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THE SHARED EQUITY CREDIT AGREEMENT AS A NEW CREDIT AGREEMENT TO FINANCE THE SHARED OWNERSHIP IN CATALONIA

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Abstract

The Catalan lawmaker introduced the Shared Ownership into the Catalan Civil Code in 2015. However, since the entry into force of the Act 19/2015, there have been no acquisitions of assets using this new tenure.

The Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 regulates the Shared Equity Credit Agreement, which could be a new credit agreement to facilitate the acquisitions of assets using the Shared Ownership. Moreover, the Spanish lawmaker has transposed the Directive 2014/17/UE in the same terms than the Directive 2014/17/EU.

The aim of this paper is to facilitate the implementation of the Shared Equity Credit Agreement in Spain once the Directive 2014/17/EU is transposed by the Spanish lawmaker to make housing more affordable.

Keywords: shared equity credit agreement, credit agreement, shared ownership, housing, mortgages, co-ownership, affordable housing, intermediate tenures, condominium.

EL CONTRACTE DE PRÉSTEC SOBRE CAPITAL COMPARTIT COM UN NOU INSTRUMENT FINANCER PER A LA PROPIETAT COMPARTIDA A CATALUNYA

Resum

L'any 2015 el legislador català va introduir la propietat compartida en el llibre cinquè del Codi civil de Catalunya, relatiu als drets reals. No obstant això, des de la introducció de la propietat compartida, les adquisicions d'immobles a través d'aquesta tinença han estat residuals.

La Directiva 2014/17/UE del Parlament Europeu i del Consell, de 4 de febrer de 2014, regula alguns aspectes del contracte de préstec sobre capital compartit, el qual podria ser un contracte de préstec que facilités les adquisicions d'immobles a través d'aquesta tinença. En

relació amb els contractes de préstec sobre capital compartit, el legislador estatal ha transposat la Directiva 2014/17/UE mitjançant la Llei 5/2015, de 15 de març, dels contractes de crèdit immobiliari, en els mateixos termes que la Directiva 2014/17/UE.

Aquest article té per objecte facilitar la implementació dels contractes de préstec sobre capital compartit i afavorir les adquisicions d'immobles a través de tinences com la propietat compartida que no comporten una situació de sobreendeutament.

Paraules clau: contractes de préstec sobre capital compartit, contracte de préstec, propietat compartida, habitatge, hipoteques, copropietat, habitatge social, tinences intermèdies, condomini.

EL CONTRATO DE PRÉSTAMO SOBRE CAPITAL COMPARTIDO COMO UN NUEVO INSTRUMENTO FINANCIERO PARA LA PROPIEDAD COMPARTIDA EN CATALUÑA

Resumen

En el año 2015 el legislador catalán introdujo la propiedad compartida en el libro quinto del Código civil de Cataluña, relativo a los derechos reales. No obstante, desde la introducción de la propiedad compartida, las adquisiciones de inmuebles mediante esta tenencia han sido residuales.

La Directiva 2014/17/UE del Parlamento Europeo y del Consejo, de 4 de febrero de 2014, regula algunos aspectos del contrato de préstamo sobre capital compartido, el cual podría ser un contrato de préstamo que facilitase las adquisiciones de inmuebles mediante esta tenencia. En relación con los contratos de préstamo sobre capital compartido, el legislador estatal transpuso la Directiva 2014/17/UE en los mismos términos que la Directiva 2014/17/UE.

Este artículo tiene por objeto facilitar la implementación de los contratos de préstamo sobre capital compartido y favorecer las adquisiciones de inmuebles a través de tenencias como la propiedad compartida que no comportan una situación de sobreendeudamiento.

Palabras clave: contratos de préstamo sobre capital compartido, contrato de préstamo, propiedad compartida, vivienda, hipotecas, copropiedad, vivienda social, tenencias intermedias, condominio.

