
Leading international best regulatory principles in responsible lending policy: lessons for Namibia

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Abstract: The economic downturn following the 2008 global financial crisis has *inter alia* invoked a movement towards responsible lending practices in order to protect credit consumers from irresponsible lending and over-indebtedness. In Namibian consumer credit law, inasmuch as debt prevention measures are contained in three pieces of legislation, there are still no responsible lending measures in place. This article provides an overview of the current and emerging international regulatory measures intended to promote responsible lending policy. It begins by tracing the development of consumer credit policies from truth-in-lending to responsible lending responses. It then provides a broad survey of the efforts aimed at promoting responsible lending policy with the aim of determining current trends and guidelines for devising a responsible lending regime and formulates leading international best principles for a modern and effective responsible lending regime. It is submitted that these leading international best principles can be useful lessons for countries such as Namibia and other developing countries alike in improving their national consumer credit law policies.

Keywords: Irresponsible lending; consumer over-indebtedness; responsible lending policy; pre-agreement assessments; consumer protection.

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1 Introduction

In the context of the prevention of consumer over-indebtedness, responsible lending practices by credit providers play a crucial role in preventing consumers from over-indebtedness.¹ Generally the concept “responsible lending” is used to denote the existence of regulatory measures enacted with the aim of preventing irresponsible credit lending and consumer over-indebtedness by ensuring that credit providers, in the pre-agreement stage of credit extension, assess the creditworthiness of the consumers and the affordability of the credit applied for.² Creditworthiness is defined as the propensity of the consumer to repay the credit applied for, whereas affordability implies the consumer’s ability to repay or to undertake a specific credit commitment in a sustainable manner without the consumer incurring financial difficulties and/or experiencing adverse consequences.³ Nonetheless, responsible lending is but a policy term.⁴ The policy of responsible lending is *inter alia* aimed at “ensuring responsible behaviour of participants in the financial market”.⁵

A consideration of the Namibian financial system and the consumer credit industry in particular reveals that credit products such as mortgage loans, car finance, instalment sales, leasing agreements, credit cards, overdrafts, other personal loans and advances, as well as microloans are offered in the Namibian credit market.⁶ Of all these, mortgage loans and microloans are said to be the leading cause of credit growth in Namibia and the consequent elevation in consumer indebtedness.⁷ Consumer credit in Namibia is regulated by the Usury Act 73 of 1968, the Sale of Land on Instalments Act 72 of 1971 and the Credit Agreements Act 75 of 1980. However, this legal framework does not provide for responsible lending measures by for instance imposing an obligation on credit providers to conduct an assessment of the consumer’s financial position and ability to repay the credit before extending credit to the consumer, raising questions of their adequacy in protecting consumers from irresponsible credit and over-indebtedness.

Generally, internationally recognised standards on responsible lending are yet to be developed. However, several jurisdictions have reviewed their consumer credit policies by introducing elements of responsible lending.⁸ The aim of this article is to trace the development of responsible lending policy and to formulate leading international best principles for an effective and efficient responsible lending regime. To achieve this aim, this article is organised as follows: Section 2 considers a shift in consumer credit policies from truth-in-lending to responsible lending responses. Sections 3 and 4 give an overview of the developments of responsible lending principles in the European Union and the United States of America. Section 5 provides an overview of the broad principles aimed at promoting responsible lending policy as developed by international bodies. Section 6 considers Wilson’s criteria of an effective responsible lending regime as discussed in her book titled “International responses to issues of credit and over-indebtedness in the wake of crisis (markets and the law)”.⁹ Section 7 outlines the identified international leading principles where after a few concluding remarks will follow in Section 8.

2 The development of responsible lending policy

Consumer credit has been accurately described as “the lubricant of economic life” due to the role it plays in the economy.¹⁰ As a result of the liberalisation of financial markets and the

deregulation of credit markets in the 1980s the use of consumer credit to pay for services has increased.¹¹ Consumer credit policy has consequently been tailored to ensure affordable access to credit in order to enable the full participation of consumers in contemporary society.¹² Traditionally, the concept of “consumer sovereignty”¹³ was the central goal of consumer credit policy.¹⁴ In this model of regulation there was less concern on the part of regulators as to the manner in which consumers exercised their sovereignty in the credit markets.¹⁵ Users of consumer credit were treated as adults fully capable of managing own financial affairs and their freedom of access to credit was not restricted merely to protect the few who may get into financial difficulties.¹⁶

The traditional model of regulation supports Fama’s hypothesis that a market in which prices fully reflect available information is efficient.¹⁷ Considering this hypothesis with the rational choice theory, which assumes that human beings are “rational maximisers of preference satisfaction”,¹⁸ it is presumed that if credit consumers are provided with accurate information about the credit goods and services offered by credit providers, then they will be able to exercise their competitive choices effectively.¹⁹ Based on the assumption that rational informed consumers cannot borrow beyond their means and that credit providers cannot provide credit products or services if they have doubts about repayment,²⁰ theoretically the burden was on credit consumers to determine the type of credit they needed and to decide responsibly regarding whether or not they should enter into credit agreements, by taking into account their personal circumstances and needs.²¹ However, as consumers commit future income to present consumption needs it is inevitable that some consumers commit too many of their resources resulting in over-indebtedness.²²

Information economics, which emerged later, identified imperfect consumer information as a fundamental rationale for consumer regulation.²³ This development recognised that consumers rarely possess the perfect information on “price, quality and terms to make efficient choices in the market”.²⁴ In this regard disclosure regulation developed as a “relatively ‘pro market’ regulatory response to consumer credit policy because it facilitates the consumer’s making of an informed choice”.²⁵ On this assumption measures, such as truth in lending and controls on providing misleading information to the consumers, became evident in most consumer credit policies.²⁶ However, making a responsible credit decision has proven to be a complex process for both parties.²⁷ On the one hand consumers do not always make rational decisions about borrowing regardless of the information provided to them,²⁸ probably because their choice and bargaining power are limited due to socio-economic factors, an impaired credit history or to personal circumstances.²⁹ On the other hand, compensation for loan volumes for credit intermediaries as well as penalty fees for late repayments may provide an incentive for both credit providers and their intermediaries to conclude credit agreements without considering the ability of their prospective consumers to repay the credit.³⁰

Behavioural economics eventually provided insights into consumer decisions negating the above assumptions by arguing that consumers are not rational maximisers of their resources and may well make wrong borrowing decisions even if they are provided with adequate information.³¹ A term first coined in neo-liberal models of regulation,³² the literature on behavioural economics led to a new development in consumer credit policy that perceives credit as a product potentially dangerous to consumers.³³ Basing its formulations on social psychology, behavioural economics dispute the efficiency of rational choice theories as far as consumers are concerned on account of three aspects which affect consumer choices, namely unbounded rationality, unbounded willpower and unbounded self-interest.³⁴ These aspects rely on individuals having limited information-processing capabilities and, because they “often lack

clear, stable or well ordered preferences: choices are influenced by context for example by default rules, and framing”.³⁵

The concept of a consumer who is fully “rational, fully informed and able to choose which is in his best interest, free of cognitive and other limitations, is replaced by a consumer, who is far more than expected irrational, impulsive and [led] by subjective-opinions, gossips or fears”.³⁶ It is assumed that most unfavourable contracts are as a result of irrational, impulsive and financially illiterate consumers.³⁷ Given that unbounded rationality of the prospective consumer frequently impairs the consumers’ welfare due to wrong borrowing choices,³⁸ in order to best protect consumers against their own biases and from those who exploit those biases, a need for a social model of regulation to protect consumers has been identified.³⁹

