



**THE IMPACT OF THE MORTGAGE CREDIT DIRECTIVE
2014/17/EU IN SPAIN**

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Part I. General overview of consumer credits secured by immovables

Do people generally buy or rent their homes? Is there any clear reason for it?

Homeownership and tenancy are by far the most common land tenures in Europe¹. The former is widespread in Spain (in 2015, 47% were owners with no outstanding mortgage or mortgage loan, and 31.2% were owners with a mortgage or loan), whereas the latter plays a minor role (it accounted for 21.8%). The reasons underlying such reality are manifold, but the most noteworthy are the following. On the one hand, Spanish housing policies have encouraged homeownership during the last decades, for instance through public incentives such as tax benefits.² This approach changed tack however with the State Housing Plan 2013-2016,³ whereby tenancy has become the cornerstone of the State's public housing policies. On the other hand, the reform of the 1994 Urban Leases Act⁴ (by Law 4/2013) has reduced tenants' stability, so that Spanish law seems to be following an opposite path to other European countries where tenancy is a real alternative to homeownership (e.g. Germany or Switzerland).⁵ As a result, tenancy is still not a priority for Spanish households (68% of those interviewed by Fotocasa –a well-known Spanish real estate agency- prefer being homeowners than tenants).⁶ Be that as it may, the generalisation of homeownership has been one of the reasons behind the international economic crisis,⁷ which has led to a number of relevant (negative) consequences in Spain, as discussed below.

What types of credits and what kind of securities over immovable property are usually undertaken by consumers?

The mortgage is the main security right consumers undertake in order to secure loans to finance the acquisition of real estate. As a matter of fact, 90 per cent of households'

¹ See EUROSTAT. *Distribution of population by tenure status, type of household and income group* (source: SILC). Last update: 06-06-2016.

² See T. Jurado Guerrero, 'El creciente dinamismo familiar frente a la inflexibilidad del modelo de vivienda español', (2006) 193 *Cuadernos de Información Económica* 117-126. Available at http://e-spacio.uned.es/fez/eserv.php?pid=bibliuned:23037&dsID=Dinamismo_familiar_y_vivienda_Jurado.pdf.

³ Royal Decree (RD) 233/2013, 5 April, which governs the State Plan for Promotion of Rented Housing, Building Rehabilitation and Urban Renewal and Regeneration and Renewal (BOE –Spanish Official Gazette-, n. 86, 10 April 2013), available at: <https://www.boe.es/buscar/doc.php?id=BOE-A-2013-3780>.

⁴ BOE n. 134, 5 June 2013; available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1994-26003>.

⁵ Similar problems may be found in other Southern European countries, see S. Nasarre-Aznar, K. Xerri, M. O. Garcia and H. Simón-Moreno, *Can tenancy be a real alternative to homeownership as a way of housing access? A legal comparison between Portugal-Spain-Malta and other European countries*. Forthcoming.

⁶ Fotocasa, *Los españoles y su relación con la vivienda en 2015* (2016).

⁷ See S. Nasarre-Aznar, 'La vivienda en propiedad como causa y víctima de la crisis hipotecaria', (2014) 16 *Teoría & Derecho. Revista de Pensamiento Jurídico* 11 ff.

debt until 2008 stemmed from investments in real estate, mainly through mortgage loans.⁸ According to the Spanish Mortgage Association,⁹ primary residences guarantee 90% of housing loans, the loan-to-value (LTV) of which stands between 0-50% in almost 40% of cases. Furthermore, the use of floating interest rates –the vast majority of mortgage loans were benchmarked against the Euribor- were widespread during the Spanish housing boom -2000 to 2007- (less than 10% of mortgage loans were benchmarked against fixed interest rates). Low interest rates (Euribor below 2% since April 2009), coupled with the widespread presence of interest rate floor clauses in mortgage deeds, have led, first, to an increase in fixed interest rates in recent years, which accounted for 30% of the total in November 2016¹⁰, and second, to a increase in the number of legal proceedings aiming at rendering such clauses void (see below).

Do consumers usually/frequently mortgage or otherwise link their residential immovable property to credits the purpose of which is not to acquire or renovate such property?

The following Figure shows the purpose of mortgage loans granted between February 2007 and February 2016. According to this data, the acquisition of primary and secondary residences is the main purpose when consumers acquire real estate through mortgage loans. Debt refinancing and housing construction (third and fourth position, respectively) and other purposes play a minor role.



Figure 1. Purpose of the mortgage loans granted between February 2007 and February 2016. Source: General Council of Notaries¹¹.

⁸ Defensor del pueblo, *Crisis Económica y Deudores Hipotecarios* (30 July 2015) 7.

⁹ Spanish Mortgage Association (AHE), *Analysing the Spanish mortgage pool* (March 2016) 5. Available at: www.ahe.es. The figures analysed comprise data from 12 credit institutions whose outstanding mortgage portfolio accounts for 94% of the total national outstanding mortgage value, excluding outstanding residential mortgage-backed securities (RMBs).

¹⁰ Source: Spanish National Statistics Office (INE, www.ine.es).

¹¹ <http://www.notariado.org/>.

Are there many foreign consumers buying/investing in residential immovable property?

The acquisition of real estate by foreigners¹² accounted for 12-13% on average of all property purchases in 2014-2015. The British (21.34%), the French (8.72%) and the Germans (7.33%) were the main nationalities involved in 2015. If we look back to 2006 (where acquisitions by foreigners amounted to 5.85%), 2008 (where they amounted to 5.85%) and 2012 (8.1%) there seems to be a constant growth in purchases by foreigners. Law 14/2013, 27 September,¹³ encouraged this, by granting residence visas to buyers of real estate the cost of which is at least €500,000. However convenient this measure may sound so as to promote the internationalization of the Spanish economy, the truth is, however, that it has not had a significant impact on the property market as the percentage of acquisitions by foreigners under the provisions of this law was very similar in 2015 (5.18%) to what it had been in previous years (5.20% in 2014; 4.72% in 2013 and 5.21% in 2012).¹⁴

Has the financial and economic crisis led to consumers defaulting on credits secured by mortgages (or similar securities) over residential immovable property? If so, has this led to a relevant increase in foreclosures and evictions? It would be good if you were able provide official figures in this respect.

There were several factors that fuelled the Spanish housing boom (2000-2007)¹⁵: accommodative monetary conditions (i.e. low interests rates); improvements in domestic economies (thanks to low unemployment rates for Spain, which were below 12% between 2000 and 2007); an increase in the number of households (due to immigration and to baby boomers of the 1960s; in fact the Spanish population grew by 11% between 1997 and 2006, the number of people employed by 42% and the number of homes by 23%);¹⁶ tax incentives and foreign investment. During that period, the residential construction sector doubled its contribution to the Spanish GDP (from 4.7% in 1997 to 9.3% in 2007), and the average price for a square metre increased by 178% on average between 1995 and 2007 (The Economist warned in 2005 that Spanish

¹² Colegio de Registradores de la Propiedad, *Estadística Registral Inmobiliaria* (Anuario 2015), Colegio de Registradores de la Propiedad, Bienes Muebles y Mercantiles de España, 66.

¹³ BOE n. 233, 28 September 2013; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-10074.

¹⁴ Colegio de Registradores de la Propiedad, *Estadística Registral Inmobiliaria* (Anuario 2015), 68.

¹⁵ E. M. Pareja-Eastaway, 'El mercado de vivienda en España: La necesidad de nuevas propuestas', in S. Nasarre Aznar (ed.), *El acceso a la vivienda en un contexto de crisis* (Madrid: Edisofer, 2011) 32 ff.; and G. Bernardos Domínguez, 'Creación y destrucción de la burbuja inmobiliaria en España', (2009) 85*ICE, La primera crisis global: procesos, consecuencias* 23 ff.

¹⁶ J. L. Campos Echeverría, *La burbuja inmobiliaria española* (Madrid-Barcelona: Marcial Pons, 2008).

properties were overvalued by 50%¹⁷).

The favourable economic backdrop led to subprime and/or irresponsible lending on the part of banks and savings banks so as to help households to enter into the mortgage market (see below). Such behaviour was strongly encouraged not only by the Spanish governments¹⁸ but also by all actors involved (Bank of Spain,¹⁹ banks,²⁰ savings banks and property developers²¹), which actively denied the existence of a housing bubble. Housing was treated then as a capital asset and not as a social right or consumer asset, as the UN Special Rapporteur on adequate housing pointed out in 2008.²² This laid the foundation for consumer's over-indebtedness, with families spending 50% of their income on mortgage repayments in some cities, such as Madrid.²³ The European Commission also pointed out that the combination of high housing prices and consumers' over-indebtedness could be "explosive".²⁴

The Spanish economy was not immune to the international economic crisis.²⁵ A number of negative consequences followed when the housing bubble burst in Spain: a sharp reduction in the number of mortgage loans (only 32% of housing acquisitions were financed through a mortgage loan in January 2013; in contrast, more than 60% of dwellings purchased were financed in that way in 2006), thus making access to housing more difficult; a sharp increase in the number of vacant dwellings (almost 3.5 million in 2010, accounting for as much as 13,5% of the total housing stock²⁶); an increase in the number of mortgage loans in negative equity (there were more than 500,000 in

¹⁷ The Economist 16-6-05, *The global housing boom. In come the waves* (http://www.economist.com/node/4079027/print?story_id=4079027).

¹⁸ Francisco Álvarez Cascos (Popular Party): "No existe la burbuja inmobiliaria que algunos dicen. Los pisos están caros porque los españoles pueden pagarlos" (20-11-2003); and Beatriz Corredor (PSOE: "El 2008 es un año excelente para comprar vivienda" (16-03-2008).

¹⁹ Jaime Caruana (Governor of the Bank of Spain): "No se puede hablar de burbuja inmobiliaria, y ni mucho menos de riesgo de pinchazo" (01-07-2004).

²⁰ Emilio Botín (Bank of Santander): "No existe burbuja inmobiliaria en España" (23-10-2003).

²¹ Fernando Martín (Martinsa-Fadesa): "La vivienda en el 2009 va a subir vertiginosamente. Tenemos salud, y salud boyante" (22-03-2007).

²² Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kotha, Mission to Spain, 27. Available at: <http://www.ohchr.org>.

²³ See, about the origins of consumers' overindebtedness in Spain and the measures taken to counteract such situation, P. Gutiérrez de Cabiedes and M. Cantero Gamito, 'Country Report Spain', in H.-W. Micklitz and Irina Domurath (eds.), *Consumer Debt and Social Exclusion in Europe* (Abingdon-on-Thames: Routledge, 2016) 67 ff.

²⁴ El Mundo 27-3-06, *Bruselas pide 'cautela' a la hora de conceder hipotecas por la sobrevaloración de la vivienda* (<http://www.elmundo.es/mundodinero/2006/03/27/economia/1143470709.html>).

²⁵ From an economic perspective, see E. Ortega and J. Peñalosa, *Claves de la crisis económica española y retos para crecer en la UEM*, Documentos Ocasionales (1201) (2012).

²⁶ Source: Dirección General de Arquitectura, Vivienda y Suelo; Ministerio de Fomento, *Observatorio de Vivienda y Suelo. Boletín especial Censo 2011* (2014). Available at: <http://www.fomento.gob.es/MFOM.CP.Web/handlers/pdfhandler.ashx?idpub=BAW021> (accessed 18 July 2016).

2010²⁷) due to consumers' over-indebtedness (more than 85% of mortgage loans that could not be paid in 2014 and that led to the start of enforcement proceedings were entered into in 2007 or earlier²⁸); a sizeable drop in housing prices (more than 40% since 2007²⁹); an increase in the unemployment rate (13,91% in 2009, 20,33% in 2010, and it reached 26% in December 2012; in fact, unemployment is the main reason for defaulting on mortgage payments in 70.4 % of the cases³⁰); and more than 400,000 enforcement proceedings started since 2008³¹ (no distinction between primary and secondary residences is made), although only 10% have taken place over primary residences in the words of the president of the Spanish General Council of the Judiciary.³² Recent data show, however, that the number of enforcement proceedings on primary residences decreased by 29.8% in March 2016 by comparison to March 2015,³³ and by 13% in 2015 in comparison to 2014.³⁴

Notwithstanding the negative outcomes of the crisis quoted above, surprisingly enough, no action was taken until 2011, four years after the enactment of Law 41/2007, 18 December,³⁵ which, despite being coined as the “most profound and significant reform of the mortgage market” by the Spanish Mortgage Association,³⁶ did not lay down any measure aiming to counteract the impending (as widely known) international economic crisis. As a matter of fact, this Law encouraged borrowing—in a foreseeable credit crunch context³⁷ by offering new mortgage products, such as the

²⁷ Source: El Confidencial 10-4-13, *Medio millón de viviendas en España valen menos ya que sus hipotecas* (<http://www.elconfidencial.com/vivienda/2013/04/10/medio-millon-de-viviendas-en-espana-valen-menos-ya-que-sus-hipotecas-118559/>).

²⁸ Bank of Spain (30 July 2015) *Nota informativa sobre la presentación de una nueva estadística de procesos de ejecución hipotecaria sobre viviendas*, 30 July 2015, 2. Available at: http://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/Briefing_notes/es/notabe300715.pdf.

²⁹ Fotocasa, *La vivienda en el año 2015*. Available at: http://images.fotocasa.es/inmesp/noticias/sala_prensa/informes/17695/LA%20VIVIENDA%20EN%20EL%20A%c3%91O%202015.pdf.

³⁰ Observatorio DESC and PAH (2013), *Emergencia habitacional en el Estado español. La crisis de las ejecuciones hipotecarias y los desalojos desde una perspectiva de derechos humanos* 107.

³¹ Source: <http://www.poderjudicial.es/>.

³² Source: Infolibre (23-3-2013), *Stop Desahucios Los jueces llevaron a cabo 101.034 desahucios en 2012* (http://www.infolibre.es/noticias/politica/2013/03/23/101_034_desahucios_2012_1469_1012.html).

³³ Source: El Mundo 20/06/16 (<http://www.elmundo.es/economia/2016/06/20/5767c217268e3eff678b45e5.html>).

³⁴ INE, *Estadística sobre Ejecuciones Hipotecarias (EH). Cuarto trimestre de 2015 y Año 2015. Datos provisionales* (March 2016). Available at: <http://www.ine.es/daco/daco42/eh/eh0415.pdf>.

³⁵ BOE n. 294, 8 December 2007; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2007-21086.

³⁶ Spanish Mortgage Association, *Updated Legal Texts of the Main Laws Regulating the Spanish Mortgage Market* (December 2007). Available at www.ahe.es.

³⁷ In September 2007 the coming credit crunch was widely known. Source: El confidencial 7-9-2007, *La economía española se queda sin gasolina: bancos y cajas cierran el grifo a empresas y familias* (http://www.elconfidencial.com/mercados/finanzas-personales/2007-09-07/la-economia-espanola-se-queda-sin-gasolina-bancos-y-cajas-cierran-el-grifo-a-empresas-y-familias_838964/).

reverse mortgage –see below- or a new type of a maximum mortgage (art. 153 bis Spanish Mortgage Law). Given the inability of private law rules to address the negative effects of the crisis on households during such period, some court decisions started to act as “Robin Hood”, distorting the legal principles with the aim to alleviate the situation of Spanish households.³⁸ Paradigmatic examples of this approach are decisions accepting that liability is limited to the value obtained from the property at auction, even if the parties had not agreed upon this (the legal reasoning underlying these decisions is either an incorrect application of the doctrine of equity³⁹ or the application of the abuse of law doctrine⁴⁰). Also, some decisions granted a fresh start to insolvent mortgagors in insolvency proceedings, which Spanish legislation did not permit prior to 2015 (see below Part III). The courts in these cases failed to apply the principle of universal liability (art. 1911 Spanish Civil Code). The shortcomings of private law rules fuelled increasing pressure from social groups, such as the Platform of Mortgage Victims,⁴¹ which have been actively involved in failed legislative proposals aiming at introducing *datio in solutum* as a general rule in Spain, but have been successful in aborting evictions, especially when pursued by a bank or other financial institution.

Finally, the Spanish Government took several measures after 2011 in reaction to the housing crisis with the purpose of alleviating the impact thereof on Spanish households, which will be outlined below (Part III).

If applicable, could you highlight the main reasons why you think your legal system regarding securities over immovables failed consumers? We will ask you to provide a general sketch of measures adopted in your country to contain or alleviate this situation below, in Part III.