1. INTRODUCTION: THE ACT 19/2015 OF THE CATALAN PARLIAMENT RELATING TO INTERMEDIATE TENURES AND THE ENACTMENT OF THE DIRECTIVE 2014/17/EU ON CREDITS AGREEMENTS FOR CONSUMERS RELATING TO RESIDENTIAL IMMOVABLE PROPERTY

The Catalan lawmaker adopted the Act 19/2015 to regulate new tenures to make housing more affordable in Catalonia. This Act provides the temporal ownership and the shared ownership. These are new tenures whereby the Catalan lawmaker aims to facilitate the purchase of residential immovable properties fleeing from the classical methods to acquire an immovable property: «renting or buying full property».[1]

The temporal ownership and the shared ownership are conceived of for not being tenures whose acquisition involves an over indebtedness situation for the consumers. Instead of buying the full property contracting a mortgage loan, the shared ownership is conceived as a co-ownership where at least two shareholders coexist at the same time. The first one is named by the Act 19/2015 as «formal shareholder» and in the majority of cases it is the original householder who decides to sell a share of his property to constitute a co-ownership. The second one is named as «material shareholder» and is the titleholder of the share of domain of the original householder.

The idea is to facilitate the gradual acquisition of the immovable property owned, for example, by a bank as a «formal shareholder», and the consumer acquires the full ownership by exercising the right of staircase, which is the right of acquiring more shares of domain from the «formal shareholder» in a few years' time.

Nevertheless, the classical financial schemes in Spain would be adapted to finance new tenures like the Catalan shared ownership. The Directive 2014/17/EU on Credit Agreements for Consumers Relating to Residential Immovable Property may offer new credit agreements which could be imported into the Spanish legal system of laws to facilitate the acquisitions of immovable properties.

1. Glen Bramley and James Morgan, «Low Cost Home Ownership Initiatives in the UK», *Housing Studies*, no. 13/4 (1998), p. 571-573. The shared ownership began in the UK where some initiatives were foster by the British, Scottish and Welsh governments. The British government fostered two modalities of shared ownership. The first one is the conventional scheme which the supplier (usually an a housing association) builds a new housing unit with a mix of public subsidy and private loan. The second one was a program called «Do-It-Yourself Shared Ownership (DIYSO)» in which the household found a typically second-hand home on the market and it was then purchased with the housing owning part and the household the other part. In Scotland there was a similar modality of conventional shared ownership called «Shared Ownership Of The Shelf (SOOTS) in which associations purchased complete units from speculative builders.

The Directive 2014/17/EU considers the Shared Equity Credit Agreement[2] as a contract to buy immovable properties and minimize the risks associated with homeownership related to the household income and costs of housing.[3] However, the regulation of this contract is not detailed and the technique of the minimum harmonization would lead to not transposing this contract adequately in the Spanish legal system of laws. Finally, the Spanish legislator transposed the Directive 2014/17/EU by the Act 5/2019 Act 5/2019, 15 March 2019, on immovable credit agreements with any reference to the shared equity credit agreement.

2. THE DIRECTIVE 2014/17/EU ON CREDIT AGREEMENTS FOR CONSUMERS RELATING TO RESIDENTIAL IMMOVABLE PROPERTY

The Directive 2014/17/EU is the second Directive, in conjunction with Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, that adopts the EU to defend the consumer's rights. However, there are several differences between both directives related to the level of harmonization and the mechanisms to protect consumer's interests.

The adoption of the Directive 2014/17/EU is justified for the economic importance of the credit agreements to acquire a residential immovable property. On the one hand, it is estimated that the credit agreements to buy an immovable property represent an important share of the EU' GDP. On the other hand, the importance of these agreements for the consumers and their families is well-known because the acquisition of an immovable property is the major inversion made by a consumer in lifetime.

As regards the objective scope of the Directive 2014/17, the Recital 15 Directive 2014/17/EU says:

> The objective of this Directive is to ensure that consumers entering into credit agreements relating to immovable property benefit from a high level of protection. It should therefore apply to credits secured by immovable property regardless of the purpose of the credit, refinancing agreements or other credit

2. Christine Whitehead, *Shared ownership and shared equity: reducing the risks of home-ownership?*, York, Joseph Rowntree Foundation, 2010, p. 4, in <http://www.jrf.org.uk>. This author notes that shared ownership and shared equity products have been developed as mechanisms for increasing access to owner-occupation by a mix of shared ownership and shared equity instruments and shallow subsidy.

3. Christine Whitehead, *Shared ownership and shared equity*, p. 4. Purchasers who use shared equity hold a traditional mortgage only on the proportion they are purchasing. For this reason, the shared equity reduces the risk from interest rate changes by reducing the size of the traditional mortgage.

