup>.

That said, the rule of the Court – at the first sight – seems to outline a relevant link between this regulation and the special provision under art. 23, comma 6, T.U.F., regarding securities brokerage and the burden of proof. But the most important aspects are certainly related with some debated issues of general theory about *onus probandi*.

In italian law, the burden of proving is governed by art. 2697 c.c., according to which a person wishing to assert a right in trial must prove the facts upon which that

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<sup>(44)</sup> Corte di giustizia, 18 dicembre 2014, n. 449, C-449/13: the text of decision is findable on thta internet adress: <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=160946&occ=first&dir=&cid=1519716> For a first brief comment, see FRANCISSETTI BROLIN, *Ancora sul c.d. merito creditizio nel credito al consumo. Chiose a margine di una recente decisione comunitaria*, in *Contr. impr. Eur.*, 2015, p. 357 ss.

<sup>(45)</sup> It's very interesting the justification of this principle: «a diligent creditor must be aware of the need to gather and retain evidence that its obligations to provide information and explanations have been fulfilled.» (§ 28 of Judgment's ground):

<sup>(46)</sup> See §§ 23-25 of Judgment's ground.

<sup>(47)</sup> See again, § 28 of Judgment's ground.

right is based; at the opposite, any person who challenges the relevance of the facts, must prove the facts on which the exception is based. A large part of Italian literature has described this provision as a so-called «white norm» (*norma in bianco*)<sup>(48)</sup>: thus it means that this provision is undetermined, because it does not clearly explain which facts are in burden of proving for plaintiff, and which other facts are in burden for the sued person<sup>(49)</sup>. That said – as it has been already suggested in other essays<sup>(50)</sup> – we think that provision contained in art. 2697 c.c. has to be considered under a well-known perspective of literature, which encourages the reading of civil law precepts in the light of the Constitution, as well as the complete fulfilment of constitutional legality: this is, by the way, a general thinking pattern that is now very accredited<sup>(51)</sup>. Using this method, we can deduce two inferences:

- a) the burden of proof provided by art 2697 c.c. must be balanced with the constitutional right to proceed (art. 24 Cost), and with the principles of «fair trial», of «protection of adversarial process» and of «equality of arms in trial» (art. 111 Cost.)<sup>(52)</sup>. Therefore the burden of proof has not to be

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<sup>(48)</sup> In the sense that art. 2697 c.c. is a «white norm» (*norma in bianco*), see at first ANDRIOLI, voce *Prova (diritto processuale civile)*, in *Noviss. dig. it.*, vol. XIV, Torino, 1967, p. 26 ss. and spec. 293 (also in ID., *Studi sulle prove civili*, Milano, 2008, p. 1 ss. and spec. p. 89). See also CONSOLO, *Spiegazioni di diritto processuale civile*, III, *Il processo di primo grado e le impugnazioni delle sentenze*, 2<sup>a</sup> ed., Torino, 2012, p. 139; S. PATTI, *Le prove*, in *Tratt. dir. civ.* a cura di Iudica e Zatti, Milano, 2010, p. 95 and p. 141; CALVO, *Il contratto di assicurazione. Fattispecie e effetti*, in *Tratt. Resp. civ.* Franzoni, Milano, 2012, p. 99.

<sup>(49)</sup> See for instance SACCO, *Presunzioni, natura costitutiva o impeditiva del fatto, onere della prova*, in *Riv. dir. civ.*, 1957, I, p. 420; MICHELI, *In tema di onere della prova dell'inadempimento*, in *Giur. it.*, 1960, I, c. 1420; ID., *L'onere della prova (rist.)*, Padova, 1966, p. 457; FINZI, *Il possesso dei diritti (rist.)*, Milano, 1968, p. 300 ss.; VERDE, *L'onere della prova nel processo civile*, Napoli, 1974, p. 157; TARUFFO, voce *Onere della prova*, in *Digesto dic. priv. sez. civ.* XIII, Torino, 1995, p. 68.

<sup>(50)</sup> I've already discussed this theme on FRANCISSETTI BROLIN, *L'indisponibilità e l'inespropriabilità (limitata) del fondo patrimoniale*, Napoli, 2012, p. 26 ss.; ID., *Fondo patrimoniale e onere della prova ex art. 170 c.c.: note critiche e proposta (alternativa) per un'interpretazione costituzionalmente orientata*, in *Giur. it.*, 2013, p. 2506 ss.