In particular, how relevant do you consider issues such as the following to have been?:

- a) Unfair terms (interest rate floor clauses, high default interest rates, acceleration clauses, etc.)

The Spanish mortgage enforcement procedure is one of the fastest in the EU. It was designed as an expeditious path toward recovery of the loan by the lender upon default, which would attract investment secured with land or property rights over land. And so it did. But the side-effect of the procedure being so fast is that the grounds for defence have traditionally been very limited, to the extent that any

³⁸ See about these “Robinhoodian” court decisions S. Nasarre Aznar, “Robinhoodian courts’ decisions on mortgage law in Spain” (2015) 7 *International Journal of Law in the Built Environment* 127 ff.

³⁹ Art. 3.2 Spanish Civil Code. Ruling of the Provincial Court of Navarra 17 December 2010. AC 2011\1.

⁴⁰ Art. 7.1 Spanish Civil code.

⁴¹ <http://afectadosporlahipoteca.com/>.

discussion regarding such an important issue as nullity or avoidability of the loan itself has to be discussed in a different procedure, which would not (and still today does not) stay the mortgage enforcement proceedings. Cases where the loan or the mortgage are null or avoidable (for instance, on the grounds of mistake) are rare, but due to the crisis and the increase in the number of foreclosures, judges, practitioners and social movements soon realised that the creditors' titles were often infested with unfair terms⁴² and that the procedure laid down by arts. 681 ff. of the Law on Civil Procedure (LEC)⁴³ did not allow the court or the debtor to raise the issue.

A request for a preliminary ruling was submitted to the ECJ, which led to its decision dated 14 March 2013 (the *Aziz* case)⁴⁴, whereby it was held that Spanish mortgage rules did not comply with the principle of effectiveness, in so far as they made it impossible or excessively difficult, in mortgage enforcement proceedings initiated by sellers or suppliers against consumer defendants, to apply the protection that the 1993 Directive on unfair terms grants them. Following this decision, the Spanish mortgage enforcement procedure was reformed by Law 1/2013, 14 May,⁴⁵ which also introduced new provisions on default interest rates and acceleration clauses, among other amendments.

With regard to strictly procedural norms, Law 1/2013 introduced a new defence both in general enforcement procedures (art. 557.1.7 LEC) and in the mortgage enforcement procedure (art. 695 LEC) whereby the consumer may oppose enforcement on the grounds of the title containing unfair terms. In the context of mortgage enforcement, these unfair terms must determine the possibility to seek enforcement or they must determine the amount claimed. This has led to some enforcement proceedings to be rendered void.⁴⁶ Law 1/2013, however, did not do a very good job, since it managed to provide that whilst the creditor could appeal the decision to stay the proceedings or to not apply an unfair term, the consumer was not granted such a possibility if the consumer's objection was dismissed. Thus, another ECJ decision, dated 17 July 2014,⁴⁷ held that the domestic rule infringed the principle of

⁴² A number of which had been declared unfair by the courts in general, and more specifically by the Supreme Court decision 16 December 2009 (ECLI:ES:TS:2009:8466). Recently, see also Supreme Court decision 9 May 2013 (on interest rate floor, which will be discussed below); Supreme Court decision 23 December 2015 (ECLI:ES:TS:2015:5618) and Supreme Court decision 18 February 2016 (ECLI:ES:TS:2016:626).

⁴³ Law 1/2000, 7 January (BOE n. 7, 8 January 2000; available at: <https://www...es/buscar/act.php?id=BOE-A-2000-323>).

⁴⁴ Case C-415/11.

⁴⁵ BOE n. 116, 15 May 2013; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-5073.

⁴⁶ Commercial Court n. 3 Barcelona, decision 5 May 2014 (JUR 2014\139100) and Commercial Court n. 1 Palma de Mallorca, 3 January 2014 (AC 2014\310), later confirmed by the Provincial Court of the Balearic Islands decision of 12 May 2014 (JUR 2014\169240).

⁴⁷ Case C-169/14. Sánchez Morcillo and Abril García v Banco Bilbao.

equality of arms and, as a result, Law 9/2015, 25 May (additional provision 3) amended LEC once again.

With regard to the default interest rate, Law 1/2013 limited it to three times the applicable legal interest rate for mortgages over primary residences and only if the purpose of the credit was to finance the acquisition of said primary home. The new provision also states that the default interest rate accrues over the principal, not over capitalised interests. Generally speaking, this limitation applies to mortgages created after the entry into force of Law 1/2013 as well as to default interest accrued or owed since then. It is frequent to see default interest rates between 19 and 24%. This, in theory, could cost the consumer a lot of money and be disproportionate in comparison with the damage caused to the creditor. However, it should also be borne in mind that in a landmark case such as the *Aziz* case that led to the ECJ decision 14 March 2013, the default interest rate was extraordinarily high, but the actual default interest claimed by the bank was only slightly over €70.

The courts have taken different approaches once the term providing the default interest rate has been deemed unfair and, thus, void.⁴⁸ In our opinion, and after the entry into force of the Law 3/2014, 27 March, which implemented the Directive on Consumer Rights (2011/83/EC), the lender should not be entitled to claim any compensation at all if the default interest term is rendered void (according to the new wording of art. 83 Royal Legislative Decree 1/2007). The ECJ Decisions 21 January 2015 and 11 June 2015⁴⁹ have taken the same approach, but the Spanish Supreme Court still finds ways to grant the creditor compensation.⁵⁰

With regard to acceleration clauses, Law 1/2013 amended the mortgage enforcement procedure so that the total amount owed may only be claimed insofar as the mortgage loan provided for full maturity in the event of the debtor failing to pay three monthly instalments or an equivalent amount (art. 693 LEC). However, no explanation is given as to why the threshold is set at precisely three months and why this is regardless of the duration of the mortgage. It is worth noting that the Spanish Supreme Court stated in 2009⁵¹ that the default of only one mortgage instalment was enough to accelerate the mortgage loan and claim the whole outstanding debt. In practice, however, except for a period immediately after the crisis had set on, banks started enforcement

⁴⁸ For some, the creditor would not be entitled to any compensation whatsoever; others have reduced the default interest rate to the limit foreseen in Law 1/2013 or have applied the default rule as if the parties had not agreed upon a default interest rate at all (in this case, the legal interest is applied, as per article 1108 Spanish Civil Code). See in more detail A. I. Berrocal Lanzarot, 'Cuestiones controvertidas en torno a las cláusulas abusivas insertas en los préstamos o créditos hipotecarios (y II)' (2016) 753 *Revista Crítica de Derecho Inmobiliario* 500 ff.

⁴⁹ Case C-602/13.

⁵⁰ Supreme Court decisions 22 April 2015 (ECLI:ES:TS:2015:1723) and 3 July 2016 (ECLI:ES:TS:2016:2401).

⁵¹ Supreme Court decision 16 December 2009.

procedures after the non-performance of three or more mortgage instalments, as several court decisions show. The rule laid down in Act 1/2013 applies whether the property is the main debtor's residence or not, and regardless of whether the borrower is a consumer or not. Spanish courts have adopted different approaches on this issue⁵². Once more, the ECJ has had the opportunity to state that, where an acceleration clause in a contract with consumers is deemed unfair, all consequences of such a finding should unfold (Order 11 June 2015, C-602/13), but the Spanish Supreme Court, in our view, does not follow its doctrine; instead, it justifies claims based on the full maturity of the loan and their enforcement by means of the specific mortgage procedure by highlighting the "benefits" that this procedure entails for the consumer⁵³ (which, in our view, are non-existent, since the procedure, as already stated, was designed to lure investors into granting very secure loans). In any event, if the acceleration clause is unfair, the question is whether the creditor may seek enforcement for the full amount in any kind of procedure (which we believe should not be possible), and not merely whether the specific mortgage enforcement procedure is barred.

Finally, terms including interest rate floors are a matter of discussion in Spain as borrowers complain that they are paying a fixed minimum interest rate (e.g. a 3%), whilst the variable interest rate index (i.e. Euribor) is significantly lower (it has very rarely been over 2% since March 2009) and the "interest cap" is so high (e.g. a 12%) that they are unlikely to benefit from it. The Bank of Spain⁵⁴ stated that 30% of the mortgage portfolio at the end of 2009 contained such terms and that the interest rate floor was around 3% on average, whilst the interest cap was around 13% on average.

According to the Spanish Supreme Court decision 9 May 2013, later confirmed by another decision dated 24 March 2015⁵⁵, interest rate floors are lawful but they may be deemed to be unfair due to lack of disclosure and information transparency that may result in an unexpected change in the price of the loan. This decision also stated

⁵² After the entry into force of Law 1/2013, Spanish courts have deemed contractual terms establishing the possibility of accelerating the mortgage loan in case of defaulting one monthly payment unfair (Provincial Court Vizcaya 30-6-15, JUR 2015\190495). The Provincial Court of Barcelona 30-7-15 (AC 2015\1538) considered this contractual term unfair even in cases where enforcement took place before the entry into force of Law 1/2013, on the basis of the general consumer protection rules on unfair contractual terms. The Provincial Court of Barcelona 31-7-2015 (JUR 2015\257933) also considered such a term unfair on the basis of the general rules contained in the Spanish Civil Code, according to which non-performance must be substantial in order to declare the early termination of the mortgage loan (article 1124 Spanish Civil Code).

⁵³ Supreme Court decisions 23 December 2015 (ECLI:ES:TS:2015:5618) and 18 February 2016 (ECLI:ES:TS:2016:626).

⁵⁴ Bank of Spain, *Informe del Banco de España sobre determinadas cláusulas presentes en los préstamos hipotecarios*, which was presented at the request of the Spanish Senate, 18. Available at: www.senado.es/legis9/publicaciones/pdf/senado/bocg/10457.PDF.

⁵⁵ ECLI: ES: TS: 2015: 1279.

that consumers are not entitled to claim repayment of the amounts wrongly paid during the whole contractual term. Indeed, the interest paid in excess shall be refunded to the borrower as from the date of publication of the decision of 9 May 2013. The Supreme Court based its holding upon the principle of legal certainty and the risk of serious difficulties with economic significance for public order should consumers be entitled to claim the entire amount that was unduly paid (a full retroactivity could lead banks to pay more than 12,000 million euros⁵⁶).

Although some courts followed this doctrine, others have continued to rule in favour of borrowers entitling them to claim the entire amount they had unduly paid since the interest rate floor began to have an effect on their mortgage loan, regardless of when that was. In our opinion, this is the best option, since economic considerations should not overrule private law norms as essential as those that provide that when a term (or a contract) is deemed null, it should be treated as not having produced any effect whatsoever and the *statu quo ante* should be re-established. This general rule was enshrined by the 1889 Spanish Civil Code, thus embracing an ancestral principle.⁵⁷ Moreover, nullity, with all its consequences, is an effective deterrent in the area of unfair terms.

However, the opinion of Advocate General Mengozzi, delivered on 13 July 2016,⁵⁸ stated that art. 6.1 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts does not preclude a supreme court decision which finds that 'floor' clauses are unfair, orders the cessation of their use and their removal from existing contracts and declares them invalid, while restricting, on the basis of exceptional circumstances, the effects of that invalidity to the date of its first judgment. The opinion of the Advocate General is in line with the arguments used by the Spanish Supreme Court decisions. A final ruling by the ECJ is expected at the end of 2016. In the meantime, the Spanish Supreme Court is staying appeals on this matter.⁵⁹

⁵⁶ Source: El Mundo 26-4-2016, *La banca sabrá en julio si debe devolver hasta 7.600 millones más por las 'cláusulas suelo'* (<http://www.elmundo.es/economia/2016/04/26/571f87ba46163fca708b4640.html>).

⁵⁷ We support thus the view of F. Redondo Trigo, 'Acerca de la limitación de la retroactividad de la 'cláusula suelo' en la sentencia del Tribunal Supremo de 25 de marzo de 2015 en base al régimen general restitutorio de la nulidad y al Orden Público' (2015) 750 *Revista Crítica de Derecho Inmobiliario*, who argues that "El Orden Público Económico ni es Fuente del Derecho ya que ni siquiera tiene el fundamento en los Principios Generales del Derecho, ni está basado en la realidad social por lo que no puede servir como criterio interpretativo de una norma jurídica y su recurso en el caso analizado se nos revela más que nada como un auténtico y desmesurado arbitrio judicial y en cuya decisión no se sigue el sistema de fuentes establecido (art. 1.7 del Código Civil)" 2395.

⁵⁸ Due to requests for a preliminary ruling from the Juzgado de lo Mercantil n. 1 de Granada (Commercial Court n.1, Granada, Spain) (Case C-154/15) and from the Audiencia Provincial de Alicante (Provincial Court, Alicante, Spain) (Cases C-307/15 and C-308/15)).

⁵⁹ Supreme Court Order 12 April 2016 (ECLI:ES:TS:2016:2927A).

b) Interest Rate Swaps and other interest rate limitation products

Interest rate swaps were marketed by credit entities in a clearly bullish Euribor period (the Euribor reached its peak -5.38%- in October 2008) and have been deemed to be a bad banking practice as the subsequent decrease of the interest rate has favoured banks exclusively.⁶⁰ These products fall under the scope of Royal Legislative Law 4/2015, 23 October, on the securities market (which repealed the previous Law 24/1988)⁶¹; therefore, investment firms must carry out the suitability and convenience tests.⁶² Court decisions show how these tests –aimed at protecting retail investors– were not carried out properly, and credit institutions did not deliver the mandatory pre-contractual information concerning these products. This may result in the contract being rendered void (Supreme Court decision 17 November 2015⁶³) on the grounds of lack of provision of information relating to the product and the doctrine of mistake (art. 1266 Spanish Civil Code).

c) Foreign currency loans, bridging loans, buy-to-let schemes, reverse mortgages

It was said that there were around 65,000 multicurrency mortgages in Spain in 2012.⁶⁴ This data has been later confirmed by the Spanish *Asociación de Usuarios Financieros*, which outlined in its last report (30 June 2016)⁶⁵ that there are more than 70,000 multicurrency mortgages in Spain, 46% of which were denominated in yens and 52% in Swiss francs. This Report also highlighted the fact that borrowers have lost on average 200,000 euros per mortgage, and that banks accumulate a total of €14,000M in loans in foreign currencies. Taking into consideration the total number of mortgages created between 2005 and 2011 for housing purposes (more than 5 million), multicurrency mortgages do not seem to be significant in the Spanish mortgage market. Borrowers have however complained about the complexity of this mortgage product, and it is worth mentioning that multicurrency mortgages have been deemed to be a financial

⁶⁰ S. Nasarre Aznar, 'Malas prácticas', 2686 ff.

⁶¹ BOE n. 255, 24 October 15; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-11435.

⁶² They must obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives (suitability test, art. 213). On the other hand, they must ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or requested (convenience test, art. 214).

⁶³ ECLI:ES:APTE:2015:138.

⁶⁴ Source: El Confidencial 9-12-2012, *La pesadilla de las hipotecas en yenes: cuotas que se duplican y deudas que engordan un 40%* (http://www.elconfidencial.com/vivienda/2012-12-09/la-pesadilla-de-las-hipotecas-en-yenes-cuotas-que-se-duplican-y-deudas-que-engordan-un-40_200237/).

⁶⁵ Available at:

<https://asufin.com/wp-content/uploads/2016/06/160630-2-INFORME-Hipoteca-Multidivisa.pdf>

derivative by the Supreme Court decision 30 June 2015,⁶⁶ thus leading to the application of the investor protection rules laid down in above-mentioned legislation on the securities market.

Reverse mortgages were regulated for the first time in Spain by Law 41/2007 (Additional provision 1), although banks and savings banks had marketed such products before. Óptima Mayores⁶⁷, one of the leading companies in providing advice to the elderly in Spain, found in a survey carried out in 2005 that a total of 21 institutions marketed these products in 2008 and approximately 2,500 contracts were concluded. The same report conducted in 2010⁶⁸ pointed to a growth in the marketing of reverse mortgages, but the number of institutions marketing them had descended to 19. A study carried out in 2011⁶⁹ among 92 institutions showed the following results: only 19 were actively marketing such product and only 7 sent information about the product (22 did not answer). This would be consistent with the fact that only a few thousands of reverse mortgages were granted until 2011; there was no official data for the same year.⁷⁰ Recent interviews with the main intermediaries of these products revealed that the reverse mortgage market is not currently significant, with few transactions concluded per month. It is actually a problem for elderly people, perhaps severely hit by the crisis, to not be able to monetise their assets; banks do not want to risk being landed with more real estate. Therefore, the economic crisis has had a huge impact on the marketing of these products as the economic environment (as well as other sociological and cultural factors) plays a key role in their success.