> agreements that would help an owner or part owner continue to retain rights in immovable property or land and credits which are used to purchase an immovable property in some Member States including credits that do not require the reimbursement of the capital or, unless Member States have an adequate alternative framework in place, those whose purpose is to provide temporary financing between the sale of one immovable property and the purchase of another, and to secured credits for the renovation of residential immovable property.[4]

3. THE SHARED EQUITY CREDIT AGREEMENT IN THE DIRECTIVE 2014/17/UE

According to the article 4.25 Directive 2014/17, «Shared equity credit agreement' means a credit agreement where the capital repayable is based on a contractually set percentage of the value of the immovable property at the time of the capital repayment or repayments».[5]

The Directive 2014/17/EU defines the Shared Equity Credit Agreement because the directive contains some functional requirements for the calculation of the APRC. Therefore, the directive does not regulate this credit agreement beyond the calculation of the APRC.

Consequently, the Shared Equity Credit Agreement enables to finance the acquisition of a residential immovable property without financing the acquisition of 100 % of the domain.

4. The Spanish authors have criticized the objective scope of the Directive 2014/17. *Vid.* Esther Arroyo Amayuelas, «La Directiva 2014/17/UE sobre los contratos de crédito con consumidores para bienes inmuebles de uso residencial», *Indret*, no. 2 (2017), p. 15.

5. Christine Whitehead, *Shared ownership and shared equity*, p. 4. The shared equity is a credit agreement where the consumer buys 100 per cent of the property by mixing a mortgage and a traditional loan. For instance, the consumer has a 25 per cent buffer arising from the equity mortgage and financial institutions allow up to 100 per cent mortgages on the 75 per cent required in the form of a traditional loan. Therefore, the deposit requirements are lower than buying a property taking out a mortgage loan to finance 100 per cent of the property. Glen Bramley and James Morgan, «Low Cost Home Ownership Initiatives in the UK», p. 571-573. It seems that the origin of shared equity was in Wales, where an initiative of shared ownership was fostered by the Welsh government. Under that scheme, the buyer effectively received an interest-free loan 30 per cent equivalent to the property value from a housing association and purchased the remaining part of the association fees.

Firstly, the Directive 2014/17/EU contains the formula for the APRC calculation.[6]

Secondly, with reference to the APRC calculation, the Directive establishes some functional requirements which are regulated in the annex II:

> (g) In the case of credit agreements other than overdrafts, bridging loans, shared equity credit agreements, contingent liabilities or guarantees and open-ended credit agreements as referred to in the assumptions set out in points (i), (j), (k), (l) and (m):
>
> (i) if the date or amount of a repayment of capital to be made by the consumer cannot be ascertained, it shall be assumed that the repayment is made at the earliest date provided for in the credit agreement and is for the lowest amount for which the credit agreement provides;
>
> (ii) if the interval between the date of initial drawdown and the date of the first payment to be made by the consumer cannot be ascertained, it shall be assumed to be the shortest interval.

6. Annex I Directive 2014/17/UE of the European Parliament and of the Council of 4 February 2014.

I. Basic equation expressing the equivalence of drawdowns on the one hand and repayments and charges on the other.

The basic equation, which establishes the annual percentage rate of charge (APRC), equates, on an annual basis, the total present value of drawdowns on the one hand and the total present value of repayments and payments of charges on the other hand, i.e.:

$$\sum_{k=1}^{m} C_k (1 + X)^{-t_k} = \sum_{k=1}^{m'} D_l (1 + X)^{-S_l}$$

where:

— *X* Is the APRC
— *m* is the number of the last drawdown
— *k* is the number of a drawdown, thus $1 \leq k \leq m$
— *Ck* is the amount of drawdown *k*
— *tk* is the interval, expressed in years and fractions of a year, between the date of the first drawdown and the date of each subsequent drawdown, thus $t_1 = 0$
— *m'* is the number of the last repayment or payment of charges
— *l* is the number of a repayment or payment of charges
— *Dl* is the amount of a repayment or payment of charges
— *sl* is the interval, expressed in years and fractions of a year, between the date of the first drawdown and the date of each repayment or payment of charges.

