



Monographic report on “Economic crisis and mortgage debtors : actions and propositions by the *Defensor del Pueblo*”.

The *Defensor del Pueblo* asks for the reinforcement of the protection of the mortgaggers.

- Maria Luisa Cava de Llano asks for extraordinary measures for the citizens who can no longer afford the payment of their mortgage, in the same way that the financial sector has been granted public funds.
- The report contains 20 recommendations and calls for a political agreement assumed by the banking sector which could include in certain cases a moratorium on the payment of the mortgage, more flexibility in the payment of the instalments as well as more transparency and information from the banks.
- The report suggests to recognise different treatments for the acquisitions which are necessary like the main residence or the premises where is exercised the business that constitutes the livelihood. The *datio in solutum* should be applicable to the aforementioned cases after the determination of certain elements.
- The report asks for a specific procedure for cases of personal or family insolvency.
- The reports finally demands that the *Banco de España* changes its orientation and implicates itself in the consumer and user protection.

Madrid, January 25th 2012.

The offices of the *Defensor del Pueblo* run by Maria Luisa Cava de Llano, released a monographic report which searches for an answer to the situation of thousands of citizens who, as a consequence of the economic crisis, the collapse of the real estate market and the increase of unemployment, can no longer afford the payment of the instalments for their mortgage.

The study called “*Economic crisis and mortgage debtors : actions and propositions of the Defensor del Pueblo*”, considers these conflicts reflected by the complaints filed before this Institution, exposes the actions undertaken in this area and presents 20 recommendations in order for public authorities to



take those into consideration, while searching for answers to this problem whose ultimate consequences are poverty and social exclusion.

According to figures from the *Banco de España*, the indebtedness of families as regards the available income has been increasing until the 2008 crisis. About 90% of the indebtedness of the families proceeds from the funding of investments in real estate assets, that is to say, mortgages.

As explained in the report, mortgage loan is the principal source of profit of the Spanish banking system, which designs and commercializes these financial products through advertising campaigns and standard mortgage contracts which terms have already been set. This is why banks should always assess the borrowing capacity of their clients and refrain from offering mortgages over the reimbursement capacity.

However, for over a decade, the credits entities have recklessly granted mortgage loans and have initiated practices which, according to this Institution, have contributed to the over-indebtedness of families in Spain.

The benefits made by the banks should also benefit the client

Somehow, the crisis of the economic system brought about that numerous credit entities have benefited from exceptional measures consisting in State aids, which exceeded legal forecasts, but which have been considered as the lesser of two evils when faced with the alternative of letting the system collapse. For those entities, the reports points out that, in order to set the balance straight and render it more fair by making up for the excesses and to restore some form of equality, the actual situation requires to distribute the benefits already made by the banks to the other party – ie the over-indebted client.

Since we are facing an extraordinary situation, extraordinary - but temporary – measures, should be taken until the improvement of the economic climate. For, if the injection of funds to the credit entities was justified in the name of public interest, the trust granted by private mortgage loaners to our financial system is also at stake.



The office of the *Defensor del Pueblo* also reminds that the regulation of the mortgage market shall respect the right to decent housing and all relevant constitutional rights. Therefore, the protection of such rights should be taken into account when interpreting norms regarding the granting and foreclosure of mortgages.

This is why one of the principal conclusions of this report regards the necessity to reinforce the protection of mortgagors in order to avoid the repetition of situations such as the actual one and so as to lessen the most harmful effects that we are facing right now. For this reason, the recommendations are concerned with two types of measures : preventive ones through, for example, the increase of pre-contractual information, and curative ones amongst which the ones regarding bankruptcy stand out.