This identification has resulted in the social consumer credit models being defined to include terms controls, such as interest rate ceilings, capping of default rates and lender liability for irresponsible lending.⁴⁰ It is submitted that the responsible lending policy developed as a response to concerns about over-indebtedness and forms an essential component in the social model of regulation.⁴¹ This regulatory approach is justified as preserving the consumer’s future autonomy⁴² by tasking those providing credit with the responsibility of ensuring that they provide it only to consumers who have the ability to repay and understand the ramifications of taking up such commitments. Responsible lending policy therefore serves to promote economic efficiency by addressing information asymmetry between credit providers and consumers, to protect consumers by overcoming power imbalances between credit providers and consumers that result in abusive or predatory practices and to promote financial stability by lessening systemic risk in the credit market.⁴³

3 Developments in the European Union

The development of responsible lending policy in the European Union was put into motion as a result of the European Commission’s resolution on consumer credit and indebtedness in November 2001, calling for an exchange of information on best practices in addressing the problem of over-indebtedness.⁴⁴ This process resulted in the European Commission’s 2002 draft Directive,⁴⁵ which was *inter alia* aimed at “lessening the risk of consumers falling victim to disproportionate commitments that they are unable to meet”.⁴⁶ This draft Directive sought to prevent consumer over-indebtedness by requiring member states to establish a central database in which late payments were to be recorded, debtors were to furnish security and credit providers were generally required to exercise caution in providing consumers with credit.⁴⁷ This was the first time the concept “responsible lending” was mentioned in any European Commission Directive.⁴⁸ The explanatory memorandum of the 2002 draft Directive provided that the consequence of extending irresponsible credit is the imposition of civil and trade sanctions.⁴⁹ It further directed that sanctions must be effective, proportionate and deterring, for example, a creditor losing his claim for interest and charges.⁵⁰

In a 2004 draft Directive the principle of responsible lending was specifically outlined,⁵¹ by which credit providers were required to assess the creditworthiness of prospective credit consumers on the basis of information they provided and, where appropriate, after consulting the relevant database.⁵² This document was shortly replaced in October 2005.⁵³ However, the requirement to assess the consumer’s creditworthiness on the basis of information disclosed by the consumer and, where possible, consultation of databases was retained.⁵⁴ The duty to provide pre-contractual information was modified to include the duty to advice, however emphasising that the consumer is always responsible for his final decision to conclude a credit agreement.⁵⁵ In this light, the credit provider not merely should fulfil the pre-contractual

information requirements but should provide additional explanations in order to enable the consumer to take a well-informed decision having assessed the rewards and drawbacks of the loan.⁵⁶

The efforts by the European Commission and the European Parliament eventually resulted in the adoption of the 2008 Directive.⁵⁷ This was the first Directive to introduce the principle of responsible lending at European Union community level as it imposes obligations on credit providers to provide standardised information and disclosures on a loan to consumers at advertisement and at the pre-contractual and contractual stage and to assess the creditworthiness of consumers.⁵⁸ One objective in introducing the principle of responsible lending at Community level was to ensure responsible and reliable markets and to restore consumers' confidence in credit markets where credit products are affordable and appropriate to the needs of consumers.⁵⁹

After the global financial crisis, which raised issues regarding the protection of consumers and the effectiveness of regulation in financial markets,⁶⁰ the European Union put in place a European Economic Recovery Plan to deal with the crisis and prepare for the economic recovery.⁶¹ The European Commission asserted that a stable financial sector is a prerequisite to building a sustainable recovery.⁶² It also emphasised the importance of responsible lending and borrowing in the delivery of responsible and reliable credit markets.⁶³ The European Commission subsequently held a public consultation on responsible lending and borrowing in the European Union because consumers were being granted credit that was unsuitable for them or their needs.⁶⁴ The consultation covered various business practices in the context of credit transactions, such as the provision of pre-contractual information, the assessment of consumers' creditworthiness and the suitability of credit products.⁶⁵ The consultation document asserted that the provision of clear information is an essential element in responsible lending and borrowing.⁶⁶ The concept of "responsible lending" was defined to mean credit products appropriate to consumers' needs and tailored to their ability to repay, whereas responsible borrowing implied that prior to obtaining credit consumers should provide relevant, complete and accurate information as to their financial situation and should make informed and sustainable borrowing decisions.⁶⁷

On 31 March 2011 the European Commission adopted a proposal for a Directive on credit agreements relating to residential property.⁶⁸ As a result the 2014 Directive⁶⁹ entered into force on 20 March 2014⁷⁰ and aims to develop a transparent, efficient and competitive internal market while promoting sustainable lending and borrowing.⁷¹ It focuses on boosting consumer confidence and tackling lending practices that lead to the development of property bubbles and an increase in consumer over-indebtedness, defaults and repossession cases across Europe.⁷² Further, it seeks to ensure that consumers are offered affordable credit and thereby reduce the need for recourse to the foreclosure of properties.⁷³ To achieve this objective the Directive introduces an obligation to assess the consumer's creditworthiness before granting mortgage credit.⁷⁴ A discussion of the main principles in the 2008 and 2014 Directives follows.

3.1 Regulatory principles in the 2008 Directive

The 2008 Directive imposes two primary responsible lending obligations on credit providers, namely, the obligation to ensure that consumers receive complete and relevant information before the conclusion of the contract⁷⁵ and the obligation to assess the creditworthiness of consumers before providing them with credit.⁷⁶ The first obligation serves the purpose of enabling the consumer to compare different credit offers more easily before committing to a credit agreement.⁷⁷ A credit provider therefore is required to provide pre-contractual

information on standardised sheets⁷⁸ in good time before the consumer is bound by any credit agreement or offer.⁷⁹ A credit provider is further required to provide adequate explanations to the consumer at pre-contractual stage about the characteristics of the proposed credit agreement and its inherent potential risks.⁸⁰ The consumer ultimately carries the responsibility of deciding whether or not to conclude the credit agreement based on the information provided to him.⁸¹ With regard to the second obligation, it is accepted that the aim of the creditworthiness assessment is to protect consumers from the irresponsible granting of credit that is beyond their financial capacity.⁸² In conducting the mandatory creditworthiness assessment, the credit provider is required to base such an assessment on the information provided by the consumer and, if necessary, by consulting specific databases.⁸³

The 2008 Directive, however, does not express the precise criteria or method of that assessment and leaves it to member states to provide further instructions and guidelines to credit providers.⁸⁴ In this regard it is accepted that the regulatory institutions may issue guidelines on the ways in which assessments should be conducted.⁸⁵ The guidelines may indicate that when assessing the consumer's prospects of meeting his obligations under the credit agreement, the credit provider

“should make reasonable inquiries and take reasonable steps to verify the consumer's underlying income capacity, the consumer's income history and any variability over time. In the case of consumers that are self-employed or have seasonal or other irregular income, the creditor should make reasonable inquiries and take reasonable steps to verify information that is related to the consumer's ability to meet his/her obligations under the credit agreement, including profit capacity and third party verification documenting such income.”⁸⁶

The 2008 Directive also does not contain an obligation to refuse the granting of credit in the case of a negative outcome of the assessment, leaving it to the credit provider to exercise discretion.⁸⁷ It further does not prescribe specific sanctions that have to be applied by member states in the event of a breach of duties relating to responsible lending.⁸⁸ Notwithstanding the above, the Directive provides direction to member states that they should implement penalties that are effective, proportionate and dissuasive.⁸⁹

3.2 Regulatory principles in the 2014 Directive

The 2014 Directive contains provisions equivalent to the 2008 Directive on the provision of pre-contractual information and the creditworthiness assessments. Specifically, credit providers are required to provide consumers with “personalised information needed to compare the credit available on the market, assess their implications and make an informed decision on whether to conclude a credit agreement”. It must be in good time before the consumer is bound by any offer after the consumer has provided information on his needs and financial situation.⁹⁰ The information must be provided on the Standard European Consumer Credit Information Sheet and the European Standardised Information Sheet found in Annexure II of the Directive.⁹¹ Adequate explanation must also be given to the consumer about the inherent characteristics and risks of the proposed credit.⁹² However, there is no explicit obligation on the credit provider to provide advice to the consumer as regards the suitability of the proposed credit.⁹³