Indeed, considering the Catalan Shared Ownership as a potential application for the Shared Equity Credit Agreement, the APRC calculation shall be made at the time of exercising the right of staircase for the «material shareholder». In accordance with the article 556-4.2*b* of the Catalan Civil Code, hereinafter CCCat, the foundational title must regulate the exercise of the staircasing right. Moreover, despite the fact the article 556-4.2*b* CCCat does not establish that the periodicity of the straircasing right is a mandatory issue that must be regulated in the foundational title, the article 556-11*d* determines that the Shared Ownership terminates when the right of staircasing is not exercised by the «material shareholder». It leads to the conclusion that the periodicity is an issue that both householders have to deal with, in spite of the fact the Catalan Civil Code does not determine it is a mandatory issue which must be regulated in the foundational title.

Therefore, by combining the regulation of the Shared Equity Credit Agreement with the potential agreements contained in the foundational title of the Shared Ownership, the APRC calculation shall be made at the time of exercising the right of staircasing to buy another set of domain from the «formal shareholder» because that is the time when the amount of money to buy the initial share of domain shall be repaid.

Furthermore, the last paragraph describes when the APRC calculations shall be made, but both shareholders may not provide the periodicity of the staircasing right. Indeed, this situation could be common because it is not mandatory to deal with such issue in the foundational title. In this case, the article 556-4.3 CCCat states that the Shared Ownership has a duration of thirty years if both shareholders do not determine an other duration that could never be longer than ninety-nine years.

Indeed, if both shareholders do not determine the duration of the Shared Ownership, I consider that the second paragraph of the article transcribed could be a solution in these cases. In the absence of an agreement about the periodicity of the staircasing right, the APRC calculation shall be made at the time of exercising the staircasing right to finance the acquisition of more sets of domain until purchasing the residential immovable property.

Indeed, in order to achieve the purpose of financing the Shared Ownership in Catalonia whereby the Shared Equity Credit Agreement, I consider that both shareholders shall deal with the duration of the Shared Ownership so as to give legal security to the Shared Ownership and its financing. At least, the letter *m* of the annex I comes to this conclusion supposing that the payments shall be made on the dates or dates permitted under the credit agreement:

> *(i)* the payments by consumers shall be deemed to occur at the latest date or dates permitted under the credit agreement.

However, the second paragraph of the letter m) considers that the Shared Equity Credit Agreement may need a real guarantee to constitute this credit agreement to finance to purchase of an immovable property:

> *(ii)* percentage increases in value of the immovable property which secures the shared equity credit agreement, and the rate of any inflation index referred to in the agreement, shall be assumed to be a percentage equal to the higher of the current central bank target inflation rate or the level of inflation in the Member State where the immovable property is located at the time of conclusion of the credit agreement or 0 % if those percentages are negative.

Consequently, according to the value of the immovable property, the credit institutions may require a real guarantee to constitute the Shared Equity Credit Agreement. In this case, I consider that the situation would be the same as if both shareholders agreed on the periodicity of the exercise of the staircasing right without a real guarantee. However, troubles may arise in case of foreclosure of the real guarantee due to the non-payment Shared Equity Credit Agreement.

The Spanish lawmaker transposed the Directive 2014/17/EU into the Spanish legal system of laws by the Act 5/2019, 15 March 2019 on immovable credit agreements in the same terms as the Directive 2014/17/UE. Consequently, the implementation of the shared equity credit agreement in Spain depends on the financial institutions and its capacity to adopt new financial schemes.

4. THE EXECUTION OF THE SHARED EQUITY CREDIT AGREEMENT AND THE FORECLOSURE OF THE REAL GUARANTEE

First of all, I consider that the treatment of the execution of the Shared Equity Credit Agreement would be substantially different considering that both shareholders may be natural persons or one of them may be the funding institution.[7]

4.1. Shareholders as Natural Persons

The article 556-12 CCCat establishes that the shared ownership does not expire due to the foreclosure of the share of the formal shareholder or to the foreclosure of

7. Christine Whitehead, «Increasing Affordability Problems. A Role for Shared Equity Products? Experience in Australia and UK», *Housing Finance International*, no. 22 (2007), p. 16. Whitehead alerted that some troubles could arise in case of foreclosure on the asset if there were repayment problems.

the material shareholder's share. Certainly, this article is a guarantee for the parties involved in the shared ownership in case of defeats of any owners. The intention of this article is to preserve the shared ownership instead of becoming an ordinary condominium and it expounds some questions that shall be solved.