As for buy-to-let schemes, there were not the rule during the Spanish housing boom as investors acquired dwellings with the aim of obtaining high returns from their sale in the short term, since housing prices significantly increased from one year to another (the year-on-year growth rates reached 17%). Due to the current problems in accessing homeownership, Law 4/2013⁷¹ was passed with the aim to boost the tenancy market, by rendering rent contracts more flexible (thus decreasing the tenant's rights). Before this, the main goal pursued by Law 11/2009, 26 October, which regulated the Real Estate Investment Listed Companies,⁷² was the professionalization

⁶⁶ ECLI:ES:TS:2015:3002.

⁶⁷ Óptima Mayores, 'Informe Anual de la Hipoteca Inversa' (2008, December) *Boletín Informativo Semanal de Seguros* 58 ff.

⁶⁸ Óptima Mayores, 'Informe Anual de la Hipoteca Inversa 2010', 3.

⁶⁹ E. Del Pozo García; Z. Díaz Martínez; L. Fernández Sevilla, 'La hipoteca inversa en España: un estudio comparativo con otros países de la Unión Europea y EEUU' (2011) 15 *Revista Universitaria Europea* 99 ff.

⁷⁰ According to El Confidencial 24-11-11, *El piso a cambio de una pensión: otro 'cadáver' del crash inmobiliario*, neither the Spanish Bank Association (AEB) nor the Confederation of Saving Banks (CECA) had data on this matter (http://www.elconfidencial.com/vivienda/2011-11-24/el-piso-a-cambio-de-una-pension-otro-cadaver-del-crash-inmobiliario_212409/).

⁷¹ BOE n. 134, 5 June 2013; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-5941.

⁷² BOE n. 259, 27 October 2009; available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2009->

of the private rental sector (more than 21 companies have been established since 2009⁷³). The decrease in housing prices, coupled with the growing importance of tenancy, make buy-to-let schemes more appealing now than during the housing boom. As a matter of fact, the investment in properties with a commercial view (resale or rent) accounted for 20% on average in July 2016,⁷⁴ probably aided by the fact that the gross return on rental is over 4% on average.⁷⁵

Bridging loans were used during the housing boom for speculative purposes, and also some consumers who simply aimed to improve their quality of life were caught up in these schemes, promoted by both property developers and the banking sector, at the time when the property bubble burst. There are instances where both the purchase of the second property and the mortgage loan could be deemed null and void, on the grounds of fraud and/or mistake.

- d) Interest rates referenced to indexes resulting from borrowing rates among a small group of creditors

See below Part II, 8.

- e) The existence of non-regulated and/or non-supervised lenders

Law 26/1988, 29 July, on the discipline and intervention of credit institutions, established a special administrative supervision regime for financial institutions. This Law has been amended by Law 10/2014, June 26.⁷⁶ The problem was, however, that credit intermediaries were only subject to consumer law rules and the provision of mortgage loans is not an activity reserved for credit institutions. In order to address this problem, Law 2/2009, 31 March, on contracting with consumers for mortgaged backed credits or loans by companies other than credit institutions or their agents⁷⁷, was passed. These lenders must comply with the same transparency requirements required of credit institutions. It is worth noting, however, that this set of rules was introduced after the housing bubble burst.

17000).

⁷³ Source: <http://www.bolsasymercados.es/mab/esp/SOCIMI/Listado.aspx>.

⁷⁴ According to Servihabitat, a well-known Spanish estate agent linked to one of the three big banks. Source: La Vanguardia 25/7/16, *Una de cada cinco viviendas en España se compra como inversión* (<http://www.lavanguardia.com/economia/20160725/403448629210/extranjeros-grandes-inversores-compran-vivienda-espana-rentabilidad-alquiler.html>).

⁷⁵ Source: Bank of Spain, *Indicadores Del Mercado De La Vivienda*. Available at: http://www.bde.es/webbde/es/estadis/infoest/si_1_5.pdf

⁷⁶ BOE n. 156, 27 June 2014; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-6726.

⁷⁷ BOE n. 79, 1 April 2009; available at: <https://www.boe.es/buscar/doc.php?id=BOE-A-2009-5391>.

Scholars⁷⁸ argue that in order to increase the effectiveness of this Law it should be required that notaries mention whether the transaction is subject to Law 2/2009 or not, and, where applicable, that they check that the private lender is registered at the public company register and that it complies with the reporting obligations set out by Law 2/2009. The Law should also require notaries to verify that the borrower receives the amount loaned in full. In this respect, notaries should refrain from formalising public mortgage deeds if the borrower states that a greater amount than what is delivered before the notary has been received.

- f) Deposits or other advanced payments made when consumers acquire immovable property that may render transparency provisions ineffective

As pointed out elsewhere,⁷⁹ the starting point of the sale process in Spain is a private contract; delivery does not take place at this first stage, so property is not transferred yet (this would require a public deed). The buyer assumes as a general rule the duty to provide the seller with a deposit (earnest money), the amount of which is not limited by law. These preliminary (not notarised) contracts were the rule during the housing bubble in Spain (2000-2007) and are still quite common, including when professional developers sell the properties before completing the building (off-plan). In this case, Royal Decree (RD) 515/1989, 21 April,⁸⁰ imposes on the developer the duty to provide consumers with some pre-contractual information relating to the real estate concerned (name of the seller, location of the building and materials used, etc.).

However, problems arise when the developer falls into bankruptcy before finishing the construction⁸¹. The buyer must start a long and complex procedure to recover the earnest money already paid. In this case, the Spanish Insolvency Law 22/2003, 9 July⁸², does not consider purchasers to be privileged creditors, although they may seek the termination of the contract (arts. 61 and 62). In order to address these problems, Law 57/1968, 27 July, was enacted. It provided for measures destined to guarantee the return of the deposits, but they were not properly applied.⁸³ Indeed, insurance

⁷⁸ F. Zunzunegui, who has delivered several speeches on this topic, such the one delivered in 2009 at the *Primer Congreso Nacional de Asesores e Intermediarios de Crédito* (Madrid, 19 May 2009).

⁷⁹ P. Sparkes, Lead author of the report on *Cross-Border Acquisitions of Residential Property: Problems that Arise for Citizens* (European Parliament, January 2016) 110.

⁸⁰ BOE n. 117, 17 May 1989; available at:

https://www.boe.es/diario_boe/txt.php?id=BOE-A-1989-11181.

⁸¹ Purchasing off plan is one of the problems in cross-border acquisitions of immovable property pointed out by Diana Wallis, 'European Property Wrongs – what can the EU do?', in D. Wallis & S. Allanson (eds.), *European Property Rights & Wrongs*, 14 (available at: <http://www.elra.eu/wp-content/uploads/2014/01/EUROPEAN-PROPERTY-RIGHTS-2.pdf>).

⁸² BOE n. 164, 10 July 2003; available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2003-13813>.

⁸³ Memoria del Servicio de Reclamaciones (Madrid: Bank of Spain, 2008) 66 ff; J. Romero Domínguez, *La Recuperación de Cantidades Anticipadas por el Adquirente de Vivienda en Construcción* (Valencia: Tirant lo Blanch, 2011).

companies estimated that only 30% of private home developments complied with the requirements set by Law 57/1968; this proportion rose to (only) 70% in state subsidised housing.⁸⁴ This Law has been repealed by Law 20/2015, 14 July⁸⁵, which has introduced new protective measures regarding down payments.

Lastly, it is worth noting that, due to the credit crunch, some Spanish households have faced difficulties in obtaining the mortgage loan in order to finance the acquisition of the property once the preliminary contract had already been concluded (e.g. in 2006) and the construction had been finished (e.g. in 2008, after the burst of the housing bubble). It is a matter of discussion whether the *rebus sic stantibus* doctrine (“things standing thus”) could apply and thus allow rescission of the preliminary contract in such circumstances; otherwise the buyer will be liable with all his present and future assets before the seller for the full amount of the purchase price (art. 1911 Spanish Civil Code). The Spanish Supreme Court has been generally reluctant to apply the above-mentioned doctrine, but it has left the door open to its application under specific circumstances (Supreme Court decisions 17 January 2013⁸⁶, 26 April 2013⁸⁷, 30 June 2014⁸⁸ and 30 April 2015⁸⁹).

g) The role of notaries or other professionals in conveyance and mortgaging

Notaries fulfil a role that sometimes goes beyond that of just formalising the conveyance deed (which includes the sale contract and produces the transfer of property, as well as allowing registration thereof) and the mortgage deed. In Spain (Decree 2 June 1944⁹⁰, art. 147) the notary has the duty to inform the parties, check the title to the property and the encumbrances that may exist over it, and consult the Land Registry before the deed is executed.

When the deed is presented for registration, the land registrar assesses, under his or her responsibility, the formal requirements of the document, the capacity of the parties and the intrinsic validity of the documented transaction, as well as the obstacles to registration that may arise from the Land Register itself (Spanish Mortgage (Land Register) Law, art. 18).

Therefore, Spanish notaries and land registrars play a key role as gatekeepers in assessing the legality of real estate transactions in Spain. However, the Spanish

⁸⁴ Á Carrasco Perera, E Cordero Lobato & C González Carrasco, *Régimen Jurídico de la Edificación* (Pamplona: Aranzadi, 2007) 555.

⁸⁵ BOE n. 168, 15 July 15; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-7897.

⁸⁶ ECLI:ES:TS:2013:1013.

⁸⁷ ECLI:ES:TS:2013:2247.

⁸⁸ ECLI:ES:TS:2014:2823.

⁸⁹ ECLI:ES:TS:2015:1923.

⁹⁰ BOE n. 189, 7 July 1944; available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1944-6578>.

ombudsman⁹¹ pointed out that there were a number of complaints from clients expressing their concerns about the performance of some notaries, because -in their view- they felt that they did not provide adequate information when proceeding with the formalization of mortgage loans, thus limiting their intervention to quickly reading the corresponding deed without giving any advice to citizens, although in most cases the borrowers did not accurately understand the contractual terms (such as the ones related to floor clauses and swaps) due to the complexity thereof.

With regards to the duties of notaries, the Spanish Order *EHA/2899/2011, 28 October, on transparency and protection of clients of banking services*,⁹² imposes on notaries the duty to check if the borrower has received the binding offer prior to the conclusion of the contract (see below Part II, 3), and if such offer coincides with the information gathered on the deed. They will also check if the Personalized Information Sheet (FIPER) has been delivered to the borrower prior to the conclusion of the contract. In relation to unfair terms, notaries are required to verify that mortgage deeds they formalise do not contain general conditions declared invalid by a final judicial decision that have been registered in the Register of General Conditions (art. 147 Decree 2 June 1944). It should be noted that this Register is far from efficient.

Notaries, however, cannot declare contractual terms unfair themselves, even though their main role is to control the legality of the transaction. It is worth noting that arts. 30.(3) and (4) of Order *EHA/2899/2011* stated that notaries shall refuse to authorise a loan when it does not comply with the provisions of that order and whatever other legislation is in force, but this provision was declared null and void by the National High Court decision 5 March 2013, later confirmed by the Supreme Court decision 7 March 2016,⁹³ which has been criticised by scholars.⁹⁴ The same applies with regards to the power of Land Registrars over unfair contractual terms (General Directorate of Registrars and Notaries, decision 1 October 2010⁹⁵).

The underlying problem is that not all decisions declaring contractual terms unfair have access in due time to the Register of General Conditions, thus hindering the effective control of unfair contractual terms by these gatekeepers. As an example, the

⁹¹ Defensor del pueblo, *Crisis económica y deudores hipotecarios: actuaciones y propuestas del Defensor del Pueblo* (January 2012) 71 ff (available at: <https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2012-01-Crisis-econ%C3%B3mica-y-deudores-hipotecarios-actuaciones-y-propuestas-del-Defensor-del-Pueblo.pdf>).

⁹² BOE n. 261, 29 October 2011; available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2011-17015>.

⁹³ ECLI:ES:TS:2016:782.

⁹⁴ F. J. García Más, 'Algunas reflexiones sobre la protección del deudor hipotecario: especial consideración de la intervención notarial', in M.A. Alcalá Díaz, *Hacia un nuevo modelo de mercado hipotecario* (Madrid: Dykinson, 2014) 83.

⁹⁵ RJ 2010\5273.

Supreme Court decision 16 December 2009 declared a number of clauses void, six years after the decision of the court of first instance (!). This means that such terms were in force during a long period of time in thousands of mortgage deeds without notaries and land registrars –formally considered to control the legality of real estate transactions - having the chance to deem such terms void.

On the other hand, real estate agents also play a relevant role in the property market by providing advice to potential buyers.⁹⁶ This role, however, has been called into question in Spain after the housing bubble burst due to the lack of sufficient skills and training. Indeed, only the Autonomous Communities of Catalonia (Decree 12/2010, 2 February) and the Basque Country (Law 3/2015, 18 June, additional provision 1, not in force since it has been challenged before the Constitutional Court, 18 April 2016⁹⁷) establish the conditions that estate agents must meet so as to act in the property market after the liberalisation that took place in Spain by means of Royal Decree (RD) 47/2000, 23 June. Therefore, no rules on specific training, insurance or the duty to keep an office open to the public, which promote professionalization in this sector, were in force during the Spanish housing boom.

h) Unfair commercial practices; irresponsible lending

A number of unfair commercial practices have been identified in the banking sector in recent years, as mentioned above. As a matter of fact, the European Parliament resolution 8 October 2015 stated that “over the past few years 700,000 Spanish citizens are estimated to have been the victims of financial fraud, as they were sold risky financial instruments in bad faith by their banks, without being duly informed about the extent of the risks and the real implications of not being able to access their savings”; and the Bank of Spain’s Claims Report⁹⁸ pointed out that 20,262 claims were presented in 2015, of which 9,354 were related to interest rate floor terms -46,2% of the total-, and 19,9% were related to other issues regarding active operations, such as the lenders’ behaviour concerning the application of Royal Decree-Law (RDL) 6/2012 and the RDL 1/2015 (which accounted for 488 claims; on these provisions, see below Part III). The Report for 2014 showed similar results. The underlying reasons behind consumer claims have changed compared to before the crisis, though, as well as the amount of claims. As an example, the Report for 2007 showed that the Bank of Spain answered 4,687 claims, 25,6% of which were related to credits and loans. The issues at stake were the usual ones at that time (commissions due, contractual terms, such as those related to interest rates, or the information provided by lenders).

⁹⁶ See the website of the European Association of Real Estate Professions (<http://www.cepi-cei.eu>).

⁹⁷ BOE n. 94, 18 April 2016; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-7802.

⁹⁸ Bank of Spain, *Claims Report* (2015). Available at: www.bde.es.

Having said that, it is worth pointing out that a number of legal provisions are in place to protect consumers: Law 3/1991, 10 January⁹⁹, protects consumers against unfair commercial practices, such as misleading advertising; Law 34/1988, 11 November¹⁰⁰, protects consumers against illegal advertising; and the Ministerial Order EHA/1718/2010, 11 June¹⁰¹, deals with the regulation and control of the advertising of financial services and products.

Regarding irresponsible lending, a number of mortgage loans were granted with a 100% loan-to-value during the Spanish housing boom. In order to address such issue, the Sustainable Economy Law 2/2011, 4 March¹⁰², introduced for the first time the duty of credit institutions to assess borrower's creditworthiness (art. 29). Later, art. 18 of the Spanish Ministerial Order EHA/2899/2011 also included such duty. The major issue here is to determine the consequences of the lender granting the loan in spite of a negative creditworthiness assessment or when it has not been carried out adequately (see below part II).