<sup>(51)</sup> See P. PERLINGIERI, *Produzione scientifica e realtà pratica*, in *Riv. dir. comm.*, 1969, I, p. 475 ss.; ID., *Introduzione alla problematica della «proprietà»*, Napoli, 1971, *passim* and spec. p. 10 ss.; ID. *Norme costituzionali e rapporti civilistici*, in *Rass. dir. civ.*, 1980, p. 95 ss.; ID., *Scuole, tendenze, metodi*, Napoli, 1989, p. 111 ss.; ID., *La personalità umana nell'ordinamento giuridico*, Camerino, Napoli, 1972, *passim* and spec. p. 131 ss.; ID., *Il diritto civile nella legalità costituzionale*, 3<sup>rd</sup> ed., Napoli, 2006, p. 35 ss.; ID., *Constitutional Norms and Civil Law Relationships*, in *The Italian Law Journal*, 2015, I, p. 17 ss. (findable also in <http://www.theitalianlawjournal.it/issue>). This point of view thinks the Constitution is integral part of the law controlling private relationships, making them functional to the general values that mould the whole legal system: in this sense, there is a critical account of the views according to which constitutional norms have a merely programmatic nature.

<sup>(52)</sup> For this reason, if a provision of law rules a burden of proof to much strong or excessively difficult, this provision is suspected to be not compatible with Constitution, for infringements of artt. 24 and 111 Cost. See Corte Cost., 22 dicembre 1989, n. 568, in *Giust. civ.*, 1990, I, p. 605.

«excessive» or «impossible» to gain; so that this burden must be equally distributed among the contending parties and has to be linked to the principles of «proportionality» and «reasonableness»<sup>(53)</sup>;

- b) we have to agree with an other famous theory coming from Germany<sup>(54)</sup>, because this theory seems to be in great accordance with the point just expressed sub *a*). Namely, the burden of proving a certain fact must be referred to the party that has more «proximity» with this fact (*Beweisnähe*), because this fact is on his «sphere of responsibility» or, at least, this fact ought to be better known from him<sup>(55)</sup>.

So, we have to notice that both these points – sub *a*) and sub *b*) – are finding a strong confirm into the judgement of Court of Justice: the Court, in fact, refers to a principle of proportionality; but, even more, the burden of proof is so distributed between lender and consumer, because the consumer «does not have the means at his disposal to enable him to prove that the creditor, first, did not provide him with the information required under art. 5 of that directive and, secondly, did not check his

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<sup>(53)</sup> In literature, for a call to «reasonableness» with regard to distribution of the burden of proof, see VERDE, *L'onere della prova nel processo civile*, cit., p. 142; S. PATTI, *Le prove*, cit., p. 139; CIATTI, *Responsabilità medica e decisione sul fatto incerto*, Padova, 2002, p. 167 ss.; TOPPETTI, *La responsabilità presunta “fino prova contraria”*, Milano, 2008, p. 4 ss.; COMOGLIO, *Le prove civili*, Padova, 2010, p. 284; CALVO, *L'equità nel diritto privato: individualità, valori, regole*, Milano, 2010, p. 60 e p. 157 ss. See also Corte Cost. 9 luglio 2002, n. 332, in *Giust. civ.*, 2002, p. 3043.

<sup>(54)</sup> See RAAPE, *Die Beweislast bei positiver Vertragsverletzung*, in *Arch. civ. Prax.*, 1941, p. 217 ss.; PROLLS, *Die Beweislastverteilung nach Gefahrenbereichen*, in *Versicherungsrecht*, 1964, p. 901 ss.; Hans STOLL, *Die Beweislast bei positiven Vertragsverletzungen*, in *Festschrift für Fritz von Hippel*, Tübingen, 1967, p. 517 ss.; for more references see S. PATTI, *Le prove*, cit., p. 185.