Firstly, the funding institutions might place some hindrances to divide the mortgage loan between the owners if it were constituted in favor of the original owner, the formal shareholder. For instance, the original owner could have contracted a mortgage to finance the acquisition of a flat and then constitute the shared ownership. Nasarre Aznar[8] has claimed that this situation should be dealt with by both shareholders and the mortgage creditor. At least, this is the premise of the article 123 Mortgage Act which establishes that the mortgage responsibility will not be divided between the parties in case of estate segregations. However, the mortgage responsibility could be divided between the landlords if it is accepted by the mortgagee. This would be the best solution, but the article 123 Mortgage Act requires the consent of the mortgagee to divide the mortgage responsibility between the landowners. Nevertheless, the same author warns that the material shareholder would be taking responsibility for the mortgage of the formal shareholder and it is not the best solution for the material shareholder.[9]

Therefore, the good predisposition of the funding institutions is essential to promote the shared ownership in Catalonia. According to the article 123 Mortgage Act, the real guarantee would not be reduced because the mortgagee would be able to execute the foreclosure of the real guarantee in case of the default of the formal shareholder. Therefore, it would not be attractive for the material shareholder, who would be affected by the default of the formal shareholder, if the funding institution did not divide the mortgage responsibility.

Hence, considering the nature of the shared ownership, which might be resembled to a condominium, but instead of assigning the use of the property to the co-owners, it is exclusively assigned to the material share-owner, it might be interesting to consider the jurisprudence of the article 405 Spanish Civil Code, hereinafter SCC, and the article 552-12.2 CCCat. These articles establish that the estate segregation will not be detrimental for the mortgagee. In accordance with those articles, the jurisprudence of the Spanish Supreme Court has claimed, as laid down in the arti-

8. Sergio Nasarre Aznar, «La propiedad compartida y la temporal como tenencias intermedias de acceso a la vivienda y a otros bienes en el Derecho civil de Cataluña y su extensión al resto del Estado», in Sergio Nasarre Aznar (ed.), *Bienes en común*, Valencia, Tirant lo Blanch, 2015, p. 813.

9. Manuel Peña Bernaldo de Quirós, *Derechos reales*, 3rd. ed., t. ii, *Derecho hipotecario*, Madrid, Centro de Estudios Registrales, 1999, p. 115-116: «En caso de división de la finca entre los comuneros (art. 405 Cc), o por el solo acto del dueño, el acreedor hipotecario conservará intacto el derecho de hipoteca; pero con la ventaja de que puede exigir "la totalidad de la suma asegurada contra cualquiera de las nuevas fincas en que se haya dividido la primera o contra todas a la vez"».

cle 123 Mortgage Act, that the estate segregation does not affect the guarantee of the mortgagee; however, the funding institution might divide the mortgage responsibility between the landowners.[10]

In my opinion, this would be the panorama if the formal shareholder had constituted a mortgage to buy an immovable property and then he decided to sell a share of domain and set up a shared ownership. However, Nasarre Aznar[11] noted that the mortgage responsibility would be divided between the landowners in accordance with the article 216 Mortgage Regulation by a private agreement between the parties.

The decision of the Directorate General for Registers and Notaries of Spain of 7th January 2004 admitted this possibility to register a private agreement in order to divide the mortgage responsibility, taking into account that the division of the mortgage responsibility should be the same as the mortgage loan established in the original property.[12] Furthermore, a legal case reached the courtroom and the Valencia Provincial Court[13] declared that the distribution of the mortgage responsibility is admissible

10. Sentence Spanish Supreme Court 77/2012, 22th February: «[…] la división de la cosa común no perjudica al tercero, quien según lo que dispone el art. 405 CC, "conservará los derechos de hipoteca […]" y otros derechos reales que la graven. Este es el sentido del art. 405 CC, así como el del art. 670.5 LEC, que impone al adjudicatario la subsistencia de las cargas o gravámenes anteriores, subrogándose en la responsabilidad que de ellos se deriva, no en la deuda que origina semejante responsabilidad. No se infringe, por tanto, el art. 1205 CC, que regula la novación por cambio del deudor de una obligación, puesto que en el supuesto actual, solo cambia el responsable en tanto que como adquirente del bien sujeto a una hipoteca, debe soportar la ejecución por las deudas impagadas, pero no se convierte en deudor ni se subroga en esta posición, al contrario de lo que insinúa el recurrente. A tal efecto conviene recordar lo que establece el art. 123 LH, cuando después de admitir que el acreedor hipotecario y el deudor garantizado con hipoteca pueden pactar la distribución de la deuda en los casos de división de la finca hipotecada, a falta de pacto, "podrá repetir el acreedor por la totalidad de la suma asegurada contra cualquiera de las nuevas fincas en las que se haya dividido la primera o contra todas a la vez"».