On the other hand, the legal framework on securitisation also fostered subprime lending. The (apparent) recent economic recovery has increased lenders' confidence to the extent that subprime mortgage lending has increased its presence in the banking sector (see below). As a matter of fact, new mortgage loans with a LTV exceeding 80% have now reached 15% of the total.¹⁰³

i) Provisions on usury and anatocism (compound interest)

The Spanish usury law dates back to 1908 and is still in force.¹⁰⁴ According to this act, loan agreements shall be declared void if they set higher interest rates than normal, which are manifestly disproportionate according to the specific circumstances of the case; also, loan contracts shall be deemed void if the interest rate can be considered unfair, because there are reasons to believe that the loan has been accepted by the borrower as a result of being in a desperate situation, or due to inexperience or limited mental faculties. Generally speaking, court decisions apply this set of rules only to ordinary interest; default interest rates are deemed to fall outside the scope of the

⁹⁹ BOE n. 10, 11 January 1991; available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1991-628>).

¹⁰⁰ BOE n. 274, 15 November 1988; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-1988-26156.

¹⁰¹ BOE n. 157, 29 June 2010; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-10315.

¹⁰² BOE n. 55, 5 March 2011; available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2011-4117>.

¹⁰³ Source: *El Economista* 18/7/16, *Santander y Popular duplican el volumen de hipotecas de alto riesgo* (<http://www.economista.es/vivienda/noticias/7710878/07/16/El-Santander-y-el-Popular-duplican-el-volumen-de-hipotecas-de-alto-riesgo.html>).

¹⁰⁴ BOE n. 206, 24 July 1908; available at: <https://www.boe.es/buscar/doc.php?id=BOE-A-1908-5579>.

Usury Law (Supreme Court Decision 4 June 2009¹⁰⁵). Several court decisions have rendered mortgage loans void on these grounds, but the interpretation of the act varies from one decision to another.¹⁰⁶

With regard to anatocism, by which interest outstanding shall accrue the legal interest from the time that it is judicially claimed (arts. 1109 Spanish Civil Code and 317 of the Spanish Commercial Code), Law 1/2013 established that, if the mortgage loan is over a primary residence and its purpose was to acquire it, default interest rates may only accrue on the outstanding principal. The provisions of Law 1/2013 on anatocism apply to mortgage loans created before its entry into force that have not been enforced yet. Courts may, however, render this contractual term void on other grounds, such as consumer protection rules (Provincial Court decision of Alicante 10 June 2014¹⁰⁷ and see above, Part I.a).

j) Property appraisal systems

The property appraisal system¹⁰⁸ was introduced in Spain as a compulsory requirement so as to issue covered bonds and securitise mortgage loans (since Law 2/1981 and the Decree 685/1982). The appraisal sector became more and more professionalised since that moment. Appraisals were not carried out, however, for the benefit of lenders and borrowers, but to offer guarantees to the prospective holders of the title. RD 775/1997 and later the Ministerial Order ECO/805/2003, 27 March, introduced rules relating to appraisal companies (i.e. minimum capital share, human, technical and professional requirements, liability insurance, etc.), thus increasing legal certainty in this aspect of the mortgage market. Notwithstanding such set of rules, the independence of appraisers was called into question during the Spanish housing boom, as lenders set up their own appraisal companies. This situation led to a conflict of interests, since lenders demanded “generous” appraisals so that the LTV fell within the margins set for issuing covered bonds and for securitisation. More than 90% of the equity appraisals

¹⁰⁵ ECLI:ES:TS:2009:3875.

¹⁰⁶ As an example, the Supreme Court decision 18 June 2012 (ECLI:ES:TS:2012:5966) refers to a case where the nominal interest rate was set at 20.50%, and the penalty interest rate at the annual rate of 26%. The Supreme Court did not consider these interest rates to be usurious, although the legal interest rate on the date of the conclusion of the contract was 4%. Instead, a nominal interest rate of 20% per annum and a penalty interest rate of 22% per annum, being the legal interest 5.5%, was deemed to be unfair by the Supreme Court decision 22 February 2013 (ECLI:ES:TS:2013:867). See in this sense M. E. Lerdo de Tejada, ‘El contenido financiero del préstamo y la protección del deudor hipotecario: algunas cuestiones actuales (2015) 748 *Revista Crítica de Derecho Inmobiliario* 628.

¹⁰⁷ AC 2014\1624.

¹⁰⁸ See L. Leirado Campo, ‘Las entidades de tasación (artículos 3, 4, 5 y 6 de la Ley 41/2007)’, in E. Muñiz Espada; S. Nasarre Aznar; M.E. Sánchez Jordán (eds.), *La reforma del mercado hipotecario y otras medidas financieras en el contexto de la crisis económica* (Madrid: Edisofer, 2009) 75 ff; and A. Gómez-Bezares Revuelta, F. Gómez-Bezares Pascual, A. Jiménez Eguizábal, ‘Regulación de la tasación inmobiliaria’ (2015) 6 *Revista de Derecho, Empresa y Sociedad (REDS)* 155 ff.

carried out between 1998 and 2007 were for mortgage financing purposes.¹⁰⁹ Appraisers contributed to some extent to the over-indebtedness of Spanish households as they overvalued properties, thus allowing borrowers to finance the acquisition of real estate as well as other goods and services, such as cars, holidays, etc.¹¹⁰ The close relationship between banks and appraisal companies was highlighted by the Supreme Court decision 18 July 2013.¹¹¹

This situation was addressed in 2007 and again in 2013 by the Spanish legislature, as will be shown below (Part II, 6).

k) Assignment of secured credits to investment funds

Mortgage loans may be securitised (Law 5/2015, 27 April, on Promotion of Corporate Finance,¹¹² which repealed the previous rules on securitisation contained in Law 19/1992 – on securitisation of mortgage certificates- and RD 926/1998 – on securitisation of any other claim-). The following figure shows the essential data on the volume of covered bonds (1) and securitisation (2) in the Spanish mortgage pool.

PESO DEL SALDO DE LOS TÍTULOS HIPOTECARIOS SOBRE EL SALDO TOTAL DEL CRÉDITO			
Porcentaje (%)			
Periodo	Total Cédulas (1)	Total Titulización (2)	Total Títulos Hipotecarios (1) + (2)
2004	16,3%	8,0%	24,2%
2005	20,6%	9,4%	30,0%
2006	23,8%	9,9%	33,7%
2007	25,5%	12,5%	38,0%
2008	28,3%	17,2%	45,5%
2009	30,6%	17,2%	47,8%
2010	31,9%	17,0%	48,9%
2011	36,7%	16,6%	53,3%
2012	45,8%	14,2%	60,0%
2013	43,2%	15,1%	58,4%
2014	38,5%	15,5%	54,0%
jun-15	37,3%	16,6%	53,9%

Figure 2. *Spanish mortgage pool*. Source: Spanish Mortgage Association¹¹³

The legal framework on securitisation contributed to some extent to the housing boom.¹¹⁴ Although Law 2/1981 required a loan-to-value of up to 80% so as to

¹⁰⁹ A. Gómez-Bezares Revuelta, F. Gómez-Bezares Pascual, A. Jiménez Eguizábal, 'Regulación de la tasación inmobiliaria' 164.

¹¹⁰ S. Nasarre Aznar, 'Malas prácticas' 2711 ff.

¹¹¹ ECLI:ES:TS:2013:4422.

¹¹² BOE n. 101, 28 April 2015; available at:

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-4607.

¹¹³ Spanish Mortgage Association (AHE), *Analysing the Spanish mortgage pool* (March 2016).

¹¹⁴ "The growth of the securitization market, together with other factors, fuelled the rise of a credit boom which contributed to the formation of a real estate bubble in Spain, which in turn derived in a

securitise mortgage loans, Law 44/2002, 22 November,¹¹⁵ allowed credit institutions to securitise sub-prime mortgages through mortgage transfer certificates, which did not comply with the LTV requirements set out by Law 2/1981.¹¹⁶

A number of court decisions have recently called into question the legal standing of credit institutions so as to initiate enforcement proceedings on the basis of unpaid mortgage loans that were securitised.¹¹⁷

In addition, the Spanish Law 9/2012, 14 November, on restructuring and resolving credit institutions,¹¹⁸ created the so-called Fund for the Orderly Restructuring of the Banking Sector (FROB) in order to safeguard the stability of the financial system while minimising the use of public resources. This entity can force a credit institution to transfer certain types of assets held on its balance sheet, such as mortgage loans, to an asset management company. In this vein, the Law also provides that assets shall be transferred to the asset management company with no need for third-party consent to be obtained, by means of any legal transaction, and without complying with the requirements for structural changes to commercial companies. In this respect, articles of association or contractual terms restricting the transferability of holdings may not be brought to bear against such transfers, and no liability or compensation claims of any kind may be filed for breach of such provisions or terms.

As a result, this regulation has superseded the application of art. 1535 Spanish CC, according to which, in the event of sale of a litigious credit, the debtor shall be entitled to extinguish said credit by reimbursing the assignee for the price paid, any costs incurred and interest on the price from the date on which it was paid.¹¹⁹

The narrow scope and application of this article has been brought to light, since some vulture funds have acquired mortgage loans and consumer credits, and borrowers may not have the chance to pay off the debt because art. 1535 Spanish CC only applies to litigious credits. As a matter of fact, it is said¹²⁰ that international investors have

higher issuance of ABS” see I. Roibás Millán, ‘Securitization in Spain: Past developments and expected future trends’ *BBVA Research* (September 2014) 5 (available at: https://www.bbva.com/wp-content/uploads/2014/09/EW_Securitization-in-Spain1.pdf).

¹¹⁵ BOE n. 281, 23 November 2002; available at:

<https://www.boe.es/buscar/doc.php?id=BOE-A-2002-22807>.

¹¹⁶ S. Nasarre Aznar, ‘Malas prácticas’ 2708 ff.

¹¹⁷ See F. Lacaba Sánchez, ‘La titulización de créditos hipotecarios. Nueva controversia en nuestro derecho hipotecario’ (2016) 144 *Revista de Derecho vLex*.

¹¹⁸ BOE n. 275, 15 November 2012; available at:

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-14062.

¹¹⁹ A credit shall be deemed litigious from the time that a response to the claim relating thereto is filed. The debtor may exercise his right within nine days, counting from the assignee’s demand for payment.

¹²⁰ Source: El Diario 29/09/13, *Una brecha legal permite arrebatar la hipoteca revendida a un fondo buitre* (http://www.eldiario.es/economia/fondos_buitre-hipoteca-banca_0_179882313.html).

acquired more than 17,000 million euros of consumer and mortgage loans since 2012.

In Catalonia, Law 24/2015, 29 July (additional provision) granted all debtors of assigned credits the possibility to acquire the credit – and therefore extinguish the claim- by reimbursing the assignee the price paid, the legal interest and any expenses incurred, regardless of the nominal value of the credit. This Catalan act is, in general, very poorly drafted (in this particular aspect, for instance, it does not provide for time limits of any kind) and it is naïve, since the real problem is finding out what price the credit was sold for in the event of transfers in bulk, and no disclosure duties are laid down to this effect. Whatever the case, it is irrelevant at the moment, since of course this provision has been challenged before the Constitutional Court by the Spanish Government and it does not apply at present.¹²¹

Part II. The Impact of Directive 2014/17

Has your country transposed Directive 2014/17?

If applicable, do you think that, in general terms, the transposition has been carried out adequately?

As of December 2016, Directive 2014/17/EU (MCD) had not been transposed in Spain and therefore it was one of the 20 Member States against which infringement proceedings were launched by the Commission.¹²² Spain is renowned for implementing EU Directives late, especially where core matters, such as property rights over land, and other relevant sectors, like tourism, may be concerned.¹²³ Moreover, the two last general elections (December 2015 and June 2016) resulted in hung parliaments and, although the caretaker government continued to function, it did not seem like the transposition of of the MCD was a priority. Having said that, it would not have been the first time that we were surprised by an expeditious transposition by means of a legislative tool in the hands of the government and designed for emergency legislation (the “Royal Decree-Law”; RDL); this would probably have meant that the Directive would merely be copied into Spanish law.¹²⁴ If this had been the case, transposition would probably have been inadequate and yet another opportunity to reassess the credit mortgage legal framework in Spain would have been missed. And this will be the

¹²¹ Constitutional Court admitted the challenge on 24 May 2016 (BOE n. 134, 3 June 2016).

¹²² http://ec.europa.eu/finance/enforcement/directives/index_en.htm#mortgage-credit.

¹²³ See, for instance, the delay in implementing both time-share Directives; Directive 94/47/EU should have been transposed by March 1997 and it was not until December 1998 (Law 42/1998, 15 December, BOE n. 300, 16 December 1998) and Directive 122/2008, which should have been transposed by February 2011, was not until March 2012 (RDL 8/2012, 16 March; BOE n. 66, 17 March 2012).

¹²⁴ Such was the case with the second time-share Directive, as shown in the previous footnote. RDL 8/2012 was then passed as an act of parliament by means of Law 4/2012, 6 July (BOE n. 162, 7 July 2012; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-9111).

result, as well, if the Draft Bill published on 26 July 2016 (hereinafter, “the Draft Bill”)¹²⁵ crystallises as the mechanism chosen to transpose the MCD. It mainly focuses on the regulation of creditors, credit intermediaries and representatives and it bypasses all the issues that we consider more relevant and that could have direct private law implications (such as the creditworthiness assessment and the implementation of art.28 MCD). Most matters are simply delegated to the Ministry of Economy and Competitiveness. Therefore, the provisions on relevant topics will still be contained in administrative instruments and not in acts of parliament.

However, both Catalonia¹²⁶ and Andalusia¹²⁷ have enacted provisions that are inspired by the MCD and amount to partial transpositions thereof. In different instances, the Spanish Constitutional Court has held that European legislation does not alter the internal distribution of powers between the central government and parliament and the autonomous regions in Spain;¹²⁸ therefore, if a region has the power to legislate on consumer protection or on civil matters, it can transpose EU directives concerning these areas of law. In our case, the Andalusian Act expressly states that it develops the region’s powers regarding consumer protection and that no civil or commercial law sanction is attached to its provisions; therefore, only administrative sanctions are in place to ensure the enforcement of the rules it lays down. Unlike Andalusia, Catalonia does have powers in civil matters, but, again, the Act does not attach civil sanctions to the infringements thereof. It should also be noted that the powers of Autonomous Communities are, by definition, limited, and areas such as the organisation and supervision of the banking system or the basic credit circulation criteria¹²⁹ or, more broadly, the “general planning of the economy”¹³⁰ or the basic conditions to guarantee equality in constitutional rights and duties throughout Spain¹³¹ are reserved to the Spanish State.¹³² Thus these two pieces of legislation do not cover the entire content

¹²⁵ Available at: <http://www.tesoro.es/sites/default/files/leyes/pdf/sleg7880.pdf>

¹²⁶ Law 20/2014, 29 December, amending the Catalan Consumers Code (Law 20/2010, 20 July) (BOE 21 n. 18, January 2015). Available at: <https://www.boe.es/boe/dias/2015/01/21/pdfs/BOE-A-2015-471.pdf>. Consolidated version of the Code available at:

http://portaljuridic.gencat.cat/ca/pjur_ocults/pjur_resultats_fitxa/?action=fitxa&mode=single&documentId=543841&language=ca_ES

¹²⁷ Law 3/2016, 9 June (BOE n. 157, 30 June 2016), available at:

<http://www.boe.es/boe/dias/2016/06/30/pdfs/BOE-A-2016-6309.pdf>.

¹²⁸ This is the opinion held since the Constitutional Court’s Judgment 236/1991 (STC 236/1991, 12 December 1991; BOE 15 January 1992, n. 13, p.7); see also A. Mangas Martín; D.J. Liñán Noguera, *Instituciones y Derecho de la Unión Europea* (Madrid: Tecnos, 2005) 535 ff.

¹²⁹ Art. 149.1.11 Spanish Constitution 1978 (BOE n. 311, 29 December 1978). English original text available at: http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf.

¹³⁰ Art. 149.1.13 Spanish Constitution 1978.

¹³¹ Art. 149.1.1 Spanish Constitution 1978.

¹³² In fact, the Draft Bill states that it develops the State’s exclusive powers on commercial law, the banking system and the “general planning of the economy”.

of the Directive, and focus mainly on information duties (although they both refer to the creditworthiness assessment).¹³³

Even if the Directive has not been transposed, we would like to find out what changes it entails in your legal system and whether they remedy any of the problems you have pointed out to be the most relevant in Part I.

In particular, it would be good to address the following areas:

- 1) If the Directive has been transposed, and with regard to its **scope**, has your country made use of the possibility to not apply the Directive or part thereof as per art. 3.3? If so, does this allow for the continuation of bad practices?