Directive 2014/17/EU's provisions aim at minimum harmonisation.⁹⁴ Member states therefore can adopt more stringent measures in their national laws to better protect consumers.⁹⁵ As far as the creditworthiness assessments are concerned, this Directive prescribes a strict creditworthiness assessment and verification of the credit consumer's ability and propensity to repay the credit before a credit agreement is concluded.⁹⁶ This assessment should consider the consumer's regular expenditure, debts and other financial commitments, as well as income,

savings and assets.⁹⁷ The Directive asserts that although the value of the secured property is important in the assessment of the amount that may be granted to the consumer the main focus should be on the ability of the consumer to repay.⁹⁸ In addition, Directive 2014/17/EU contains an explicit prohibition on credit providers from extending credit to the consumer if the outcome of the credit assessment indicates that the consumer is not likely to meet the obligations arising from that credit agreement.⁹⁹ However, it lacks a provision on the legal consequences of the credit provider's failure to deny credit in the case of a negative outcome of the creditworthiness assessment.¹⁰⁰

4 Developments in the United States of America

The subprime lending market in the United States is one of the undisputed contributors to the 2007-2008 financial crisis.¹⁰¹ To address the loopholes in State and Federal consumer protection laws that mortgage brokers had taken advantage of leading to subprime lending, Congress passed the Dodd-Frank Act in 2010.¹⁰² The Dodd-Frank attempts to protect consumers from dangerous levels of consumer debt by tightening lending standards and increasing the transparency in the mortgage market by requiring mortgage originators to retain some risk of default.¹⁰³ Its Title XIV is entitled "Mortgage Reform and Anti-Predatory Lending Act". The primary focus of the Dodd-Frank is on mortgage credit. The Dodd-Frank is the first piece of consumer credit legislation in the United States which introduced a duty to assess a consumer's ability to repay a mortgage loan.¹⁰⁴ A discussion of relevant principles in the Dodd-Frank follows.

4.1 Regulatory principles in the Dodd-Frank

Subtitle B of Title XIV of the Dodd-Frank sets out minimum standards for residential mortgage loans by providing that

"[i]n accordance with regulations prescribed by the Board, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments."¹⁰⁵

In terms of the Dodd-Frank, the credit provider must determine the consumer's ability to repay the loan *inter alia* by considering the consumer's credit history, current income, expected income, current obligations and residual income after paying mortgage-related and non-mortgage related obligations, employment status and financial sources other than the consumer's equity in the dwelling.¹⁰⁶ Any payments for a second mortgage or any other subordinate loans should be included in the calculations.¹⁰⁷ The credit provider's determination should use a payment schedule that fully amortises the loan over the full loan term.¹⁰⁸ The Dodd-Frank further provides guidance to credit providers when verifying the consumer's income or assets in determining the consumer's ability to repay. It is indicated that the credit provider may have regard to the consumer's expected income or assets, tax returns, payroll receipts, financial institutions' records and other third party documents that may provide evidence of the consumer's income or assets.¹⁰⁹ The requirement for the determination to be based on verified and documented information implies an end to low document and no document mortgage loans in the United States, which have been a prominent feature of subprime mortgage lending.¹¹⁰

The Dodd-Frank authorises the Consumer Financial Protection Bureau to administer, implement and enforce the provisions of Federal consumer financial law.¹¹¹ The Dodd-Frank also requires the Consumer Financial Protection Bureau to promulgate regulations prohibiting the "steering" of a consumer to a mortgage loan that the consumer lacks the reasonable ability

to repay or which has predatory characteristics such as equity stripping, excessive fees or abusive terms.¹¹² For violations of the responsible lending obligations, the Consumer Financial Protection Bureau may pursue civil actions to impose a civil penalty or to seek an appropriate remedy, including an injunction, rescission or reformation of credit contracts, refund of the consumer's moneys, restitution, compensation for unjust enrichment, payment of damages, limits on the credit provider's activities and civil money penalties.¹¹³ Without regard to any statute of limitations, a consumer is also entitled to defend mortgage foreclosure proceedings on the grounds of non-compliance with the responsible lending requirements.¹¹⁴ As such, the qualified mortgage presumption creates a safe haven situation for the credit provider concerning the provisions which relate to foreclosure.¹¹⁵

To ensure that consumers are provided with adequate information to assist them in the decision-making of taking up a loan, section 1419 of the Dodd-Frank requires credit providers to disclose all credit costs, charges and interest relating to the mortgage loan to the prospective mortgage loan consumer.¹¹⁶ However, the Dodd-Frank fails to provide an indication as to whether this duty of disclosure includes the duty to ensure that the consumer actually understands all the obligations flowing from the credit agreement. Although it empowers the Consumer Financial Protection Bureau to prescribe rules on disclosure aimed at ensuring that consumers understand the costs, benefits and risks associated with financial products and services,¹¹⁷ it goes only as far as directing that if a model form is used at a minimum it should succinctly explain the information that must be communicated to the consumer,¹¹⁸ without elaborating on whether or not the credit provider is expected to ensure that the consumer does in fact understand the credit terms before providing credit. The Dodd-Frank is also criticised for its focus purely on mortgage credit and not on consumer credit in general. These critics describe its responsible lending measures as reactive rather than proactive as they respond only to a specific market failure,¹¹⁹ leaving a segment of the consumer population of other credit products other than mortgages unprotected against the threat of irresponsible credit.

5 International bodies' principles aimed at promoting responsible lending policy

The responsible lending movement has recently been influenced by the efforts of international bodies, such as the Group of Twenty,¹²⁰ the Organisation for Economic Co-operation and Development¹²¹ and the World Bank¹²² in developing work aimed at promoting a responsible lending policy. This paragraph provides an overview of the broad principles aimed at promoting responsible lending policy as developed by international bodies.

5.1 The G20

The G20 adopted the Principles for Innovative Financial Inclusion in 2010 underpinning the necessity for an inclusive approach to the protection of consumers in financial markets.¹²³ At the endorsement of these principles in October 2011 by the G20 Finance Ministers and Central Bank Governors,¹²⁴ the G20 set out a comprehensive framework on the ways in which financial consumer protection may be regulated in a document titled "G20 High-level Principles on Financial Consumer Protection".¹²⁵ The G20 high-level principles on financial consumer protection at a minimum require financial services providers and their intermediaries to work in the best interests of their consumers and be responsible for upholding financial consumer protection as an objective.¹²⁶ Financial services providers are also required to assess their consumers' financial capacity, situation and needs, based on information primarily provided by consumers, before agreeing to provide them with a product, service or advice.¹²⁷ Further, they are also required to ensure that the financial products and services offered to consumers should meet the particular needs of every individual consumer.¹²⁸

Sufficient information must be provided to the consumers to place them in a position where they are able to choose the most suitable and affordable product or service.¹²⁹ To assist consumers in making appropriate decisions on their financial needs and essentially to curb consumer over-indebtedness, credit providers should also properly assess the consumer's creditworthiness when offering new credit or extending credit that significantly increases the debt amount assumed by the consumer.¹³⁰ This requirement is said to have triggered a wave of new regulations on responsible lending around the world as it serves a double function: preventing consumer over-indebtedness and promoting a sound financial system.¹³¹