11. Sergio Nasarre Aznar. «La propiedad compartida y la temporal», p. 814.

12. Decision of the Directorate General for Registers and Notaries of 7th January 2004: «Se debate en el presente recurso sobre si la distribución de la responsabilidad hipotecaria que recaía sobre la finca matriz entre las varias resultantes de su división, puede inscribirse en virtud de documento privado ratificado ante el Registrador; y al respecto ha de señalarse que dicha cuestión viene expresamente resuelta en sentido afirmativo en el Reglamento Hipotecario en su artículo 216, y a tal pronunciamiento ha de estarse ahora, sin que a tal conclusión pueda objetarse el que algunas de las fincas resultantes queden libres de toda responsabilidad, pues, no se ve por qué ha de ser distinto el tratamiento en las hipótesis de reducción parcial y en las de reducción total cuando, en definitiva, lo relevante es que la suma de las responsabilidades a que quedan afectas las distintas fincas resultantes sea igual a la de la originaria finca matriz».

13. Sentence Valencia Provincial Court 511/2004, 30th September: «A la vista de tales normas y doctrina, este Tribunal entiende que, como afirma la última resolución y la juez "a quo", si un documento privado es título suficiente para inscribir en el Registro la distribución de la responsabilidad hipotecaria ello implica que puede serlo, tanto para el caso de constitución de hipoteca sobre varias fincas sin distribuir la responsabilidad, como para hacer esta distribución entre una finca hipotecada y las resultantes de su división, sin que el art. 216 citado exija que esta distribución no haya tenido lugar en el título constitutivo».

in a private document and this agreement should be registered based on the article 216 Mortgage Regulation.

Therefore, in accordance with the decision of the Directorate General for Registers and Notaries of Spain of 7th January 2004 and the jurisprudence, it might be possible to divide the mortgage responsibility between the landowners in a private agreement and then register it. The article 123 Mortgage Act declares that it is possible to divide the mortgage responsibility if the estate is divided into more flats through the agreement between or among the mortgagee and the debtors. Whether the mortgagee accepts this agreement, both shareholders should agree on the distribution of the mortgage responsibility in a private agreement and register it in accordance with the article 216 Mortgage Regulation.

Secondly, in terms of mortgage responsibility, the funding institutions possibly hinder the fact of reaching an agreement and divide the mortgage responsibility between two landowners. Nasarre Aznar[14] has proposed another option, which is to achieve a settlement to extinguish the mortgage affected to the share of the material shareholder and focus the mortgage responsibility on the share of the formal shareholder, who was the original debtor of the mortgage loan. The material shareholder might ask the same funding institution or another for a mortgage to finance the acquisition of their share. Nevertheless, according to the article 122 Mortgage Act, it seems difficult to expire the mortgage responsibility referred to in the share of the buyer due to provision of that article which establishes that the mortgage affects the entire domain regardless of reducing the mortgage debt.

The division of the mortgage responsibility is not a new phenomenon in the Spanish Mortgage Act. For instance, financial institutions usually grant a mortgage loan to a promoter so as to build a building and then the mortgage responsibility is divided between the landowners of the flats which form the building. However, in these cases there is a subrogation in the mortgage loan. The buyer of the flat becomes the debtor of the mortgage loan and the promoter is not affected by the foreclosure of the mortgage guarantee.

The reflections above have been made in case the original land owner asked for a mortgage before the constitution of the shared ownership. Nevertheless, I consider that the situation might be easier if a mortgage on the property is not constituted. In other words, if both owners decide to constitute a mortgage to finance the acquisition of their shares of domain, the funding institution might deal with the phenomenon as a primary division of estates, instead of proceeding in accordance with the article 123 Mortgage Act. The mortgage responsibility would be focused on the share of domain of both shareholders and the foreclosure might be limited by the share of every landowner, according to the article 556-12 CCCat.