<sup>(55)</sup> In this sense see CIATTI, *Responsabilità medica e decisione sul fatto incerto*, cit., p. 192; CALVO, *L'equità nel diritto privato: individualità, valori, regole*, cit., p. 157 ss.; ID., *Contratti e mercato*, 2<sup>nd</sup> ed., Torino, 2011, p. 276. The «proximity principle» has found application in many situations. The clearest reference is obviously a well-known decision, about the burden of proof in contractual liability: see Cass., Sez. un., 30 ottobre 2011, n. 13533, in *Corriere giur.*, 2001, p. 1565, with comment of V. MARICONDA, *Inadempimento e onere della prova. Le sezioni unite compongono un contrasto e ne aprono un altro*; in *Contratti*, 2002, p. 113, with comment of CARNEVALI, *Inadempimento e onere della prova*. See also VILLA, *Onere della prova, inadempimento e criteri di razionalità economica*, in *Riv. dir. civ.*, 2002, II, p. 707 ss.; VISINTINI, *La suprema corte interviene a dirimere un contrasto fra massime (in materia di onere probatorio a carico del creditore vittima dell'inadempimento)*, in *Contr. impr.*, 2002, p. 903 ss.; RIVA, *Le sezioni unite in materia di prova dell'inadempimento*, in *Riv. trim. dir. proc. civ.* 2003, p. 323 ss.; MAGGIOLO, *Inadempimento e oneri probatori*, in *Riv. dir. civ.*, 2007, I, p. 165 ss. However a similar reasoning emerges in the folds of the case law, in others (and varied) situations: see for instance Cass., 11 maggio 2009, n. 10744, in *Vita not*, 2009, p. 1457. For more details see FRANCISSETTI BROLIN, *L'indisponibilità e l'inespropriabilità (limitata) del fondo patrimoniale*, cit., p. 41.

creditworthiness»<sup>(56)</sup>. Obviously, this is nothing more than a right apply of «proximity principle» of proof.

6. In the same direction, it should be appreciated an other rule stated by the Court: has no effect any standard term, in which consumer has acknowledged that the creditor's pre-contractual obligations have been fully and correctly performer. This kind of standard term – as the Court well noticed – provides on facts a dangerous reversal of the burden of proving the performance of those obligations, such as to undermine the effectiveness of the rights conferred to consumer by directive 2008/48/EU, thus making difficult and «not-proportional» the exercise of consumer's right to proceed on trial<sup>(57)</sup>.

At the same time, we think that this kind of standard term seems to be void, just arguing on the basis of national private law of Italy. Namely, we can imagine almost two reasons.

First of all, under provision contained in art. 2698 c.c., the parties can reverse or change the burden of proving with an express agreement, but only when the reversal or the modification does not make the exercise of the right «exceedingly difficult»<sup>(58)</sup>. In case of «exceeding difficulty», the clause of reversal of modification is void. That said, we have already noted that this standard term on consumer credit agreement, empirically, makes difficult and «not-proportional» the exercise of consumer's right to proceed: so, it's possible to imagine voidness, under provision of art. 2698 c.c.

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<sup>(56)</sup> See § 27 of of Judgment's ground.

<sup>(57)</sup> See also CALVO, *Le regole generali di condotta dei creditori, intermediari e rappresentanti*, cit., 825 s., nt. 14.

<sup>(58)</sup> We believe that this provision could be inspired by a duplicity of reasons: first of all, there is a clear purpose of protection of the weaker party, against abuse of the party economically stronger, which imposes a modification or reversal of the burden of proof in his favor. See, in the preparatory work of Italian Civil Code, *Relazione al Re*, n. 39. In the same sense, in literature see for instance: ANDRIOLI, voce *Prova (diritto processuale civile)*, in ID., *Studi sulle prove civili*, cit., 82; LOMBARDO, *La prova giudiziale, contributo alla teoria del giudizio di fatto nel processo*, Milano, 1999, p. 313 ss.; COMOGLIO, *Le prove civili*, cit., p. 409 ss.; S. PATTI, *Le prove*, cit., p. 257 and p. 279. But we also think that this prohibition contained into art. 2698 c.c. can be easily connected to the interpretation constitutionally oriented of provision of art. 2697 c.c., namely in the same sense which has just been described: for this idea see FRANCISSETTI BROLIN, *L'indisponibilità e l'inespropriabilità (limitata) del fondo patrimoniale*, cit., p. 35.

Secondly it should also consider that, in this loan contract, the debtor is obviously a «consumer», as specially provided into art. 121, comma 1, lett. b) T.U.B. Therefore, all the other laws designed to protect consumers apply in his favor <sup>(59)</sup>: so this clause is subject to the rules on «unfair terms in consumer contracts» (see directive 93/13/EU and, in Italy, the provisions under artt. 33 ss. c.cons.). That said, we can easily suppose that this term is «unfair», on the basis of the provision of art. 33, lett. *t*), c.cons. Following this idea, the clause is void, unless the creditor proves that it has been individually negotiated.

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<sup>(59)</sup> See in this sense Cass., 6 settembre 2007, n. 18743, in *Foro it.*, 2008, I, c. 1164.





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