Hopefully Spain will not make use of the exclusions provided for by art. 3.3. Applying art. 3.3.(a) would mean that credits undertaken for, let's say, medical expenses and guaranteed with the family home, could be excluded from the protection granted by art. 11 and the ESIS. The reform of Directive 2008/48 does not solve the problem. Although, as stated above, the majority of mortgage loans in Spain are undertaken to finance acquisition or refurbishment, there does not seem to be a valid reason to exclude other consumer credits from the supposedly enhanced protection sought by the Directive. The same can be said with regard to bridging loans, for which not even the precaution laid down by art. 3.5 applies. On the other hand, in Spain the main problem seems to be access to housing (or maintaining it) and, from this perspective, some of the direct exclusions laid down in art. 3.2 are surprising. For instance, even if conditions offered to bank employees are good in comparison to those advertised to the general public, the employee still undertakes a huge economic and personal risk and may lose the family home as a result. The employee's skills may justify more lenient information obligations (although not always; this will depend on the employee's position in the bank), but it does not explain why the provisions on creditworthiness assessment should not apply and, moreover, why the creditor (who may have loaned irresponsibly) should then be able to foreclose without showing "reasonable forbearance". From another point of view, although it is obvious that the creditworthiness assessment is irrelevant when granting a reverse mortgage, the vulnerable situation in which the consumer will usually be when entering into it ought to lead to increased protection, especially bearing into account how highly he or she is compromising the property in exchange for what will usually be a relatively small income or capital.

¹³³ In spite of its limitations, the Spanish caretaker government has challenged the Catalan 2014 Act, on the grounds that it invades reserved powers. The Court acknowledged initiation of the proceedings on 6 October 2015 (BOE 9 n. 242, October 2015).

The Draft Bill basically transcribes art. 3.2 MCD and does not make use of any of the exclusions available to the States under art. 3.3. Although Spain could extend the relevant provisions to loans described in art. 3.2, we believe it is at least good news that no further exclusions are embraced. On the other hand, two aspects ought to be highlighted. First, the scope of the Draft Bill does not appear to be restricted to consumers, but to apply to any natural person. Second, it states that it applies to credits secured with a “home” (*vivienda*, in Spanish) and it does not define the concept. Since it does not require the “home” to be habitual, primary or permanent, we understand that the Draft Bill may cover the same types of properties as the Directive when it refers to “residential immovable property” (which, surprisingly for an EU norm, it does not define either). As shown in the following paragraph, this is a recurring problem.

As is the case with different crisis-induced Spanish enactments,¹³⁴ the scope of the provisions introduced by Catalan Law 20/2014 varies. Those dealing with default interest rates and interest rate floor terms apply to any consumer of mortgage credits. Other provisions, such as those imposing information obligations upon the notary and a compulsory intermediation prior to mortgage enforcement proceedings, apply to consumers whose credits “relate” to a “home” (it is not clear whether the concept of “home” includes only primary homes, both primary homes and secondary homes or also any building apt to be used as a home). Finally, the provisions that are clearly inspired by the Directive apply only where the credit was undertaken to finance the acquisition or refurbishment of the “home”, which would seem consistent with the exception of art. 3.3 (a) MCD, were it not for the fact that the provisions contained in this part of the Catalan Law cover other areas as well as arts. 11 and 14 MCD. The Andalusian Act only applies to mortgage credits over homes (again, no concept is given), “without prejudice” to other legislation, including the Directive.

- 2) Prior to the implementation of the Directive, did your system have similar rules to those laid down in art. 7 regarding the **remuneration of the staff** working for credit institutions, intermediaries or representatives? In particular, were there restrictions to tying remuneration to the number of credits granted? Do you think the rules on **knowledge and skills** required of the staff significantly alter the existing norms and/or practice?

In the light of your system, do you think more stringent provisions should rule the use of expressions such as “**advice**” and “**advisory services**” (art. 22)? In other words, has the fact that consumers trusted the employees of their local

¹³⁴ See M. Anderson, ‘¿Un modelo de propiedad distinto para la vivienda? Perspectiva europea, nacional y catalana’ (Valencia: Tirant lo Blanch, forthcoming).

bank branch or other credit institution had a significant role in inadequate borrowing or over-indebtedness?

Prior to the MCD, and in the light of CRD III and the reforms it entailed in Spain,¹³⁵ a poll carried out by PriceWaterhouseCoopers¹³⁶ showed that, consistently with the fact that Spanish banking has traditionally focused on commercial banking, rather than on investment banking, the remuneration policies have always been rather conservative. At the time, in 93% of the instances analysed, variable remuneration amounted to less than 50% of the total salary. When writing this paper, the variable remuneration for a bank branch manager, in one of the big Spanish banks, amounts to 23% of his total salary.

CRD IV and Regulation 575/2013 have required new legislation,¹³⁷ but, in the process of adapting the Spanish system to European law, the focus has remained on transparency, risk management and solvency and supervision requirements, rather than on consumer protection. The MCD seems to include this latter consideration (Recital 35 and art.7), with the aim to steer remuneration policies away from promoting reckless lending. The wording of art. 7.2 is very vague and art. 7.3 seems to forbid linking remuneration to the number or proportion of credit applications accepted only where the staff responsible for assessing creditworthiness is concerned. In Spain this can be construed to affect a limited number of people, when in practice others (such as bank branch managers) may have a direct influence on the final decision.

The scoring system of big banks is approved by the Bank of Spain. Therefore, by means of risk management delegation, and as long as the scoring is positive, it is possible for bank branch managers to decide on granting a credit as long as it does not exceed a certain amount (for instance, €300,000), that the LTV is a maximum of 80% and that the client is in a position to pay 10% of the price of

¹³⁵ On 5 December 2011, the Bank of Spain adopted the Guidelines on Remuneration Policies and Practices published by the CEBS on 10 December 2011 (available at: <https://www.eba.europa.eu/documents/10180/106961/Guidelines.pdf>). Domestic implementation of CRD III took place by means of RD 771/2011, 3 June (BOE n. 133, 4 June 2011), and Circular of the Banks of Spain 4/2011, 30 November (BOE n. 296, 9 December 2011).

¹³⁶ PWC (2012), *Remuneraciones en las entidades de crédito españolas: regulación y tendencias*, available at: <http://www.pwc.es/es/publicaciones/financiero-seguros/assets/informe-regulacion-remuneraciones-financiero.pdf>

¹³⁷ Pursuant to CRD IV (Directive 2013/36/EC) and Regulations 575/2013 and 1024/2013, Spain enacted Law 10/2014, 26 June (BOE 27 June 2014, n. 156, p. 49412), RD 84/2015, 13 February (BOE 14 February 2015, n. 39, p. 12319) and, more recently, the Bank of Spain published its Circular 2/2016, 2 February (BOE 9 February 2016, n. 34, p. 9942). The EBA's Guidelines 21 December 2015 (available at: <https://www.eba.europa.eu/documents/10180/1314839/EBA-GL-2015-22+Final+report+on+Guidelines+on+Sound+Remuneration+Policies.pdf>) will come into force on 1 January 2017.

purchase. Everything that escapes these parameters needs to be decided by the risk management department. On the other hand, bank branch managers may have an influence in determining the interest rate, which of course may alter the scoring. Part of the bank branch managers' variable remuneration is dependent on the amount of credits granted, and the same applies to the sale forces in every branch. Although, as already mentioned, the proportion between fixed and variable salary is conservative in Spain, it should also be added that the difference between attaining all the targets necessary to receive the entire variable remuneration or not is important in day to day life: the fixed salary of a bank branch manager, with a staff of six people, may amount to (as little as) €40,000.

The Draft Bill (art. 8) takes a curious approach to this matter. On the one hand, it bans tying remuneration to the number or proportion of applications accepted, but only for staff responsible for risk management. For other staff involved in the creditworthiness assessment and in the contracting process, it merely provides that the number or proportion of accepted applications must not be the predominant factor taken into account when setting their remuneration. We have doubts as to whether this adequately transposes the Directive.

With regard to knowledge and skills (Directive, art. 9), although Mifid II and the ESMA Guidelines¹³⁸ apply to investment products, it is understood that, due to the fact that commercial banks tend to carry out investment banking as well, around 80% of Spanish bank employees will be required to pass the tests set by these provisions. The Spanish *Comisión Nacional del Mercado de Valores* (National Commission for the Securities Market) has shown its intention to apply them strictly.¹³⁹ Even if the scope is different, it seems clear that if someone understands how a complex investment product operates, this person should also be in a position to prove adequate competence with regards to the aspects set out in Annex III MCD. However, this is not necessarily the case, so we understand that evaluation tools will have to be put in place as well in this area. The general practice in Spain (where unemployment is endemically high, and higher education is more accessible and more widespread than in other Member States) is to require job applicants to have a degree in Law, Economics or Business Administration. However, this does not, in our view, guarantee the level of market awareness and legal expertise that should be expected of

¹³⁸ Available at:

https://www.esma.europa.eu/sites/default/files/library/2015-1886_-_final_report_on_guidelines_for_the_assessment_of_knowledge_and_competence.pdf

¹³⁹ Cinco Días, Los 200.000 empleados de banca en España deberán examinarse para vender productos, 6 July 2016, available at:

http://cincodias.com/cincodias/2016/05/31/mercados/1464720789_299043.html

personnel dealing with credit agreements (whether over residential property or not). On the other hand, though, credit providers do have a choice of candidates, which ought to ensure competition. The Draft Bill simply delegates the matter to the Ministry, which must set the knowledge and skills requirements (art. 6).

In the same line, there is a need for a clear separation between the role of the creditor and the role it carries out providing advisory services. In Spain, where banks have traditionally had many different offices or branches, people turned to their local bank manager (or even bank clerk) for financial advice, and the staff carried out this task perhaps mostly in good faith, but often without enough distance from their own position in the bank and perhaps – although it is difficult to believe – without knowing what they were doing. An extreme example of this is the “scandal” of the massive placement of preferred stock in the hands of non-risk investors (mainly, elderly people) who were told that the shares functioned like a deposit, but with a higher yield, and that they would be able to sell them whenever they wanted and thus recover the invested capital.¹⁴⁰ Staff stated that this is what they had been told. After the financial crisis, bank branch managers who had invested in preferred stock themselves were prevented from claiming compensation...¹⁴¹

On the other hand, though, some big banks intentionally move their staff from one office to the other every few years, in order to prevent links with customers to become too personal.

The Draft Bill (art. 9) provides that only those who are recognised and supervised as the Ministry determines will be able to provide advisory services and that, when so doing, the client must be informed of the fact, the cost for the client and the commission that the advisor may receive, directly or indirectly, from the lender.

- 3) Regarding pre-contractual information, what changes does the Directive entail in: a) advertising (art.11); general information (art. 13) and ESIS (art. 14 and Annex II)? Does your country fall within the scope of art. 14.5 (where there was already in place a similar form to ESIS, containing “equivalent information requirements”)? How does ESIS work with your domestic binding offers or similar transparency documents? Has your system increased consumer protection by enlarging the reflection period or the right of withdrawal or has it

¹⁴⁰ On the effect of EU law on these subordinate rights, see recently ECJ decision 19 July 2016 (C-526/14).

¹⁴¹ See, for instance, F. Zunzunegui, ‘Comercialización de participaciones preferentes entre clientela minorista’, 31 January 2013 (report for the Ombudsman), available at: <http://www.rdmf.es/wp-content/uploads/2013/04/zunzunegui-informe-sobre-comercializacic3b3n-participaciones-preferentes.pdf>; M. Castilla Cubillas, ‘Riesgo, información y error en la distribución de participaciones preferentes emitidas por entidades de crédito’ (2012) 265-266 *Derecho de los negocios* 49-68.

set an amount of time since receiving the ESIS (or equivalent) before which the consumer cannot enter into a binding agreement? Do you think adopting the ESIS decreases consumer protection in your legal system? When and how is the draft credit agreement available to consumers?

Although most general consumer protection norms should have always applied to consumers entering into mortgage credits, their exclusion from various EU and domestic provisions led to the enactment of different regulations specifically designed for these.

With regard to advertising, dedicated norms apply to financial services, including Order EHA/1718/2010,¹⁴² developed by Circular 6/2010 of the Bank of Spain, as amended,¹⁴³ without prejudice to the general rules on advertising. According to the above mentioned Law 2/2009 (art. 12), when advertising mortgage credits and reference is made to interest rates, the amount of the credit or other costs, the expression of the APRC is mandatory, including a representative example; this does not exclude the possibility of also specifying the interest rate, as long as one and other are separate and the functions thereof are clear. The magma of regulations on this point, with different positions in the hierarchy, is huge, but it is safe to say that all relevant aspects detailed in art. 11.2 are covered by the Spanish legislation, though by no means standardised.

With regard to general information, the relevant provisions can be found in a 2011 Order of the Ministry of Economy and Tax, on transparency and protection of clients of financial services,¹⁴⁴ which develops the provisions of Law 2/2011, 4 March, on Sustainable Economy.¹⁴⁵ This Order, as well as embracing the spirit of art. 13.1 MCD (art. 6), includes, for credit mortgages on homes (residential property) or credits the aim of which is to acquire or retain rights over land or in an existing or projected building (the wording is practically identical to that of art.3.1 MCD)¹⁴⁶, a Pre-contractual Information Form (FIPRE) that must be made available to the consumer by all commercial channels (art. 21 and Annex I). According to Law 2/2009, art. 13, the same content must be made available to consumers in the form of a brochure.

The FIPRE is not yet binding on the creditor and must contain the data laid down in Annex I of the Order (attached as annex I to this paper). Comparing its content to that

¹⁴² Order EHA/1718/2010, 11 June, on regulation and control over advertising of banking services and products (Ministry of Economy and Tax).

¹⁴³ Circular n. 6/2010, 28 September (BOE 11 October 2010, n. 246; ref. [BOE-A-2010-15521](#)).

¹⁴⁴ Order EHA/2899/2011, 28 October (Ministry of Economy and Tax, BOE 29 October 2011, n. 261, p. 113242).

¹⁴⁵ BOE 5 March 2011, n. 55 (Ref. [BOE-A-2011-4117](#)).

¹⁴⁶ However, art. 19 of the Order seems to limit its scope to cases where immovable property has been mortgaged, which would need to be adapted to the broader scope of art. 3.1 (b) MCD.

of art. 13 MCD, the instructions to complete the FIPRE are in line with the European norm, except with regard to the general warning concerning possible consequences of non-compliance, although the crisis has led many creditors to include such warnings.

The next step toward entering into a mortgage credit agreement is a Personalised Information Form (FIPER) provided for by art. 22 of the Order and detailed in Annex II (attached to this paper as annex II). The FIPER is given to the client once the needs, preferences and situation has been explained to the bank, with the aim of assisting the client in the choice of the most convenient offer. Comparing this to the ESIS, the latter is longer and more detailed, but the core aspects are covered by the Spanish FIPRE, including all the warnings and, with the same spirit as the Directive, precluding alterations thereof (any additional information should be provided in a separate document). Save for slight exceptions and the fact that the scope of these provisions (art. 19 of the Order) does not include all credits covered by art. 3.1 (b) MCD, even the order of the items included in the form is almost identical to that of the ESIS. This is probably explained by the fact that the Order was passed once the Proposal for the MCD had already been published. It could be held that the Spanish Form falls within the scope of art. 14.5 MCD. However, in practice the forms are not as illustrative as the legal framework requires. They show figures and contain the necessary warnings, but the language is not always as clear and comprehensible as one would hope. Plus a certain lack of uniformity, which may be down to the way interest rates are generally set in Spain, can mislead consumers. For example, in Spanish mortgage credits it is usual for the interest rate to be variable, indexed to the Euribor, upon which a percentage is added, but this percentage may be reduced if certain conditions are met (such as, *inter alia*, having your salary paid into the same bank, taking out a credit card or an insurance with them). Most banks include the general interest rate before reductions in the section of the Form that deals with interest, and the reductions may be specified at the end. Exceptionally, some banks (mainly foreign) include the interest rate taking into account all possible reductions in the section dedicated to the interest rate and then, at the end of the form, they specify that if certain conditions are not met, the interest rate will be higher. This obviously does not allow the consumer to compare offers easily and leads to confusion (typically, the consumer may believe that the second bank is offering a better rate). We doubt whether the ESIS solves this particular problem, and others of this style that may arise both in Spain and elsewhere.