5.2 *The OECD*

In September 2013 the OECD released an updated report aimed at supporting the implementation of the G20 high-level principles on financial consumer protection.¹³² This report emphasises that the objective of the G20 in the high-level principles is to ensure that financial services providers and their intermediaries work in the best interests of the consumers and that they should be responsible for upholding financial consumer protection.¹³³ It outlines that these goals can best be achieved by *inter alia* providing adequate and objective information and advice to the consumer and, where appropriate, "assessing the needs, financial situation, attitude to risk and interests of different types of consumers at the beginning of any dealing with the consumer, before the consumer is offered a financial product or service".¹³⁴ Specifically on the aspect of consumer credit, the report asserts that the criteria on responsible lending play an important role in the protection of consumers from debt repayment problems and other ensuing issues because the criteria assist credit providers in avoiding irresponsible credit lending by considering the terms and purpose of the proposed credit agreement, the consumer's financial situation and other relevant circumstances.¹³⁵

5.3 *The World Bank*

The World Bank started a global programme on Consumer Protection and Financial Literacy in 2010,¹³⁶ which had the aim of improving consumer protection in financial services. In 2012, it published Good Practices for Consumer Protection based on a number of country-level reviews of consumer protection and financial literacy.¹³⁷ These practices represent the most frequent approaches to improving the conduct of financial institutions when dealing with consumers.¹³⁸ Primarily, they are aimed at being used as a "diagnostic tool" and thus to assist policy-makers in answering the question: "[h]ow does the country's legal and regulatory framework for financial consumer protection compare to international practice?"¹³⁹

The World Bank's consideration of responsible lending policies is contained under Part XXIV, titled "Disclosure and Sales Practices". It is indicated that when a credit provider recommends a product or service it offers to a consumer, the credit provider should ensure that such a product or service meets the needs of the consumer.¹⁴⁰ The consumer should also be provided with sufficient information on the product or service offered to enable him to choose the "most suitable and affordable product or service".¹⁴¹ Further, if the credit provider presents the consumer with a new offer on a particular credit product or service that is likely significantly to increase the amount of debt assumed by the consumer, the consumer's creditworthiness should also be assessed.¹⁴²

In October 2013 the World Bank prepared a paper as a background document for the World Bank Group's Global Financial Development 2014 Report on Financial Inclusion. This paper provides an overview of key regulatory actions that a government may implement to support responsible lending.¹⁴³ Therein, the World Bank directs that in the assessment of the consumer's creditworthiness and the suitability of the credit product to the consumer the

assessment should consider the consumer's whole financial portfolio in order to determine how the proposed credit may interact with the consumer's financial stability and long-term goals, the consumer's best interest, the consumer's understanding of the credit product or service on offer and the consumer's long-term affordability.¹⁴⁴

The World Bank also cautions that because in some countries non-bank credit and micro-finance institutions are not required to ask consumers about other outstanding debts or such debts are not required to be registered in the credit-reporting system the result often is consumers becoming over-indebted as they rely on one loan to pay-off another.¹⁴⁵ Therefore it recommends that a policy focused on access to consumer credit should ensure that credit is offered and is used responsibly.¹⁴⁶ It further emphasises the need for policymakers to strive for a balance in four distinct financial sector policy objectives, namely: financial inclusion, stability of the financial sector, integrity of the credit market and consumer protection.¹⁴⁷

In devising a responsible lending regime, the World Bank provides guidance that an effective responsible lending regulatory system must be aimed at achieving consumer protection.¹⁴⁸ To achieve this goal the World Bank suggests five key consumer protection areas that must be covered for the regime to be effective, namely the institutional arrangements, disclosure, business practices, consumer redress and financial capability.¹⁴⁹ It asserts that the key to a truly successful responsible lending regime is the ability on the part of the regulatory body to monitor and enforce the rules,¹⁵⁰ hence the need for proper institutional arrangements. It cautions that regulatory arbitrage may arise, which makes responsible lending rules harder to implement if there is no regulator tasked with the responsibility of consumer credit regulation.¹⁵¹

Regarding the disclosure component, it emphasises that responsible credit disclosure should be understandable, complete and comparable to allow prospective credit consumers to compare available offers.¹⁵² As regards business practices it is essential that the regulatory approach *inter alia* provides guidance on the lending process, which should be structured in a way that discourages extending credit to individuals who are likely to go into arrears.¹⁵³ In order to provide for consumer redress, it is submitted that the regulatory approach should allow for an "effective redress mechanism not only to address individual complaints but also to allow the regulator to identify emerging consumer issues" in the credit market.¹⁵⁴ The final aspect, financial capability, has the implication of empowering consumers to understand that in the area of consumer credit, wrong choices may have significant long-term negative effects on the consumer.¹⁵⁵

6 Wilson's criteria for an effective responsible lending regime

In addition to the work developed by international bodies aimed at promoting a responsible lending policy discussed above,¹⁵⁶ several authors have also published materials that may be useful in the development of policy.¹⁵⁷ Specific reference is made to Wilson's book titled "International Responses to Issues of Credit and Over-Indebtedness in the Wake of Crisis (Markets and the Law)", a contribution relevant to the issue in this article.¹⁵⁸ In this book Wilson considers the responsible lending regulatory regimes enacted in Australia, South Africa, the United States and Europe and argues that they have been developed in a neo-liberal context which has had an influence on their reactive nature.¹⁵⁹ She argues that ideally a responsible lending regime should show evidence of a proactive rather than a reactive regulatory approach and, further, should meet the following criteria:¹⁶⁰

- (a) A focus on responsible lending rather than responsible borrowing.
- (b) A focus on consumer credit in general, not limited to residential mortgage loans.

- (c) An encouragement of flexible, individualised credit assessment practices or at least not an encouragement of rigid and inflexible credit assessment practices.
- (d) The existence of a regulatory agency charged with enforcement, adequately resourced to properly monitor and enforce compliance with market conduct regulation, including responsible lending obligations.

These criteria are based on the contention that “the goal of any responsible lending regime should be first and foremost to protect consumers from the harms of irresponsible lending”.¹⁶¹ With regard to the first criterion, it is suggested that the focus of a responsible lending regime should be on responsible lending in order to avoid over-indebtedness as opposed to being on responsible borrowing.¹⁶² This focus shows an awareness of the structural causes of over-indebtedness where consumers lack choice and end up entering into harmful credit agreements.¹⁶³ The second criterion suggests that focusing only on one type of credit which has caused the most recent harm is short-sighted and reactive rather than proactive.¹⁶⁴

The third criterion promotes the rejection of rigid standardised credit assessment models and replaces them with flexible, individualised credit assessment models. The fourth criterion recommends that the regulatory agency be vested with powers to pursue legal action against credit providers who have contravened their responsible lending obligations.¹⁶⁵ It is affirmed that the fourth criterion is crucial for the effectiveness of the responsible lending regime because poor consumers, who in most cases are the recipients of irresponsible credit, are not likely to be in a position to pursue litigation and may not even be aware of their rights or that there is a solution to their financial situation.¹⁶⁶

7 Identified leading principles

It was mentioned above that a number of jurisdictions have reviewed their consumer credit regulation policies by endorsing responsible lending to protect consumers through adopting a range of regulatory tools that specifically have an influence in the determination of the consumer’s eligibility to enter into a credit contract and the process of decision-making by both parties to the credit agreement.¹⁶⁷ Similarly, international bodies have also developed work aimed at promoting responsible lending policy.¹⁶⁸ These are:

7.1 Consumer protection

A leading consideration that should feature in every responsible lending regime rests upon the idea that the responsible lending rules should be aimed at achieving consumer protection in the credit market.¹⁶⁹ Consumers ought to be protected against irresponsible lending practices and the threat of over-indebtedness.¹⁷⁰ In terms of this principle it is accepted that consumer protection in the credit market is achieved if credit providers are responsible for upholding it *inter alia* by conducting assessments of consumer’s financial capabilities prior to providing credit.¹⁷¹ It is good practice to set criteria on responsible lending rules in order to achieve the effective protection of consumers against repayment hardship and the ensuing over-indebtedness.¹⁷² Further, it is asserted that policy considerations aimed at making credit available to consumers should also ensure that credit is to be offered and used responsibly.¹⁷³