In any case, this Institution is well aware that every solution requires compromise and agreement of all the players of the financial sector. For this reason, we suggest that a political agreement endorsed by the banking sector and comprising organisations like the *Asociación Española de Bancos* (Association of the Spanish Banks), and the *Confederación Española de Cajas de Ahorro* (Spanish Confederation of the Saving Banks) should be found. The latter should include when appropriate and amongst other measures, a moratorium on the payment of mortgages and flexibility of the instalments, as well as the possibility to establish a year interest-only repayment period rendering the monthly instalments affordable. This would allow a debt restructuring which would mean more transactions for the banks for it would be possible to charge more for longer periods of time. Moreover, precedents exist where in less serious situations, a political agreement endorsed by the banking industry was reached with good results, such as in the case of exchange rates which were unilaterally set by electronic cards networks and which happened to be completely disproportionate.

It does not benefit anyone and everyone has something to lose by financing and maintaining in situations of social exclusion and marginalization entire families whose debt they could never reimburse.

In the same way, the report indicates another set of possible solutions which could be taken along with the moratorium such as the suppression of taxes



and costs, the moderation of penal clauses, or the neutralisation of the payments of interests for the duration of the trial which would further contribute to overcome the difficulties encountered to deal with all the unpaid mortgages. Likewise, this could allow the payment of the capital before the interest entailing the reduction of the debt which generates accessory obligations.

Datio in solutum

On the other hand, the report also deals with the problem that exists now to accept *datio in solutum* in mortgage loans and discharge the debtor of his debt which lies in the fact that the value of the property given as guarantee of the individual mortgage loan does not cover the amount of the debt guaranteed due to the market fall and the loss of value in real estate.

However and in the same way that when the real estate market was rising up the mortgage loans were adjusted down (which explains why the people over 65 years old had to give up their home to the banks in exchange of a income or compensation), there should not be problems to find solutions for those who are left without economic resources or who cannot afford the payment of their mortgage instalments and who, even if they have lost their home, are to keep being in debt.

Regarding this question, the office of the *Defensor del Pueblo* considers that the main residence and the business premises shall receive extraordinary protection in the eventuality of the foreclosure of the mortgage. Including in the most extreme cases of *datio in solutum*, solutions which allow the debtor to keep his main residence or his business premises - even through other legal mechanisms which exist in our legal system such as under the method of “forced leasing” - should be searched for. Those measures are justified by the fact that the loss of such premises increases the risk of unemployment and renders the chances of getting the production capacity back very unlikely. This usually means becoming a burden for society and converting people capable of generating wealth into recipients of social benefits.



Personal and family insolvency

The current legislation on bankruptcy is not suitable for the insolvency proceedings of private individuals because it has been construed for companies and aims at satisfying the creditors and organize a continuity of the business on the market. For this reason, the report asks for the creation of a special procedure to deal with insolvency of private individuals whether judicial or extrajudicial. Families should be given the possibility to be discharged from their debts at the end of the procedure in the same way that companies are. It is therefore important that mechanisms which facilitate the finding of an agreement between the parties be created. The objective being for the citizen to be heard, for the creditors to be willing to negotiate, and in the end, for the condemnation to poverty and social exclusion of hundreds of thousands of people to be avoided.

The greater involvement of the *Banco de España*

Finally, according to the experience of this Institution based on the received citizens complaints, it seems obvious that the Complaints Services of the *Banco de España* focuses its actions on the surveillance of the financial markets and leaves in the background consumer protection. Indeed, it hardly ever rules upon the citizens complaints filed before it even though it generally considers that questions which do not relate to the solvency of credit entities are out of its area of competence. This is the line followed by responsible of the aforementioned Organisation during a meeting at our Institution.

On the contrary, the *Defensor del Pueblo* considers necessary that the *Banco de España*, as entity in charge of the regulation of the banking market and as arbitrator of the relations existing between banks and customers, should get more involved in customer protection. Therefore, it is imperative to reinforce the independence of the Complaints Services of this Organisation towards credit entities and that be exercised a work of mediator in order to avoid judicial proceedings.

The complete report and all recommendations are available on the website of the *Defensor del Pueblo* at : www.defensordelpueblo.es