The next step towards the credit agreement is the binding offer (art. 23 of the 2011 Order) that the client may request. This may be handed to the client at the same time as the FIPER, in which case they will be in a single document. The content of the binding offer is identical to that of the FIPER, except for the fact that it is produced once the appraisal of the property and the land registry checks have taken place, and

the creditworthiness assessment has been made. Also, the offer must expressly state that it is binding on the creditor and it must state its duration, which cannot be under 14 days. There is no longer a period during which the client cannot accept the offer and it is not unheard of that the client has been given the binding offer at the notary's office on the day when the transaction is completed. Nevertheless, it is the notary's obligation to check that the binding offer was given to the client in good time before the credit agreement is entered into and that the terms of the offer coincide with those of the notarised contract. If they do not, the client may demand the contract to be adapted to the terms of the binding offer. In any case, it seems to us that the time limits laid down by the Spanish legislation already comply with those provided for in art. 14.6. MCD¹⁴⁷

As already hinted, the final step towards completing a credit agreement – and the moment when the consumer is bound – takes place by signing a notarised deed, which will then be registered (exceptionally in the Spanish system, in our case there is no mortgage unless the deed is entered into the Land Registry). The notaries' functions at this stage are important, not only concerning the correctness of the documents before them, but also in order to make sure that the consumer has understood the terms of the agreement. Certainly, some notaries carry out this task very carefully, but this is not always the case and it undoubtedly was not in many instances during the property boom. The draft deed will have been available to the consumer for three days (five in Catalonia) at the notaries' office, but this still does not ensure that the client: a) takes the time to go and read it; and, b) understands between 50 and 80 pages of legal language. This raises the question as to why not standardise the actual agreement, and not only the pre-contractual information requirements.

On the other hand, it will be interesting to see what happens with the reflection period or right of withdrawal (art. 14.6 MCD), since in Spain the purchase of the property and the mortgage are signed before the notary the same day.

A rather quaint feature of Spanish legislation, as amended by Law 1/2013, is that, under certain circumstances, it requires a handwritten declaration to be included in the notarial deed whereby the consumer declares that adequate information has been given concerning the risks involved in the operation. This applies when the mortgage credit refers to "homes" or to the acquisition or maintenance of rights over land or

¹⁴⁷ In spite of this, it should be noted that, in comparison with the previous 1994 Order on transparency (Order 5 May 1994, BOE n. 112, 11 May 1994), the level of protection for consumers decreases, since up until 2007, when Law 41/2007 came into force, it was compulsory, with regard to mortgages under €150,253.03, for the bank to provide the binding offer, even if the client did not demand it, and it had to be signed by the client at least three days prior to entering into the credit agreement.

over existing or projected buildings (the similarity in the wording to art. 3.1 MCD leads to believe that *vivienda* should be understood to mean residential immovable property), when the borrower is a natural person and (a) the credit is designated in a foreign currency, or (b) as it includes floor and/or cap interest rates or similar schemes, or (c) it is linked to an interest rate fluctuation limitation instrument (such as a SWAP). The Bank of Spain has produced a standardised text that the notary shows the borrower so that it can be copied.¹⁴⁸ Needless to say, it is very extravagant to be handwriting anything in the usually formal environment of the notary's office and with all the tension involved in the entire operation. Plus, it is dubious whether this scheme will really guarantee that the debtor has understood the terms and conditions. And even if he or she has, perhaps there was no other option and therefore free consent may still be challenged (we are thinking of cases where creditors and consumers agree to modify the mortgage credit agreement in order to allow the debtor some breathing space; if an interest rate floor is imposed by the creditor, the stressed debtor may have understood, but still had no other option).

The Draft Bill (art. 5) is non-committal and simply delegates to the Ministry the task of developing the transparency requirements that it lays down, in very vague terms. The ESIS is not even mentioned, except in an ancillary manner in the article dedicated to loans denominated in a foreign currency (art. 10).

4) Does the Directive bring about significant changes with regard to tying and bundling practices (art. 12)?

It is generally understood that tying practices, although not expressly forbidden by Spanish legislation in this area (in fact, art. 12 of Order EHA/2899/2011 openly accepts them), are very rare in practice. Art. 8 of Law 2/1981 and art. 10 of Decree 716/2009 require the mortgaged asset to be insured against damages for the amount it was appraised. This is a requisite for the securitisation of mortgage loans, but since most banks wish to keep their options open in this respect, it is a general practice to demand such an insurance to be undertaken. However, there is no obligation to take

¹⁴⁸ The text is: "Soy conoedor de que mi préstamo hipotecario: ii(i) establece limitaciones [indicar cuál/es: suelos y/o techos] a la variabilidad del tipo de interés; i(ii) lleva asociada la contratación de un instrumento de cobertura del riesgo de tipo de interés [indicar cuál], y (iii) está concedido en la/s siguiente/s divisa/s [indicar cuál/es]. Además, he sido advertido por la entidad prestamista y por el notario actuante, cada uno dentro de su ámbito de actuación, de los posibles riesgos del contrato y, en particular, de que: a) el tipo de interés de mi préstamo, a pesar de ser variable, nunca se beneficiará de descensos del tipo de interés de referencia por debajo del [límite mínimo del tipo de interés variable limitado]; b) las eventuales liquidaciones periódicas asociadas al instrumento de cobertura del préstamo pueden ser negativas, y c) mi préstamo no se expresa en euros y, por lo tanto, el importe en euros que necesitaré para pagar cada cuota variará en función del tipo de cambio de [moneda del préstamo/euro]." Banco de España, *Guía de acceso al préstamo hipotecario*, annex IX, 75 (available at: http://www.bde.es/f/webbde/Secciones/Publicaciones/Folletos/Fic/Guia_hipotecaria_2013.pdf).

up the insurance that the creditor may provide. Having said this, it is usual for banks to offer a reduction in the interest rate if the client takes up the insurance policy provided by the bank or a subsidiary thereof. The same applies, in general, to life insurance, unemployment or default insurance, credit cards, salaries being paid into a bank account held at the bank, etc. Therefore, in general we are talking about bundling practices, not tying practices, even though in reality they may amount to the same for the consumer. We believe art. 12.4 MCD is worded in such a way that it allows the creditor to condition the concession of the credit to the fact that the consumer holds a default insurance or, as stated above, an insurance against damages to the property.

The Draft Bill (art. 7) expressly forbids tying practices, but it incorporates the exception provided for by art. 12.4 MCD and it delegates to the Bank of Spain the power to authorise practices defined in art. 12.3, and to the Ministry for the definition of financial products that may be tied to the loan (the terms are vague, but we imagine this refers to the possible exclusions as per art. 12.2).

5) 5. What changes does art. 17 entail with regard to the APRC? Is your system familiar with arrangements such as those referred to in art. 17, paragraphs 5 and 6?

The first four subsections of art. 17 are in essence already implemented by art. 31 of Order EHA/2899/2011, which, as already mentioned, was inspired by the Proposal for the Directive on mortgage credits.

This brought about a change with regard to the cost of maintaining a specific account to service the credit, which must be included in the APRC. This is, of course, a general practice and art. 17 MCD allows for a charge to accrue. The solution given by the Bank of Spain, prior to the already mentioned Order EHA/2899/2011 (which came into force on 29 April 2012) and the Circular of the Bank of Spain 5/2012, 27 June, was to understand that no commission could be charged for opening or maintaining this type of account when the bank required it to service the credit.¹⁴⁹ In the light of the new provisions, the Bank of Spain has held that such commissions can be charged as long as the client is informed before entering into the agreement of the requirement of a tied account and of the part of the total cost corresponding to its maintenance; it is also required that both aspects are included in the credit agreement and that the bank is barred from modifying the commission for the duration of the credit agreement.¹⁵⁰ In

¹⁴⁹ Bank of Spain, *Memoria del Servicio de Reclamaciones*, 2010, 120. Available at: <http://www.bde.es/f/webbde/Secciones/Publicaciones/PublicacionesAnuales/MemoriaServicioReclamaciones/10/MSR2010.pdf>

¹⁵⁰ Bank of Spain, *Memoria del Servicio de Reclamaciones*, 2012, 353. Available at: http://www.bde.es/f/webbde/Secciones/Publicaciones/PublicacionesAnuales/MemoriaServicioReclamaciones/12/MSB_2012.pdf

all respects, it would have been better for the consumer if the domestic norm prior to the 2011 Order had stood.

Arrangements such as those referred to in art. 17.5 are not usual in Spain. The interest rate is set from the start for the duration of the credit agreement. Even if there are different interest periods (for instance, a fixed rate for the first five years, followed by a variable rate), the parties agree upon the rules of the game in advance. It could even be held that there is no agreement on the price of the credit if the interest rate had not been decided from the beginning and for the duration.

We believe that the only substantial change will derive from the implementation of art. 17.6 MCD, with regard to the inclusion of potential variations of the APRC in the ESIS where the interest rate is not fixed (i.e. the usual case for Spanish mortgage credits).

The APRC is not dealt with directly by the Draft Bill. It only refers to it with regard to intermediaries.

- 6) The **creditworthiness assessment** needs to yield a positive result. Otherwise, the credit cannot be granted (art. 18). Has this been transposed by means of prudential norms or by civil law norms, or both? What are the consequences of infringing this rule in your legal system (i.e. what happens if the credit has been made available in spite of a negative creditworthiness assessment)? And what are the consequences for the creditor if the consumer provides false or incomplete information?

Arts. 18.4 and 20.3 suggest that the creditor's negligence in carrying out the assessment or in demanding the relevant information leads to the credit being maintained, which would probably entail that, even if domestic law attaches nullity to the infringement of imperative rules, in this case the Directive considers that maintaining the validity of the credit in the consumer's best interests. Nullity is certainly a bad solution for the consumer, but it remains to be seen if being tied to a loan he probably cannot afford is a good result. This difficult question is not solved by the Directive, which seems to only offer a solution through sanctions and public disclosure thereof (art. 38).

In spite of art. 18.3, art. 19 grants **property valuation** an important role in the context of the creditworthiness assessment. Does your legal system allow internal appraisal of property, i.e. that the creditor carries out the valuation, albeit under certain conditions?

As pointed out elsewhere,¹⁵¹ the Catalan government implemented some measures of the MCD for this region by means of Law 20/2014, 29 December, which amended the Catalan Consumer Code 2010. The goal of the act was to protect consumers throughout the mortgage loan cycle, i.e. it covered the advertising of mortgage lending products, the pre-contractual stage, the conclusion of the contract and the entire contractual phase. Notwithstanding the fact that some of these rules are no longer in force due to a constitutional complaint lodged by the Spanish government before the Spanish Constitutional Court¹⁵², the Catalan lawmaker implemented the original wording of the MCD as far as the creditworthiness assessment is concerned, thus prohibiting lenders located in Catalonia to grant the credit should this assessment be negative (art. 263-2). This legal framework, which is one of the possibilities the Spanish lawmaker could adopt when implementing the MCD, raises a number of relevant questions related not only to consumer law rules, but also to contractual law rules and access to housing.

The major issue at stake¹⁵³ is to what extent the validity of the contract may be affected if the lender grants the loan in spite of the creditworthiness assessment being *negative* (in the wording of the Catalan Consumer Code or the prospective wording of the Spanish law implementing the MCD) or “the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are not likely to be met in the manner required under that agreement” (in the current wording of the MCD). There are several approaches to such issue.

The first option would be to render the mortgage loan void. In spite of the administrative nature of the Catalan Consumer Code, the breach of administrative rules could lead to the mortgage loan being rendered void *on the basis of art. 6.3 of the Spanish Civil Code*,¹⁵⁴ as some Supreme Court decisions have already done (*11 June 2010*¹⁵⁵, *19 November 2009*¹⁵⁶ and *10 October 2008*¹⁵⁷).

¹⁵¹ See above (introduction to Part II) and see also S. Nasarre Aznar; H. Simón Moreno, ‘Un paso más en la protección de los deudores hipotecarios de vivienda: la Directiva 2014/17/UE y la reforma del Código de Consumo de Cataluña por Ley 20/2014’ (2015) 139 *Revista de Derecho Bancario y Bursátil* 11-55.

¹⁵² See above fn. 134.

¹⁵³ That is, leaving aside the actual parameters that should be taken into account when carrying out a creditworthiness assessment. In this respect, it is relevant to note that the EBA Guidelines, 1 June 2015 2015 have already come into force, but are not very concrete either. Text available at: <https://www.eba.europa.eu/documents/10180/1092161/EBA-GL-2015-11+Guidelines+on+creditworthiness+assessment.pdf>

¹⁵⁴ “Acts contrary to mandatory and prohibitive rules shall be null and void by operation of law, save where such rules should provide for a different effect in the event of violation”.

¹⁵⁵ ECLI:ES:TS:2010:3061.

¹⁵⁶ ECLI:ES:TS:2008:6456.

¹⁵⁷ ECLI:ES:TS:2008:5227.

Two Supreme Court decisions dated 22 February 2013 and 18 June 2012¹⁵⁸ held that the annulment of a loan contract for breach of the Law on Usury 1908 affects not only the collateral (i.e. the mortgage), but also the contracts that have been concluded on the basis of such mortgage loan, such as the sale contract by which the consumer has acquired the dwelling. The same takes place in consumer credit agreements that finance the purchase of goods or services: both (the sale contract and the consumer loan) are deemed to be the same economic operation.¹⁵⁹ In these cases, the consumer would be entitled to claim the taxes paid in consideration of the act declared void (i.e. the sale contract) to the competent public authority, such as the stamp duty (art. 57.1 of Royal Decree Legislative 1/1993, of 24 September) or the value added tax (art. 80.dos Law 37/1992 of December 28). In any event, the borrower would be entitled to claim responsibility for damages to the lender.

It is true, however, that the wording of the Directive suggests that maintaining the validity of the credit is the best solution for consumers. Therefore, another option would be for the Spanish lawmaker is to take the regulation already in force as a starting point. The consumer's creditworthiness assessment is already provided for under Spanish law, in particular in art. 29.1 of Law 2/2011, 4 March, on sustainable economy, and in art. 18 of Order EHA 2899/2011, 28 October, on transparency and protection of clients of banking services (the Circular of the of Bank of Spain 3/2014 established that more stringent granting rules should be adopted when dealing with multicurrency mortgages). The 2011 Order, however, establishes that the creditworthiness assessment shall be performed without prejudice to the freedom to contract which, in its substantive aspects and with the limitations that may derive from other legal regulations, must preside over the relations between the credit institutions and the clients. Art. 18 of the Order also stated that the creditworthiness assessment would not, under any circumstances, affect the full validity and effect of the agreements, and neither would it imply the creditor's liability for the client's lack of performance of the obligations under the credit agreement. This provision allows the parties to conclude the mortgage loan on the basis of art. 1255 CC¹⁶⁰ regardless of the result of the creditworthiness assessment, so non-compliance with such obligation by lenders (the one imposed by Directive 2014/17/EU) would not have an impact on the

¹⁵⁸ ECLI:ES:TS:2013:867 and ECLI:ES:TS:2012:5966.

¹⁵⁹ Supreme Court Decision 4 March 2011 (ECLI:ES:TS:2011:1083); Madrid Provincial Court 5 December 2011 (AC 2012\212); Tarragona Court of Appeal 3 November 2005 (JUR 2006\91839).

¹⁶⁰ The contracting parties may establish any covenants, clauses and conditions deemed convenient, provided that they are not contrary to the laws, to morals or to public policy.

validity of the contract. Taking into account the lenders' behaviour during the housing boom, such legal framework did not have any deterrent effect.¹⁶¹

Insofar as art. 18 of the 2011 Order expressly allows the credit agreement to be entered into despite a negative creditworthiness assessment, it should be deemed inconsistent with the MCD. The goals of the Directive, e. g. the prevention of household over-indebtedness, which has led to severe social and economic consequences in Spain (see above, Part I), are not consistent at first blush with maintaining the validity of mortgage loans disbursed in breach of art. 18 MCD. Taking as an example the recent amendment of art. 83 RDL 1/2007, its original wording stated that unfair terms should be legally null and void and shall be considered ineffective and that the Judge declaring the nullity of said terms should draw up the contract and exercise moderating powers with regards to the rights and obligations of the parties. This provision was sharply criticised in relation to the treatment of default interest rates (see above), as judges reduced the amount thereof instead of prohibiting lenders from claiming any compensation at all. The Spanish Law 3/2014, 27 March, which implemented Directive 2011/83/EU, changed the wording of art. 83 RDL 1/2007 by establishing that unfair terms shall be null and void and shall not be revised later by a judge, in line with the ECJ decision 14 June 2012.¹⁶² Otherwise the deterrent effect of consumer law rules would be non-existent. Taking this example as a starting point, if the Spanish lawmaker aims to truly protect consumers when transposing the MCD, it has been held that the most suitable option would be to render the mortgage loan void due to the existence of a public interest or general principle of law that deserves such protection, i.e. consumer protection.¹⁶³ Otherwise over-indebtedness would not be avoided.