7.2 Obligation to conduct pre-agreement assessments

Consumer credit legislation should impose an obligation on credit providers to conduct pre-agreement creditworthiness assessments of prospective consumers. The procedure for conducting the assessments varies from regime to regime as adopted by a specific jurisdiction.¹⁷⁴ Noting that the pre-agreement assessments methodology differs from regime to regime, it appears that the assessment of the consumer’s ability to repay before a credit

agreement is concluded should be based on a credible, standard methodology, such as loan-to-value or debt-to-income, and includes considering the consumer's income and expenses by assessing existing credit commitments and leaving sufficient flexibility to deal with unexpected cost.¹⁷⁵ It should be affirmed that these assessments, however, should not be too restrictive and should make it possible even for low income consumers to fully repay their loans.¹⁷⁶

Historically, responsible lending obligations focussed only on prudentially regulated financial institutions such as banks.¹⁷⁷ However recent developments indicate that to ensure optimum protection for consumers by preventing regulatory arbitrage the responsible lending obligations are best imposed on all credit providers and credit intermediaries who provide consumer credit products and services.¹⁷⁸ Limiting pre-agreement assessments to one industry of the credit market, for instance a focus on mortgage credit only as currently is the case in the United States, therefore is not desirable or encouraged.¹⁷⁹

7.3 *Obligation to provide pre-agreement information*

Credit providers should provide consumers with the relevant information necessary to help the consumer make an informed choice. The World Bank affirms that the protection of consumers against irresponsible credit is best achieved by ensuring that credit providers provide adequate pre-agreement information and by equipping the consumer with the ability to use the information provided.¹⁸⁰ A responsible lending regime should oblige credit providers to provide information that is clear, sufficient, reliable, comparable and timely to enable the consumer to compare different products and make an informed decision.¹⁸¹

Credit providers may use standardised key information documents with comparable information on interest rates, such as monthly and annualised percentage rates, to ensure that consumers understand the credit costs and the risks attached to over-indebtedness should they take up more credit than they can afford to repay.¹⁸² To ensure that the consumers receive complete and relevant information that enables consumers to shop around and compare offers, the European Union's Directives, for instance, impose an obligation on credit providers to provide standardised pre-agreement information to the consumers before concluding a credit agreement.¹⁸³ There is no uniform practice on whether or not the duty to disclose pre-agreement information entails a duty to explain the information provided, but it is good practice for credit providers to provide adequate explanations to consumers.¹⁸⁴ They should be given examples to demonstrate how charges and interest rates vary over the duration of the contract.¹⁸⁵

Overall, the pre-agreement information that should be disclosed to consumers includes information relating to the terms of the proposed credit and the total cost of credit. The United States' Dodd-Frank requires disclosure of all fees and charges levied in connection with the provision of the mortgage loan, including charges for the settlement of the credit, commissions to be paid to the credit provider's agents and the total amount of interest payable over the life of a loan.¹⁸⁶

7.4 *Effective credit regulator to enforce responsible lending obligations*

It is noted that the key to a successful responsible lending regime is the existence of a regulatory body tasked with the responsibility of monitoring and enforcing the rules.¹⁸⁷ This principle is informed by an understanding that regulatory arbitrage may arise which makes responsible lending rules harder to implement if no regulator is tasked with the responsibility of consumer credit regulation.¹⁸⁸ It is common practice that credit providers are required to be licensed to ease the regulatory process and to make it easier to hold credit providers accountable to their statutory obligations, including conducting the required pre-agreement assessments.¹⁸⁹

7.5 *Effective penalties for non-compliance with responsible lending obligations*

A proactive and effective responsible lending regime should prescribe sanctions which are effective in deterring credit providers from contravening their responsible lending obligations.¹⁹⁰ The credit regulators should be empowered to pursue actions intended to impose prescribed penalties or other appropriate remedies for the benefit of the consumer as a result of the credit provider's failure to comply with their responsible lending obligations.¹⁹¹ Consumers may also be entitled to defend proceedings based on a credit agreement on grounds of non-compliance with responsible lending obligations.¹⁹²

8 Conclusion

The aim of this article was to trace the development of responsible lending policy with a view to formulate leading international best principles for an effective and efficient responsible lending regime. These leading international best principles should be considered in devising a modern and effective responsible lending regime. As these principles reflect international practice on responsible lending, they may be useful to developing countries as a benchmark in determining appropriate approaches for the improvement of consumer credit policy. In Namibia, as indicated above, there is no consumer credit legislation which seeks to protect consumers from irresponsible credit lending by imposing an obligation on credit providers to conduct an assessment of the consumer's financial position and ability to repay the credit before extending credit to the consumer.¹⁹³ This deficiency constitutes a lack of effective protection of consumers from irresponsible lending practices and a failure to address consumer over-indebtedness. There is therefore a need for Namibia to update its legislative framework in order to protect consumers from irresponsible credit and over-indebtedness.

As regards the first principle identified above,¹⁹⁴ Namibia needs a policy on consumer credit which is aimed at achieving consumer protection in the credit market. The second principle relates to the requirement for credit providers to conduct creditworthiness assessments of the prospective consumer before providing the latter with credit.¹⁹⁵ Since there is no consumer credit legislation in Namibia imposing this obligation on credit providers, it is submitted that responsible lending policy should be introduced making provision for the affordability and suitability assessments of the proposed credit for the consumer. The third principle relates to the provision of pre-agreement information to the consumer to enable the consumer to make responsible financial decisions.¹⁹⁶ Although there is a form of disclosure regulation underlying the Namibian consumer credit legislative framework, it is submitted that the duty of the credit provider to supply adequate pre-agreement information to the consumer should include a duty to explain the information provided to the consumer. The fourth identified principle relates to the existence of an effective regulator to enforce the responsible lending obligations.¹⁹⁷ This principle is the yardstick in the enforcement of responsible lending rules. Namibia has two regulators of credit providers, namely the Central Bank of Namibia and the Namibia Financial Institutions Supervisory Authority. Nonetheless, there are still some credit providers who are not subject to these regulatory bodies. It is good practice to have a single regulatory body to monitor conduct and compliance thereof of all the credit providers. All credit providers should therefore be required to register with this credit regulator prior to engaging in the business of providing credit. Lastly, the fifth principle relates to the sanctions that are effective in deterring non-compliance with responsible lending rules.¹⁹⁸ The current consumer credit laws in

Namibia do not contain sanctions for the credit providers' non-compliance with their obligations therein. To correct this, the regulatory body should, for example, be empowered to institute legal action against credit providers for non-compliance. It is submitted that the identified leading international best principles can be useful to Namibia and other developing countries alike in improving their consumer credit legislative frameworks in order to protect consumers from irresponsible credit and over-indebtedness.

¹ Van Heerden, C. and Renke, S. (2015) 'Perspectives on the South African responsible lending regime and the duty to conduct pre-agreement assessment as a responsible lending practice', *International Insolvency Review*, p. 68.

² Consumers International (2013) *Responsible lending: an international landscape* (edited by Hubbard-Solli J), p. 8. See also paper by the World Bank (2013) *Responsible lending: overview of regulatory tools*, Washington DC, p. 8; Steennot, R and Van Heerden, C. (forthcoming 2017a) "Pre-agreement assessment as a responsible lending tool in South Africa, the EU and Belgium – Part 1" *PER/PELJ* 1 for a detailed discussion of the concept responsible lending.

³ Bijak, K., Thomas, L.C. and Mues, C. (2014) 'Dynamic affordability assessment: predicting an applicant's ability to repay over the life of the loan' *Journal of Credit Risk*, p. 2. See also Van Heerden, C. and Beyers, C. (2016) 'Dynamic affordability assessment in the context of the South African National Credit Act 34 of 2005' *Journal of International Banking Law and Regulation*, pp. 446-447.