14. Sergio Nasarre Aznar, «La propiedad compartida y la temporal», p. 814.

The article 556-12 CCCat claims that the shared ownership is not extinguished by the foreclosure of any share. However, the share of the buyer might be enforced due to rent default. Whether or not in the constitutive deed the owners have agreed that the buyer has to pay a rent for the exclusive possession of the flat, their share might be enforced if the rent is not paid.[15]

4.2. The Funding Institution as the Formal Shareholder

The foreclosure of the real guarantee would be easier if the formal shareholder were the funding institution. On the one hand, in these cases the funding institution would be the formal shareholder and, consequently, the owner of the major share of the domain. On the other hand, the consumer would be the material shareholder and the owner of the minor share of the domain.

In accordance with the article 123 Mortgage Act, the funding institution may divide the mortgage responsibility into the parties because in case of default, the funding institution would execute the Shared Equity Credit Agreement for the acquisition of the initial share of the domain. Hence, the creditor may recover the minor share of the domain that was financed by the Shared Equity Credit Agreement.

This solution could be attractive for the financial institution because the mortgage responsibility is divided into the funding institution and the material shareholder and, in case of default, the formal shareholder would award the share of domain of the material shareholder, executing other assets of the material shareholder if the foreclosure of his share were not enough to repay the mortgage loan granted to acquire the minor share of domain.

5. SHARED OWNERSHIP AND ITS POSSIBLE APPLICATIONS IN THE PRIVATE MARKETS

I consider that on the private market there could be some applications which might be attractive for the consumers and the financial institutions. Nevertheless, the implementation of the shared ownership might be difficult due to the confusion about the product. The population knows that the private market is based on renting

15. Susan Bright and Nicholas Hopkins, «Home, Meaning and Identity: Learning from The English Model of Shared Ownership», *Housing, Theory and Society*, no. 28 (2010), p. 386. In accordance with the legal concept of the shared ownership, the purchaser has to pay the rent in respect of the «non-owned» share, and also has mortgage payments to make. *«Default in either can lead to loss of possession».* Susan Bright and Nicholas Hopkins, «Evaluating Legal Models of Affordable Home Ownership in England», *University of Oxford. Legal Research Paper Series*, no. 52 (2013), p. 13-15.

and homeownership. Consequently, it is fundamental to promote this hybrid tenure from the Catalan Government and the local public offices of housing to spread the shared ownership among the population.[16]

However, the shared ownership might be interesting for consumers who are involved in these next situations.

The shared ownership might be considered by the spouses who financed the acquisition of the conjugal home through a mortgage loan and then they get divorced. The conjugal home might be awarded to the spouse that continued living in the conjugal home. Therefore, the spouse who leaves the conjugal home might be interested in that flat being the owner of the 50 % of the domain and drawing a rent due to the exclusive possession of the flat by the ex-partner. The spouse, which would live in the conjugal home, could acquire more shares of the domain and reduce the rent for their exclusive possession. Moreover, the spouse that left the conjugal home would have an asset that might be invested in the acquisition of another residence.

In terms of inheritance law, the shared ownership might be useful when there are some heritors and the inheritance has to be divided among the heirs, but one of them lives in a flat which is part of the heritage. For instance, there could be three heritors and the will of the testator were to divide the heritage among them with equal shares. Such heritors might constitute a shared ownership in order not to disturb the inheritor who lives in the inherited flat.

Hence, the financial institutions and other agents might be interested in the shared ownership and create an alternative market to sell empty flats mainly:

To bring empty flats to the market which have been awarded after the evictions. These flats and dwellings might be sold by the shared ownership by using public subsidies to allocate people with low resources. The Spanish Government created a private entity called Sareb in order to restructure the Spanish financial system, which consists of assembling the immovable assets from the Spanish banks. I consider that these empty flats might be sold using intermediate tenancies such as the below mentioned shared ownership.

16. Alison Wallace, «Shared ownership: satisfying ambitions for homeownership?», *European Journal of Housing Policy*, no. 12, p. 210-221. According with Wallace, there are several attributes of shared ownership to spread this tenure among the population related to the use, security and accumulation of housing assets and the socio-cultural or psychological attributes of owning.