However, other options may be considered, in order to maintain the validity of the contract, as nullity could be detrimental to the consumer's interest (see below), and we believe such is the idea underlying the provision in art. 18.4 MCD. In addition, it must be taken into consideration that the parties are free to conclude a contract or not, which constitutes a manifestation of the freedom of contract, a general principle of European contract law.¹⁶⁴ Thus, the implementation of the MCD should reconcile

¹⁶¹ As pointed out by K.J. Albiez Dohrmann, 'Opciones legales para la transposición pendiente de la Directiva 2014/17/UE' (2016) 3 *Revista de Derecho Privado* 62.

¹⁶² Case C-618/10.

¹⁶³ It was the opinion held by S. Nasarre Aznar; H. Simón Moreno, 'Un paso más' 35 ff.; also by F. Zunzunegui, 'Evaluación de la solvencia en la concesión de créditos hipotecarios' (2014) 16 *Teoría y Derecho. Revista de Pensamiento Jurídico* 151, argues in relation to the provision of the MCD that the mortgage loan should be rendered void.

¹⁶⁴ J. Basedow, 'Freedom of contract in the European Union' (2008) 6 *European Review of Private Law* 905 ff. At 921; and H. Simón Moreno, 'Disposiciones generales', in A. Vaquer Aloy, E. Bosch Capdevila, M. Paz Sánchez González (eds.), *Derecho europeo de los contratos: libros II y IV del marco común de referencia* (Barcelona: Atelier, 2012), vol. 1, 2012. 77 ff.

consumer protection rules with the freedom of contract, as the current Spanish legal framework does.¹⁶⁵ As a result, intermediate solutions may be adopted so as to maintain the validity of the contract, on the one hand, and to protect consumers' rights by imposing some penalties to lenders that could be effective from a cost-benefit analysis point of view, on the other.

Recital 58 MCD supports the idea that if the creditworthiness assessment has been incorrectly conducted due to the lender's fault, the lender shall not be entitled to terminate the credit agreement. However, the Directive does not shed light on several questions, in different scenarios.

- a) If consumers have delivered all the information required by lenders in an accurate manner, but the creditworthiness assessment has not been carried out properly, e.g. the lender has not required all the information needed in advance or the assessment has been done without following the standards, this could lead to an initial positive assessment that would be actually negative had it been carried out properly. Lenders, as already pointed out, cannot put an end to the credit agreement. Would consumers, however, be entitled to terminate the credit agreement after the conclusion of the contract in such circumstances? In our view, consumers would be entitled to terminate the credit agreement on the basis of either fraudulent misrepresentation (art. 1269 Spanish CC), had the lender intentionally induced the consumer to conclude the mortgage loan, or the rules of mistake (art. 1266 Spanish CC), had the lender simply been negligent when carrying out the assessment. This possibility would be allowed by art. 20.3 MCD. The consumer might also claim compensation, but it is difficult to envisage scenarios where damages would be high enough to set-off the obligation to return the loaned capital, in which case the consumer's position would not be ideal. On the other hand, partial nullity of the credit agreement, whereby the principal would be reduced to the amount that the consumer could reasonably be expected to pay back under the terms of the loan, could be a solution, with a powerful deterrent effect, albeit preventing unjust enrichment by the consumer.

But still other solutions may be envisaged.

An administrative penalty or sanction may be imposed on lenders. This was the solution adopted by the Catalan Consumer Code. The breach of the above-mentioned duty was deemed to be a "serious infringement" by art. 332-3.1 c)

¹⁶⁵ See E. Muñiz Espada, 'La directive "crédit hypothécaire"' (2015, mars-avril) 2 *Revue de Droit Bancaire et Financier* 104, who argues that the current wording of Directive 2014/17/EU goes against the freedom of contract and the freedom of business.

and the penalty could amount to up to €100,000 (art. 333-1 b). The Andalusian Law 3/2016 also provides for penalties in the event of infringement of the provisions thereof.¹⁶⁶ As a matter of fact, this is the solution adopted by art. 34.1 of Spanish Law 16/2011, 24 June, on Consumer Credit Contracts, in relation to the duty of lenders to assess the borrower's creditworthiness (art. 14). Another form of penalty imposed by supervisors could be devised by means of the rules on loan provisioning.

Second, some lender's faculties may be limited, by losing the right to declare the early termination of the mortgage loan, or the right to claim the interest rate or the default interest rate. This is the approach taken by the French art. L341-27 *Code de la consommation*,¹⁶⁷ as amended by the Ordonnance n°2016-351, 25 March 2016, and it has been defended by scholars,¹⁶⁸ as administrative penalties are not genuine deterrents with preventive effect. It is also considered an efficient measure by the World Bank.¹⁶⁹ However, the ECJ decision 27 March 2014¹⁷⁰ pointed out in relation to the transposition in France of the Consumer Directive 2008/48/EU –which established as a penalty for the non-performance of the creditworthiness assessment the forfeiture of the entitlement to contractual interest- that any measure should be effective, proportionate and dissuasive, so a cost-benefit analysis should be carried out before the implementation of any such measure.¹⁷¹

¹⁶⁶ Law 3/2016, 9 June, art. 20 and final provision 2.

¹⁶⁷ "Peut être déchu du droit aux intérêts dans la proportion fixée par le juge, jusqu'à un montant ne pouvant excéder, pour chacun des manquements énumérés ci-après, 30 % des intérêts et plafonné à 30 000 euros, le prêteur qui accorde un crédit : 1° Sans avoir fourni à l'emprunteur les explications adéquates permettant à celui-ci de déterminer si le contrat de crédit et les éventuels services accessoires sont adaptés à ses besoins et à sa situation financière à partir des informations prévues à l'article L. 313-11 ; ou 2° Sans avoir, en méconnaissance de l'article L. 313-12, mis en garde l'emprunteur, sur le risque spécifique que peut induire pour lui le contrat compte tenu de sa situation financière, lorsqu'un tel risque a été identifié ; ou 3° Sans avoir respecté les conditions prévues aux articles L. 313-16 à L. 313-18, applicables en matière d'évaluation de la solvabilité de l'emprunteur. Le prêteur qui accorde un crédit sans réaliser l'étude de solvabilité mentionnée à l'article L. 313-16 peut être déchu du droit aux intérêts, en totalité ou dans la proportion fixée par le juge". The World Bank, *Responsible Lending Overview of Regulatory Tools* (October 2013). Available at <http://documentos.bancomundial.org/curated/es/2013/10/18639527/responsible-lending-overview-regulatory-tools>

¹⁶⁸ See M. C. Mayorga Toledano, 'Obligaciones de la entidad de crédito en la concesión de crédito adecuado a la solvencia y capacidad de endeudamiento del cliente', in A. I. Berrocal Lanzarot; C. Callejo Rodríguez; J.T. Raga Gil; M.S. Flores Doña (eds.), *El Préstamo Hipotecario y el Mercado del Crédito en la Unión Europea* (Madrid: Dykinson, 2016) 353 ff.

¹⁶⁹ The World Bank. *Responsible Lending. Overview of Regulatory Tools*, October 2013, 46. Available at: <http://documentos.bancomundial.org/curated/es/2013/10/18639527/responsible-lending-overview-regulatory-tools>

¹⁷⁰ Case C - 565/12. *Le Crédit Lyonnais SA v Fesih Kalhan*.

¹⁷¹ The Court stated that the penalty in question cannot be regarded as genuinely dissuasive if the

It would also be possible to attach negative consequences in the event of insolvency proceedings, so that the mortgage loan lost its special preference and became a subordinated claim, to be paid in the last place (together with credits to family members, for instance) (arts. 89 ff. Spanish Insolvency Law 22/2003, 9 July).

Another solution could be the impossibility of registering the mortgage, which under Spanish law would amount to the lender losing the collateral (and the credit standing for the agreed duration at the lower mortgage loan interest rates). However, this would place a surveillance obligation upon Land Registrars that might surpass the role they are called to carry out. In this line, it has been suggested that the lender should lose any added securities and personal guarantors should be deemed discharged; this is probably a good path to explore, since quite often irresponsible lending appears hand in hand with excessive guarantees that the creditor demands.¹⁷²

- b) If consumers deliberately provide inaccurate or false information at the time when the creditworthiness assessment is made or intentionally do not provide information that would have led to a negative assessment of creditworthiness, lenders shall be entitled to terminate the credit agreement on the basis of the rules of fraudulent misrepresentation or mistake (arts. 1266 and 1269 Spanish CC), which again would be in line with art. 20.3 MCD. In this case, the consumer would not be entitled to terminate the credit agreement, as this would infringe the *venire contra factum proprium* principle (no-one may act against his own previous conduct).¹⁷³
- c) Another scenario is the following: both lender and consumer are aware of the fact that the latter is not likely to pay back the mortgage loan, as shown by the creditworthiness assessment. Would the parties be able to conclude such agreement voluntarily without further negative consequences? From our point of view, the main purpose of consumer law is the achievement of an adequate *consumer* protection. In this sense, after the provision of pre-contractual information and the creditworthiness assessment consumers should be informed enough to face the consequences of the non-performance of the

amounts which the creditor is likely to receive following application of the penalty are not significantly lower than those which it could have received if it had complied with its obligation. If the penalty of forfeiture of entitlement to interest is weakened, or even entirely undermined, the penalty will not be genuinely dissuasive, contrary to the provisions of Directive 2008/48.

¹⁷² Andalusian Law 3/2016, 9 June, art. 13.2 requires guarantors' creditworthiness assessment to be carried out in the same terms as for the borrower.

¹⁷³ See H. Simón Moreno, 'El ejercicio de los derechos: influencia de la reforma del Título preliminar del Código civil de 1973-74 y la pervivencia de su ideología tras el proceso constitucional', in J. Rams Albesa (ed.), *Tratado de Derecho Civil, Normas Civiles y derecho subjetivo* (Madrid: Lustel, 2014), vol. 2, 406 ff.

mortgage loan, so the question is whether the parties should be prevented from agreeing on assuming the risk of the debtor's default. We believe that if the law allowed such agreement without further consequences, the main goal of the MCD in this respect, i.e. providing a high level of consumer protection in the area of credit agreements relating to immovable property, would be undermined. Moreover, we believe such a rule would be inconsistent with art. 18 MCD.

Lastly, the transposition of the MCD will imply far-reaching changes in relation to housing access, as it could prevent many households from accessing mortgage loans, and ultimately, home ownership, as the Council of Mortgage Lenders pointed out in 2011.¹⁷⁴ The measures laid down the MCD are likely to increase the transaction costs lenders face, which ultimately will be paid by consumers. As a matter of fact, creditors opposed the introduction of such an obligation to assess creditworthiness as it could lead to a potential increase in litigation.¹⁷⁵ This measure is likely to have a negative impact in countries with limited alternative forms of tenure to homeownership, such as Spain (see above), where tenancy is not a real alternative to homeownership. Only the Autonomous Community of Catalonia has introduced new land tenures so as to make housing access more affordable through its Law 19/2015. These are the so-called temporary ownership (*propiedad temporal*) and shared ownership (*propiedad compartida*), which provide tenure security as well as avoiding consumer over-indebtedness. However, as our readers are probably expecting to learn by now, this Catalan act has also been challenged by the Spanish caretaker government before the Constitutional Court concerning the provisions on temporary ownership.¹⁷⁶

The Draft Bill refers vaguely to the creditworthiness assessment when delegating to the Ministry the development of certain aspects, including “adequate attention to the

¹⁷⁴ “An obligation to deny credit on this basis alone would result in the unjustified exclusion of borrowers from credit, for example, young professionals with good prospects and first time buyers with a third party guarantee. Despite the assurance in recital 25 we are concerned that it would also suggest that there was a ‘right to credit’ based on a positive creditworthiness assessment which could lead to legal uncertainty and litigation”, and also that “First and foremost, a legal obligation to deny a credit in the event of a negative creditworthiness assessment would result in increased potential lender liability and an increased risk of litigation, where subsequent interpretation by national courts is likely to penalise lenders. This would ultimately result in higher interest rates for consumers, as lenders are forced to price this risk into their products”. Report available at www.cml.org.uk.

¹⁷⁵ Preliminary EBF position on the Proposal for a Directive on credit agreements relating to residential property, Brussels, 31 January 2012: “Although the possibility to refuse to grant credit is already the case in practice the EBF takes the view that given the long - term contractual relationship between the lender and the borrower, it should not be made a legal obligation as this could lead to a potential increase in litigation where national courts would most likely be required to rule on the matter decades after the credit was actually granted”, 4. Available at <http://www.ebf-fbe.eu>.

¹⁷⁶ Tribunal Constitucional, 24 May 2016 (BOE n. 134, 3 June 2016, p. 36605; BOE-A-2016-5336)

borrower's income in comparison to the obligations undertaken due to the loan" (art. 5.1.e).

With regards to property appraisals, Law 41/2007 (arts. 3 and 3.ter 3.bis Law 2/1981) aimed to regulate the behaviour of real estate appraisers, and RD 716/2009, 24 April, established that all properties should be appraised before issuing covered bonds or securitising (art. 8). As this legal framework was called into question by the Spanish ombudsman,¹⁷⁷ Law 1/2013 amended Law 2/1981 once again. It imposed on appraisal companies the duty to have appropriate mechanisms to promote the independence of the valuation activity and avoid conflicts of interest, if at least 10% of the appraisal company's total income in a given period of time (to be established by regulation) derives from a business relationship with a credit institution or a group of credit institutions, provided that such credit institution or group has issued mortgage securities. The Bank of Spain Circular 3/2014, 30 July,¹⁷⁸ on credit institutions and credit rating firms and services, has introduced new mechanisms so as to achieve more independence in appraisals, such as the minimum content of the internal code of conduct that appraisal companies with a close commercial relationship with a credit institution (the already mentioned 10% of income proceeding from one client), and credit institutions that provide appraisal services, must have. Such legal framework seems to have increased the independence of appraisers: statistics from the Bank of Spain showed that appraisers linked to financial institutions were in charge of up to 21% of all appraisals in 2011, whereas it accounted for 44% the previous year.¹⁷⁹ Indeed, there were 58 appraisal entities in 2011, of which a dozen were linked to financial entities, mainly savings banks. The number of such entities declined to 7 in 2012¹⁸⁰ and to only 3 in 2013¹⁸¹ (there were 36 active appraisal companies).

It is therefore fair to say that nowadays in Spain there is a specific legal framework for appraisal companies, appraisers are monitored and must meet some compulsory requirements to operate, they are supervised by a public entity (the Bank of Spain) and insurance is compulsory. Probably this is why the Draft Bill (art. 5.1.f) only mentions appraisal in vague terms, delegating to the Ministry of Economy the task of laying down mechanisms that guarantee independence and prevent undue influence and conflicts of interest. We believe the job is considered to be already done.

¹⁷⁷ DEFENSOR DEL PUEBLO, *Crisis económica y deudores hipotecarios: actuaciones y propuestas del Defensor del Pueblo* (January 2012), 23.

¹⁷⁸ BOE n. 185, 31 July 2014; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-8189.

¹⁷⁹ Source: Diario Abierto 25 January 2012, *El Banco de España logra que las sociedades de tasación dependan menos de la banca* (<http://www.diarioabierto.es/70079/banco-espana-sociedades-tasacion-banca>).

¹⁸⁰ Bank of Spain, *Boletín Económico* (July-August 2013) 153. Available at www.bde.es.

¹⁸¹ Bank of Spain, *Boletín Económico* (July-August 2014) 114-115. Available at www.bde.es.

- 7) The number of consumers trapped by **foreign currency loans** varies throughout the EU. However, it is probably fair to say that most consumers did not understand the product they were acquiring, hence why transparency and financial education are essential in this area. The Directive demands that there is in place an exchange rate limitation arrangement or that the consumer has the opportunity to convert to a more familiar currency (art. 23). Does complying with these requisites solve the problems experienced by consumers in your country?