⁴ Mak, V. (2015) 'What is responsible lending? The EU consumer mortgage credit directive in the UK and the Netherlands' *Journal of Consumer Policy*, p. 413. See also Devenney, J. and Kenny, M. (eds) (2012) *Consumer Credit, Debt and Investment in Europe*, University Press, Cambridge, p. 178.

⁵ Mak (note 4) p. 413.

⁶ Bank of Namibia *Banking system in Namibia* available on <https://www.bon.com.na/Bank/Banking-Supervision/The-Banking-Supervision/The-Banking-System-in-Namibia.aspx> last accessed 31 March 2017

⁷ Bank of Namibia (2013) *Annual Report*, p. 26; International Monetary Fund (2016) *Article IV Consultation - Press Release, Staff Report and Statement by the Executive Director for Namibia* Country Report No. 16/373, Washington D.C., p. 4. See also in general Namibia Financial Institutions Supervisory Authority (2010) *Annual Report* and Namibia Law Reform and Development Commission (July 2014) *LRDC 29 Consumer Protection Discussion Document*, Windhoek.

⁸ World Bank (note 2) p. 13.

⁹ Wilson, T. (ed) (2013) *International responses to issues of credit and over-indebtedness in the wake of crisis (Markets and the Law)* Ashgate Publishing, London, pp. 109-131.

¹⁰ See Communication of the Commission *Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the member states concerning credit for consumers*, COM(2002) 443 (11 Sep 2002). See also Ramsay, I. (2012) 'Consumer credit regulation after the fall: international dimensions' *Journal of European Consumer and Market Law*, p. 26.

¹¹ Ramsay, I. (2004) *Consumer credit regulation as 'the third way'?*, keynote address delivered at the Australian Credit at the Crossroads Conference, Melbourne (8 November 2004), pp. 1-2. See also Department of Trade and Industry South Africa (Aug 2004) *Consumer credit law reform: policy framework for consumer credit*, p. 4.

¹² See Ramsay, I. (2006) 'Consumer credit law, regulatory capitalism and the 'new learning' in regulation' *Sydney Law Review*, p. 29. See also Ramsay (note 11) pp. 1-2.

¹³ Consumer sovereignty denotes consumers as "sovereign" beings who are responsible for deciding the products to be produced and the price at which those products are to be offered in the market at the same time consistently making rational choices that improve consumer welfare and overall wealth – see Cvjetanovic, M. (2014) 'Consumer sovereignty: the Australian experience' *Seven Pillars Institute* p. 68.

¹⁴ Ramsay (note 12) p. 13.

¹⁵ *Ibid.*

¹⁶ Report of the Committee *Consumer Credit* (Chairperson Lord Crowther) (1971) vol 1 Cmnd 4596, p. 153. See also Devenney and Kenny (note 4) p. 86.

¹⁷ Fama, E.F. (1969) 'Efficient capital markets: a review of theory and empirical work' *The Journal of Finance*, p. 383.

¹⁸ Posner, R.A. (1997) 'Rational choice, behavioral economics, and the law' *Stanford Law Review*, p. 1553. See also Ramsay, I. (2007) *Consumer law and policy: text and materials on regulating consumer markets*, Hart Publishing, Oxford and Portland, pp. 55, 61.

¹⁹ Posner (note 18) p. 1551.

²⁰ International Financial Consumer Protection Organisation *FinCoNet report on responsible lending: review of supervisory tools for suitable consumer lending practices* (2014) 16.

²¹ *Idem* 15.

²² Crowther Report (note 16) p. 118. See also Renke, S. (2012) *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005*, LLD Thesis, University of Pretoria, p. 3.

²³ Ramsay (note 18) 64.

²⁴ *Idem* 65.

²⁵ Cartwright, P. (2004) *Banks, Consumers and Regulation*, Hart Publishing, Oregon, p. 62.

²⁶ See, e.g. Ramsay (note 18) 64.

²⁷ See Ramsay (note 18) 71-84 for a summary of studies on behavioural economics and consumer credit policy.

- ²⁸ Thaler, R. (1980) 'Towards a positive theory of consumer choice' *Journal of Economic Behaviour and Organization* 1, p. 39. See also Ramsay (note 10) p. 27, who opines that consumers may choose short-term benefits and ignore the long-term effects of such choices by underestimating credit risks and being too confident "in their ability to stay out" of financial trouble.
- ²⁹ FinCoNet (note 20) p. 17.
- ³⁰ Europe Economics (2009) *Study on Credit Intermediaries in the Internal Market* Final Report, Contract ETD/2007/IM/H3/118, pp. iii-iv.
- ³¹ Ferretti (ed) (2016) *Comparative Perspectives on Consumer Over-indebtedness – A View from the UK, Germany, Greece and Italy*, Eleven International Publishing, The Hague, p. 14.
- ³² Neo-liberal models of regulation assume that competition in credit markets is systematically skewed to taking advantage of the behavioural biases of consumers. It is the opposite of the neo-classical models of regulation which assume the virtues of competition and disclosure in credit markets – see Ramsay (note 11) p. 28.
- ³³ See Ramsay (note 11) p. 28.
- ³⁴ Ramsay (note 18) 72. See also Ramsay (note 11) p. 8, where he explains that "the concept of bounded willpower recognises that individuals may have time inconsistent preferences and illustrates the tension between the 'impulsive self' and the 'planner self'".
- ³⁵ Sunstein, C.R. and Thaler, R.H. (2003) 'Libertarian paternalism is not an oxymoron' *University of Chicago Law Review*, p. 1159.
- ³⁶ Grundmann, S. and Atamer, Y.M. (eds) (2011) *Financial Services, Financial Crisis and General European Contract Law: Failures And Challenges of Contracting* Kluwer Law International, The Netherlands, p. 184.
- ³⁷ *Ibid.*
- ³⁸ *Idem* 185.
- ³⁹ Ramsay (note 11) p. 4.
- ⁴⁰ Reifner, Kiesilainen, Huls and Springeneer (Sep 2003) *Study of the Legislation Relating to Consumer Over-Indebtedness in all European Union Member States*, Contract Reference No B5-1000/02/000353, p. 222. See also Ramsay (note 11) p. 3.
- ⁴¹ See Wilson (note 9) p. 121.
- ⁴² Ramsay (note 11) p. 11. See also Grundmann and Atamer (note 36) pp. 185-186.
- ⁴³ FinCoNet Report (note 20) p. 15.
- ⁴⁴ Goode, R. (1977) Division I "Commentary" *Consumer Credit Law and Practice*, with updates (last updates: paras 121-126: April 2011) (1977 *et seq*) para 126.40.
- ⁴⁵ COM(2002) 443.
- ⁴⁶ Grundmann and Atamer (note 36) pp. 191-192.
- ⁴⁷ COM(2002) 443 15. See also Weatherill, S. (2005) *EU Consumer Law and Policy*, Edward Elgar Publishing Ltd, Oxford, p. 91.
- ⁴⁸ Renke (note 22) p. 14.
- ⁴⁹ Grundmann and Atamer (note 36) p.192.
- ⁵⁰ 2002 Draft Directive art 31. See also Grundmann and Atamer (note 36) p. 192.
- ⁵¹ See Communication of the Commission (28 Oct 2004) *Amended Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the member states concerning credit for consumers repealing Directive 87/102/EC and modifying Directive 93/13/EC* (COM(2004) 747).
- ⁵² *Ibid.*
- ⁵³ Communication of the Commission (07 Oct 2005) *Modified proposal for a Directive of the European Parliament and of the Council on credit agreements for consumers amending Council Directive 93/13/EC* (COM(2005) 483 final).
- ⁵⁴ *Idem Explanatory Memorandum* para 5.4.
- ⁵⁵ *Ibid.*
- ⁵⁶ *Ibid.*
- ⁵⁷ According to its art 2(2)-(5), this Directive does not apply to credit agreements secured by either a mortgage or another comparable security, interest-free credit or credit repaid within three months, hiring agreements, certain leasing contracts, credit agreements arising from a settlement agreement reached in court or before another statutory body and credit agreements where the total amount of credit is less than €200 or more than €75 000 and to overdrafts.
- ⁵⁸ See in general Ferretti, F. (2013) 'The Legal Framework of Consumer Credit Bureaus and Credit Scoring in the European Union: Pitfalls and Challenges – Overindebtedness, Responsible lending, Market Integration, and Fundamental Rights' *Suffolk University Law Review*, p. 791.
- ⁵⁹ Communication of the Commission (04 Mar 2009) *Communication for the Spring European Council: Driving European Recovery*, (COM(2009) 114 final). In this communication, the European Commission stressed the importance for member states to adopt measures to prevent consumer over-indebtedness and to maintain access to financial services.
- ⁶⁰ Ferretti (note 58) p. 791.
- ⁶¹ See COM(2009) (note 59).
- ⁶² COM(2009) (note 59) p. 3.
- ⁶³ COM(2009) (note 59) p. 7.
- ⁶⁴ European Commission (Jun 2009) *Public Consultation on Responsible Lending and Borrowing in the EU*, Brussels, p. 6.
- ⁶⁵ *Idem* p. 3.
- ⁶⁶ *Ibid.*
- ⁶⁷ *Ibid.*
- ⁶⁸ See Communication of the Commission (Mar 2011) *Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property* (COM(2011) 142 final).