With reference to the last idea, some authors[17] have claimed that the shared ownership might be used to prevent the evictions of the tenants in case of default of repaying the mortgage loans. For instance, whether the default occurs when the mortgage debtor has paid the 30 % of the mortgage loan, the tenure might become a shared ownership. The tenant would be the owner of the 30 % of the domain and they should pay a rent to the funding institution for their share and use of the entire domain. Hence, the tenant would not be evicted and would remain occupying the flat. Furthermore, the bank would receive a minor rent instead of receiving a toxic asset for the foreclosure of the mortgage in court.

The promoters might consider the shared ownership to sell estate developments by innovative tenures such as the shared ownership. I think about estate developments of tourist apartments which might be brought to the market by intermediate tenures. The shared ownership might be an affordable tenure to buy a tourist apartment by buying a minor share of the domain. The right to staircase might be an incentive to buy more shares of domain if the buyer wants to buy the full ownership mid-term.

Furthermore, in Spain there are many estate developments which were built on the outskirts. The promoters might be interested in bringing that stock of empty flats to the market through affordable tenures rather than being regarded as bad assets by the funding institutions.[18]

6. CONCLUSIONS

The Directive 2014/17/EU is focused on problems identified in mortgage markets within the European Union related to the behavior of market participants. Hence, the detailed regulation of financial loans is not the scope of the directive to acquire a residential immovable property.

17. Susan Bright and Nicholas Hopkins, «Evaluating Legal Models of Affordable Home Ownership in England», p. 10: «Part ownership is also supported as part of the government's "Mortgage Rescue Scheme" for "priority" home owners52 in England at risk of homelessness through repossession, to enable them to convert from full ownership to a part ownership arrangement with a social housing provider». Rosa María García Teruel, Núria Lambea Llop and Elga Molina Roig, «The new intermediate tenures in Catalonia to facilitate Access to housing», *Revue de Droit Bancaire et Financier*, no. 2 (2015), p. 117: «This offers a good solution, for example, to households that are about to lose their home due to the non-payment of the mortgage; a shared ownership arranged with a credit institution would enable the homeowner to retain the share of the property equivalent to the amount of the loan he would have already repaid and in the meantime he continues paying rent of the remaining share».

18. Instituto Nacional de Estadística, «Censos de población y viviendas 2011», in <http://www.ine.es/censos2011_datos/cen11_datos_inicio.htm>. According to the Spanish National Statistics Institute, in Spain there were a 14 % of empty flats in 2011 due to the last decade overbuilding.

Furthermore, the Directive 2014/17/EU regulates some aspects related to the Shared Equity Credit Agreement, which may be an appropriate credit agreement to finance the Shared Ownership in Catalonia. Nevertheless, due to the minimum harmonisation of the Directive 2014/17, the Spanish legislator transposed the directive by the Act 5/2019, 15 March 2019 on immovable credit agreements on the same terms as the Directive 2014/17/EU and, for this reason, new financial schemes to facilitate the entrenchment of the Shared ownership in Catalonia shall be proposed.

In reference to the Shared Equity Credit Agreement, the Directive 2014/17/EU regulates some specialties for this credit agreement, but the regulation contained in the Directive 2014/17/EU shall be adapted to the Shared Equity Credit Agreement. Accordingly, I consider that both shareholders should agree on the periodicity of the exercise of the staircasing right to provide legal certainty to this tenure and its financing.

I noted that the financing of the Shared Ownership may be easier if the formal shareholder were the financial institution, instead of being another natural person. The Shared Ownership would be a condominium where the holder of the minor share of the domain were a natural person and the holder of the major of the domain the financial institution. Both shareholders would be co-owners of the immovable property, but the material shareholder whereby the exercise of the staircasing right would acquire more shares of domain. In case of default, the foreclosure of the Shared Equity Credit Agreement would result in the recovery of the minor share of the domain through the financial institution which is the formal shareholder.

Connected with the last idea, the shared ownership might be used to prevent the evictions of the tenants in case of default in repaying the mortgage loans. For instance, whether or not the default occurs when the mortgage debtor has paid the 30 % of the mortgage loan, their tenure might become a shared ownership. The tenant would be the owner of the 30 % of the domain and they should pay a rent to the funding institution for their share and use of the entire domain. Hence, the tenant would not be evicted and would remain occupying the flat. Furthermore, the bank would receive a minor rent instead of receiving a toxic asset for the foreclosure of the mortgage in courts.

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