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- ⁶⁹ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements Relating to Residential Immovable Property and Amending Directives 2008/48/EC and 2013/36/EU And Regulation (EU) No 1093/2010, OJ 2014 L60/34.
- ⁷⁰ EU member states were expected to implement Directive 2014/17/EU into national law by Mar 2016.
- ⁷¹ 2014 Directive recital 6.
- ⁷² 2014 Directive recital 3.
- ⁷³ See in general Ferretti (note 58) p. 791.
- ⁷⁴ 2014 Directive recital 22 read with art 18(1).
- ⁷⁵ See 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 recital 24. See also arts 4 and 19 for the provisions concerning the completeness of the information that is to be provided to the consumer at different stages of the contractual process.
- ⁷⁶ 2008 Directive art 8(1).
- ⁷⁷ Vandone, D. (2009) *Consumer Credit in Europe – Risks and Opportunities of a Dynamic Industry*, Springer, Verlag Berlin Heidelberg, p. 105.
- ⁷⁸ The Standard European Consumer Credit Information Sheet and the European Standardised Information Sheet, found in Annex II to the 2008 Directive.
- ⁷⁹ 2008 Directive art 5. See also Vandone (note 77) pp. 104-105.
- ⁸⁰ 2008 Directive art 5(6).
- ⁸¹ See Renke (note 22) p. 44.
- ⁸² See *LCL Le Crédit Lyonnais SA v Fesih Kalhan* Case C 565/12 (27 Mar 2014) para 42 and 43.
- ⁸³ 2008 Directive art 8(1). See also Vandone (note 77) p. 112.
- ⁸⁴ 2008 Directive recital 26.
- ⁸⁵ World Bank (note 2) p. 42.
- ⁸⁶ European Banking Authority (Aug 2015) *Guidelines on Creditworthiness Assessment* Final Report EBA/GL/2015/11, p. 10.
- ⁸⁷ Micklitz and Domurath (eds). (2015) *Consumer Debt and Social Exclusion in Europe (Markets and the Law)*, Routledge, London, p. 163.
- ⁸⁸ Ibid.
- ⁸⁹ 2008 Directive art 23.
- ⁹⁰ 2014 Directive art 14(1)(a)-(b).
- ⁹¹ 2014 Directive art 14(2).
- ⁹² 2008 Directive art 5(6).
- ⁹³ Steennot, R. and Van Heerden, C. (forthcoming 2017b) ‘Pre-agreement assessment as a responsible lending tool in South Africa, the EU and Belgium – Part 2’ *PER/PELJ*, p. 36.
- ⁹⁴ 2014 Directive art 2(1).
- ⁹⁵ See Steennot, R. (2011) ‘Protecting Borrowers through Information and Advice: The Belgian Consumer Credit Act’ *Financial Law Institute Working Paper Series 2011-06*, p. 1. See also Steennot and Van Heerden (note 93) p. 28.
- ⁹⁶ 2014 Directive recital 55.
- ⁹⁷ 2014 Directive recital 55.
- ⁹⁸ 2014 Directive recital 55 read with art 18(3). Based on this, it is now claimed that the goal of responsible lending comprises the financial stability of the consumer as the creditworthiness assessment not only aims at minimising the risk for the credit provider but also at protecting the consumer from the loss of the property acquired with the credit. See in this regard, Micklitz and Domurath (note 87) p. 162.
- ⁹⁹ 2014 Directive art 5(a).
- ¹⁰⁰ Micklitz and Domurath (note 87) p. 163. See also Steennot and Van Heerden (note 93) p. 37.
- ¹⁰¹ Financial Crisis Inquiry Commission (Jan 2011) *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, p. 402. See also Gorman, C. (2014) ‘Undoing hardship: applying the principles of Dodd-Frank to the law student debt crisis’ *University of California Davis Law Review*, p. 1887 and Sovern, J. (2010) ‘Preventing future economic crises through consumer protection law or how the Truth in Lending Act failed subprime borrowers’ *Ohio State Law Journal*, p. 761.
- ¹⁰² Hereinafter “Dodd-Frank”. Dodd-Frank was signed into law on 21 July 2010. For a detailed discussion of the history of residential mortgage regulation, see Pottow, J. (2011) ‘Ability to pay’ *Berkeley Business Law Journal*, p. 175 and Hirsch, F.A. (2008) ‘The evolution of a suitability standard in the mortgage lending industry: the subprime meltdown fuels the fires of change’ *North Carolina Banking Institute*, p. 21.
- ¹⁰³ Gorman (note 101) p. 1890.
- ¹⁰⁴ See also Pottow (note 102) p. 176.
- ¹⁰⁵ Dodd-Frank s 1411(1).
- ¹⁰⁶ Dodd-Frank s 1411(3) read with s 1411(2). See also Wilson (note 9) p. 116.
- ¹⁰⁷ See Dodd-Frank s 1411(2).
- ¹⁰⁸ Dodd-Frank s 1411(3).
- ¹⁰⁹ Dodd-Frank s 1411(4).
- ¹¹⁰ Wilson (note 9) p.116. See also the discussion of Dodd-Frank’s elimination of deceptive loans with ballooning payments by Singer, L. Best, Z. and Simon, N. (2010) ‘Breaking down Wall St. financial reform: a summary of the major consumer protection portions of the Dodd Frank Wall Street Reform and Consumer Protection Act’ *Journal of Consumer and Commercial Law*, pp. 6-9, Pottow (note 102) p. 176 and Engel, K.C. and McCoy, P.A. (2011) *The subprime virus: reckless credit, regulatory failure and the next steps*, University Press, Oxford, p. 229.
- ¹¹¹ Dodd-Frank s 1022(a).
- ¹¹² Dodd-Frank s 1403(3)(A)(i)-(ii).

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- ¹¹³ Dodd-Frank s 1054(a).
- ¹¹⁴ Dodd-Frank s 1413(1). See also Wilson (note 9) p. 117.
- ¹¹⁵ Dodd-Frank s 1412(2) read with s 1413(1).
- ¹¹⁶ Dodd-Frank s 1419(17)-(19).
- ¹¹⁷ Dodd-Frank s 1032(a).
- ¹¹⁸ Dodd-Frank s 1032(b)(2).
- ¹¹⁹ Wilson (note 9) p. 129. See also Engel and McCoy (note 110) p. 17.
- ¹²⁰ Hereinafter “G20”. This is an international forum for the governments and central bank governors from 20 major economies, founded in 1999 with the aim of studying, reviewing and promoting the high-level discussion of policy issues pertaining to the promotion of international financial stability – see Nelson, R.M. (Oct 2013) *The G20 and international economic cooperation: background and implications for congress*, Congressional Research Service Report for Congress, p. 1.
- ¹²¹ Hereinafter the “OECD”. This is an international organisation which was established in 1961 and currently consists of 29 Member States. It serves the main purpose of contributing to the economic and social well-being of all people around the world. It achieves this function through the development of a diverse set of policies and has developed influential guidelines for consumer protection and competition policy – see, e.g. the OECD (2013) *Guidelines for protecting consumers from fraudulent and deceptive commercial practices across borders*.
- ¹²² The World Bank was established at the end of the World War II to support the reconstruction and development of numerous countries which had been affected by the war. Its function has evolved to “poverty reduction through inclusive and sustainable globalisation”. The World Bank also is responsible for the development of consumer protection in the area of financial services – see Micklitz, H.W. and Durovic, I. (2017) *Internationalization of consumer law: a game changer*, Routledge, London, pp. 8-9.
- ¹²³ See G20 Innovative Financial Inclusion Principles Report (May 2010).
- ¹²⁴ FinCoNet (note 20) p. 20. See also Micklitz and Durovic (note 122) p. 1.
- ¹²⁵ FinCoNet (note 20) p. 21.
- ¹²⁶ G20 *High level principles* (2011) principle 6.
- ¹²⁷ *Ibid.*
- ¹²⁸ *Ibid.*
- ¹²⁹ *Ibid.*
- ¹³⁰ *Ibid.*
- ¹³¹ Micklitz and Domurath (note 87) p. 19. See also Wilson (note 9) p. 111.
- ¹³² G20/OECD (2013) *Task force on financial consumer protection report*.
- ¹³³ G20/OECD (Sep 2013) *Task force on financial consumer protection: update report on the work to support the implementation of the g20 highlevel principles on financial consumer protection*, p. 12.
- ¹³⁴ *Ibid.*
- ¹³⁵ *Idem* 14.
- ¹³⁶ Micklitz and Durovic (note 122) p. 9.
- ¹³⁷ World Bank *Good Practices* (2012) p. 2.
- ¹³⁸ *Ibid.*
- ¹³⁹ *Ibid.*
- ¹⁴⁰ *Idem* p. 58.
- ¹⁴¹ *Ibid.*
- ¹⁴² *Ibid.*
- ¹⁴³ World Bank (note 2) p. 1. See also section 1 above.
- ¹⁴⁴ World Bank (note 2) p. 42.
- ¹⁴⁵ World Bank *Good Practices* (2012) 59.
- ¹⁴⁶ World Bank (note 2) p. 8.
- ¹⁴⁷ World Bank (note 2) pp. 8-9. See also FinCoNet (note 20) p. 15.
- ¹⁴⁸ World Bank (note 2) p. 13.
- ¹⁴⁹ *Ibid.*
- ¹⁵⁰ *Idem* p. 15.
- ¹⁵¹ *Idem* p. 14.
- ¹⁵² *Ibid.*
- ¹⁵³ *Ibid.*
- ¹⁵⁴ *Ibid.*
- ¹⁵⁵ *Idem* p. 15.
- ¹⁵⁶ See para 4 above.
- ¹⁵⁷ See for example Grundmann and Atamer (2011), Devenney and Kenny (note 4), Renke (note 22), Van Heerden and Renke (note 1), Mak (note 4) and Steennot and Van Heerden (note 2).
- ¹⁵⁸ Wilson (note 9).
- ¹⁵⁹ See Wilson (note 9) p. 109.
- ¹⁶⁰ *Idem* 128.
- ¹⁶¹ *Idem* 126.
- ¹⁶² *Idem* 128.
- ¹⁶³ *Idem* 126.
- ¹⁶⁴ *Idem* 129.
- ¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.* See also in this regard, Genn, H. (1999) *Paths to Justice: What People Do and Think about Going to Law*, Hart Publishing, Oxford, p.101.

¹⁶⁷ See paras 1, 3 and 4 above.

¹⁶⁸ Para 5.

¹⁶⁹ G20 *High-level principles* (2011), G20/OECD *Taskforce on Financial Consumer Protection Report* (2013), World Bank *Good Practices* (2012) and World Bank (note 2) and their contributions to the emerging trends in responsible lending policy.

¹⁷⁰ G20 principles for innovative financial inclusion and the G20 high-level principles on financial consumer protection both of which underscore the protection of consumers from irresponsible business conduct by all kinds of all financial providers.

¹⁷¹ See, e.g., the G20 high-level principles on financial consumer protection – para 5.1. See also the OECD recommendations on implementing the G20 high level principles – para 5.2.

¹⁷² See the OECD recommendations on implementing the G20 high level principles – para 5.2.

¹⁷³ World Bank *Good Practices* (2012) and World Bank’s consumer protection areas which should be present in every responsible lending regime to achieve effective consumer protection – para 5.3. See also Wilson’s idea of a proactive responsible lending regime aimed at protecting consumers from irresponsible lending – para 6.

¹⁷⁴ See, e.g., the discussion of the responsible lending policies in the European Union and the United States of America – paras 3 and 4.

¹⁷⁵ Consumers International (note 2) p. 8.

¹⁷⁶ Wilson (note 9) p.131 – para 6.

¹⁷⁷ FinCoNet (note 20) p. 9.

¹⁷⁸ FinCoNet (note 20) p. 9. See also Wilson (note 9) p. 129 – para 6.

¹⁷⁹ See Wilson (note 9) p. 129 – para 6.

¹⁸⁰ See World Bank *Good Practices* (2012) – para 5.3.

¹⁸¹ Consumers International (note 2) p. 10. See also the 2008 Directive recital 24 – para 3.2.

¹⁸² Consumers International (note 2) p.11.

¹⁸³ See Directive 2008/48/EC recital 24 and Directive 2014/17/EU art 14 – para 3.2.

¹⁸⁴ See Directive 2008/48/EC art 5(6) which requires credit providers to explain the terms of the proposed credit and the risks associated with it – para 3 2.

¹⁸⁵ Consumers International (note 2) p. 11.

¹⁸⁶ See Dodd-Frank s 1419 – para 4.1.

¹⁸⁷ See World Bank (note 2) p. 15 and Wilson (note 9) p. 128 – paras 5.3 and 6. See also the World Bank’s guidelines for an effective responsible lending regime which includes the need for proper institutional arrangements to implement responsible lending rules – para 5.3.

¹⁸⁸ World Bank (note 2) p. 14 – para 5 3.

¹⁸⁹ See in general Consumers International (note 2) p. 8.

¹⁹⁰ See, e.g., the World Bank’s guidelines on having a regulatory approach with effective redress mechanisms – para 5.3.

¹⁹¹ See, e.g., the powers of the United States’ Consumer Financial Protection Bureau established in terms of Dodd-Frank – para 4.2. See also the guidance provided by the European Union’s Directive 2008/48/EC in art 5(6) for member states to pass penalties which are “effective, appropriate and dissuasive” – para 3.1.

¹⁹² See the discussion of the remedies provided under the United States’ responsible lending regime – para 4.1

¹⁹³ See para 1.

¹⁹⁴ Para 7.1.

¹⁹⁵ Para 7.2.

¹⁹⁶ Para 7.3.

¹⁹⁷ Para 7.4.

¹⁹⁸ Para 7.5.