As stated above, foreign currency mortgages have not been generalised in Spain (in fact, it was often UK banks offering them), but the outcome of the relatively few credits denominated in a foreign currency has usually been fatal for the borrower. In the typical scenario, a consumer paid a fair amount of money (between €4,000 and €10,000) to “financial advisors” who recommended a certain foreign currency mortgage. The variation in the exchange rates led to the capital owed to grow exponentially. There was always the possibility to convert to another currency, but the commission for doing so was astronomic. At this stage, the “financial advisors” had disappeared from the face of the earth and yet the bank was covered by the fact that the client had received independent advice. It was and still is a dead end for the consumer, unless the judicial path is followed. It is obvious that the consumer required more information, but it is to be seen whether the ESIS and art. 23 MCD attain this result. We believe that, in the Spanish context, it is rather a question of financial education, and the common sense notion that if something is much cheaper than elsewhere, there may be a catch to it. Plus, one of the main problems was the commission charged for the currency conversion, which the MCD does not address, leaving the matter, in our view, to the general rules on unfair terms.¹⁸²

The Draft Bill does not address this matter either. In art. 10 it basically copies art. 23 MCD, opting for the alternatives in currency conversion when consumers are involved, and adding that where the loan is not granted to consumers, the possibility of conversion may be substituted or complemented by instruments that limit the rate of exchange risk.

¹⁸² A Supreme Court Judgment dated 30 June 2015 (ECLI:ES:TS:2015:3002) considered that the client, involved in property transactions, did not operate as a consumer in that case, but that the Mifid rules applied due to the complex nature of the product. Interestingly, although the bank had not complied with the Mifid requirements, the court held that the client’s expertise (he was a lawyer with knowledge on multicurrency mortgages) barred the annulment of the contract on the grounds of mistake.

- 8) In your view, is art. 24 allowing **variable interest rates** dependant on indexes set by a small group of creditors (borrowing rate among them) or would this not be an “objective index”? Has this kind of index caused problems in your country? Do the provisions in art. 27 improve consumer protection in your country?

With regard to art. 24 MCD, it should be said that most variable interest rates in Spain are set against the Euribor and, therefore, colluding practices aside, the index can be considered objective. However, the old savings banks¹⁸³ used their own index, which was the average rate of interest for mortgage loans granted in excess of three years for the acquisition of residential property, and together with this index other exceptional ones subsisted until 1 November 2013, when the Bank of Spain ceased to publish them and they were substituted by an average interest rate for mortgage loans in excess of three years for the acquisition of residential property granted by Spanish banks.¹⁸⁴ Those indexes were typically higher than the Euribor, but usually no additional percentage was added to them or it was much lower than the one added to the Euribor. When the Euribor dropped, customers began to wonder why their mortgage repayments were not dropping as well, and some challenged these indexes successfully, on the grounds of them being unfair terms, since a small number of creditors were involved in setting them. Where the challenge is upheld, the credit remains interest free.¹⁸⁵ As of 1 November 2013, loans subject to the now extinct indexes –and not successfully challenged on this account - apply whatever substitute index was foreseen in the contract, which in a number of cases has led to the loan turning into a fixed interest loan, since the agreed upon ultimate substitute index was often the last interest rate applied. Typically, this would mean the fixed interest rate is between 3.5 and 4.5%, thus much higher than for existing mortgages indexed to the Euribor and higher even than new mortgages at a variable interest, but probably still a reasonable fixed interest rate. Where the contract did not provide for a solution, the new index published by the Bank of Spain applies, with an added percentage that is calculated according to the date of the loan and the difference between the old index and the new one.¹⁸⁶

¹⁸³ Since 2008, and due to the need to restructure the Spanish financial and banking system, most small savings banks have been absorbed by banks or have merged to create new banks or have converted the old structure into a regular banking company. This has led to an important reduction in the number of branches and important staff cuts.

¹⁸⁴ See Order EHA/2988/2011, art. 27; Circular of the Bank of Spain 5/2012, annex 8, and Law 14/2013, 27 September, Additional Provision 15 (BOE n. 233, 28 September 2013).

¹⁸⁵ A quite comprehensive list of judgments declaring these indexes unfair and therefore void, including one by a Basque Provincial Court (SAP Álava 10 March 2016, JUR 2016\59148), is available at: <http://www.irphstop.plazan.net/es/epaitegiak/>.

¹⁸⁶ The Bank of Spain provides an application to calculate it: http://app.bde.es/gnt/clientebanca/calculo_diferencial.jsp

Quite rarely, some mortgage loans included as a substitute index the average lending rate of as little as five lenders. When it came to apply it, three or four of these lenders had disappeared and therefore the substitute index was deemed non applicable. We do not know of cases where this may have been a problem.

The scenario described concerning the old indexes may well unfold again if the plans to replace Euribor by a different index, due to colluding practices and instability, are actually carried out.

In any event, art. 11 of the Draft Bill basically incorporates art. 24 MCD and, once again, it delegates to the Ministry the power to establish the official interest rate indexes that may be agreed upon by the parties (it is not clear whether the idea is that no other indexes are accepted).

9) Do provisions on **early repayment** laid down by art. 25 MCD improve consumer protection in your legal system?

As for early repayment, Spanish legislation stems from the idea that partial or total discharge prior to expiry of the credit agreement is possible, because practically all mortgage credit agreements include this possibility; if this were not the case, the creditor's consent would be required.¹⁸⁷ However, there could be an exception to this concerning mortgage loans over homes where the borrower is a natural person or where the borrower is a certain type of small company.¹⁸⁸ Probably an express provision allowing early repayment regardless of the terms of the contract is required to adequately transpose the MCD. The Draft Bill (art. 13) correctly addresses the matter.

All the information forms and the binding offer mentioned above demand specification of the conditions and commissions, if any, that may apply to early repayment, thus taking for granted that the possibility thereof is agreed upon in the contract.

The commissions are capped, for credit mortgages on homes entered into by natural persons or certain small enterprises, since Law 41/2007 came into force, at 0.5% of the discharged capital if the discharge takes place during the first five years, or 0.25% if it occurs later. Interest risk compensation to the creditor cannot be charged if the interest rate is variable and is revised every 12 months or more often (as occurs in the vast majority of cases); otherwise, the law lays down systems to calculate the actual loss that early repayment has caused the creditor. Probably these provisions are in line

¹⁸⁷ Bank of Spain, *Guía de acceso al préstamo hipotecario* (2016) 45, available at:

http://www.bde.es/f/webbde/Secciones/Publicaciones/Folletos/Fic/Guia_hipotecaria_2013.pdf

¹⁸⁸ Law 41/2007, art. 7, implies that in these cases total or partial early repayment should be accepted, even if no agreement to this effect was included in the contract. However, this rule is not highlighted in the Bank of Spain's 2016 *Guide* (see previous fn.).

with the MCD, but the scope thereof should be broadened. The Draft Bill (art. 13) simplifies the rules setting the cap on compensation to the creditor and applies them to all credits covered by the Draft Bill.

10) Are there any practices or rules in your country that may interfere with the right to enforce recognised to the creditor by art. 26? In the light of your mortgage/security system, how relevant is the provision laid down by art. 26.2 (i.e. if applicable, when is the price for auction or sale set)?

According to some studies,¹⁸⁹ the Spanish mortgage enforcement procedure (arts. 681 ff. of the Law of Civil Procedure; hereinafter, LEC) is one of the fastest in Europe, averaging 10 months between initiation of the proceedings and adjudication of the property following the auction.¹⁹⁰ Prior to Law 1/2013, proceedings could be started upon the first monthly repayment default, and defences were radically limited even in comparison with the general enforcement procedures (in essence, the only defences available were that the credit or the mortgage had been terminated beforehand or that the calculation of the total amount was erroneous). Following the ECJ *Aziz* case (14 March 2013), the Spanish legislature introduced the possibility to allege unfairness of contractual terms as a defence, as long as these were the grounds upon which enforcement was sought or they determined the amount claimed (art. 695 LEC). This means, for instance, that an unfair acceleration clause or an unfair interest rate floor or default interest may amount to a successful defence; the former, if unfairness were upheld, would lead to termination of the proceedings; the latter, to a new calculation of the amount claimed.

With regard to acceleration clauses, the same Law 1/2013 provided that no mortgage credit enforcement proceedings under arts. 681 ff. LEC can be initiated unless a default of at least three monthly repayments (or equivalent amount) has occurred, insofar as it was thus agreed in the contract and regardless of the fact that the borrower is a consumer or not (art. 693 LEC). This has raised the issue as to whether acceleration contractual terms providing for early termination upon default of one monthly

¹⁸⁹ P. Kenna; L. Benjaminsen; V. Busch-Geertsema; S. Nasarre-Aznar, *Pilot project - Promoting protection of the right to housing - Homelessness prevention in the context of evictions*, European Commission (2016), 69.

¹⁹⁰ A 2007 study by the European Mortgage Federation (EUROPEAN MORTGAGE FEDERATION (2007). Study on the Efficiency of the Mortgage Collateral in the European Union, EMF Publication, which we could not access – broken link) stated that the average duration of the specific mortgage enforcement procedure in Spain was between 7 and 9 months, according to Miguel García-Posada and Juan S. Mora-Sanguinetti, authors of the Bank of Spain Study *El uso del concurso de acreedores en España*, available at:

<http://www.bde.es/f/webbde/SES/Secciones/Publicaciones/InformesBoletinesRevistas/BoletinEconomico/12/Dic/Fich/be1212-art3.pdf> However, this obviously depends on the particular court's backlog and on the creditor's interest in moving the procedure forward.

repayment (which were the norm prior to Law 1/2013) should be deemed to bar the creditor from the privileged mortgage enforcement procedure and also from any other form of enforcement grounded on early termination, even if the acceleration clause has not been applied by the creditor, provided that the court considers the clause to be unfair.¹⁹¹ Leaving this aspect aside, the truth is that in 2007 and 2008, banks foreclosed upon one or two monthly repayment defaults; instead, at present it is usual for them to wait well in excess of a year.

On the other hand, different courts have terminated enforcement proceedings when the creditor has not proved that, prior to seeking the court's assistance, it offered the client to restructure the loan or cancel the debt in exchange for transfer of the mortgaged property (*datio in solutum*) as per RDL 6/2012 (that is, if the personal and economic requirements were met and the creditor had adhered to the Code of Good Practices that said piece of legislation provides for).¹⁹² Practically all Spanish banks have adhered to the Code.¹⁹³

Finally, two Catalan provisions must be taken into account.

First, art. 132-4.3 of the Consumers Code, as amended by Law 20/2014, provides that before initiating court procedures to enforce a mortgage credit, the parties must try to attain a negotiated solution by means of mediation (which, in reality, is intermediation carried out by the Catalan Housing Agency, by delegation of the Catalan Consumers Agency). Enforcement proceedings can only be initiated if no agreement has been reached in three months. Art. 132-4.3 of the Consumers Code is one of the provisions included by Law 20/2014 that the central government challenged before the Constitutional Court,¹⁹⁴ on the grounds of lack of competence, but it currently applies, since the Constitutional Court decided to lift the suspension thereof because it

¹⁹¹ This issue has reached the ECJ. In its Decisions 11 June 2015 (C-602/13) and 8 July 2015 (C-90/14) it clearly states that the fact that an acceleration clause deemed unfair by the court has not been applied immediately (i.e. the creditor did not initiate proceedings as soon as default of one or two monthly repayments occurred) does not impede the court from extracting all the consequences of the declaration of unfairness. This should entail, we believe, that the clause is eliminated from the contract and, therefore, the creditor can only claim for the monthly repayments that the debtor has failed to meet. However, the Spanish Supreme Court, in its judgment of 18 February 2016, does not share this view and even tries to find aspects in the specific mortgage enforcement procedure that are beneficial for the consumer. Some authors share the conclusion; see A. Carrasco Perera, 'Ejecución hipotecaria instada sobre la base de una cláusula de vencimiento anticipado que se reputa abusiva, o cada día un poco más cerca del abismo', *Gómez-Acebo & Pombo*, December 2015, available at: <http://www.gomezacebo-pombo.com/media/k2/attachments/ejecucion-hipotecaria-instada-sobre-la-base-de-una-clausula-de-vencimiento-anticipado-que-se-reputa-abusiva-o-cada-dia-un-poco-mas-cerca-del-abismo.pdf>

¹⁹² Auto AP Huelva (Sec. 2) 23 October 2012; Auto JPI n. 7 Córdoba 23 September 2014.

¹⁹³ The list is published in the official journal (BOE n. 101, 28 April 2015) and is available at:

<http://www.mineco.gob.es/stfls/mineco/prensa/ficheros/noticias/2015/Anejo5.pdf>

¹⁹⁴ Constitutional Court 6 October 2015 (BOE n. 242, 9 October 2015).

considered that three months is not an excessive delay causing irrevocable damages.¹⁹⁵ The final decision is still pending.

Second, Catalan Law 24/2015, also challenged before the Constitutional Court and currently suspended in this matter,¹⁹⁶ provides for a more relevant obstacle to mortgage enforcement proceedings. According to art. 5, creditors who are banks, investment funds or asset management companies, as well as any legal entity who owns more than 1,250 m² of habitable property, are not allowed to initiate the specific mortgage enforcement proceedings (arts. 681 ff. LEC) unless they have offered vulnerable debtors (in the terms of art. 5.10) a “social rent” (which can be very low and even 0, as per art. 5.7) for at least three years, and this has been rejected. The act is technically abominable (it does not lay down information and cooperation duties upon the debtor, it fails to determine when an offer can be deemed rejected, it uses vague language mercilessly, and massive concept errors are made) and, due to its implications concerning property rights in general, as well as competence issues, it is unlikely to be approved by the Constitutional Court. In fact, the Catalan parliament has been presented with a Bill covering the same problem.¹⁹⁷ In any event and in the line of the typical short-sightedness of most of the Spanish crisis-induced legislation, Law 24/2015 only bars the specific mortgage enforcement proceedings to creditors who do not comply with art. 5, but not other court enforcement channels, such as the general enforcement procedure, which under Spanish law is also available to the creditor. Therefore, although it is a radical obstacle, probably it does not, in strict terms, contravene art. 26 MCD. As to whether Spanish law is consistent with the MCD insofar as it allows the creditor to use different enforcement paths, see below Part IV.

With regards to the rest of art. 26 MCD, certainly Spain needs to improve its systems to track what types of immovable property are being used as security, what types of contracts are underwritten, what properties are affected by mortgage enforcement proceedings and what are the real market prices.¹⁹⁸ As shown above, the data even now is dispersed and for years it has been impossible to know how many family homes banks were foreclosing on. However, market values and market flexibility are not a key to the specific mortgage enforcement procedure as per arts. 681 ff. LEC. This is one of the peculiarities and, in our view, one of the massive flaws of the system: the auction

¹⁹⁵ Constitutional Court 12 April 2016 (BOE n. 96, 21 April 2016).

¹⁹⁶ Constitutional Court 24 May 2016 (BOE n. 134, 3 June 2016).

¹⁹⁷ Projecte de llei de mesures de protecció del dret a l'habitatge de les persones que es troben en risc d'exclusió residencial Available at: <http://www.parlament.cat/document/bopc/178437.pdf#page=8>

¹⁹⁸ The Spanish Ministry of Development (*Ministerio de Fomento*) publishes what are supposed to be average housing prices, but at least for the property boom years, they are often lower than the price that was really paid (perhaps due to the practice of paying partially in black money, which has now been clamped down upon with moderate success). The Ministry's prices are available at: <http://www.fomento.gob.es/be2/?nivel=2&orden=35000000>

value is determined by the value given to the property at the time of entering into the mortgage credit agreement, and not the market value at the time of enforcement. This benefits borrowers who bought pre-2008, but it can equally be to their detriment under normal market conditions, especially if enforcement takes place years after the mortgage credit was undertaken. In fact, it may prove detrimental to those who are entering into mortgage credit agreements at present, when property prices are low. The reason for this rule, exceptional in Europe,¹⁹⁹ was to remove any additional time and cost obstacles to enforcement by means of this expedite procedure, but whilst it may have worked when mortgages had a short duration (i.e. five to seven years) it is not justifiable when mortgage credits are granted for over a quarter of a century. We believe that the starting price for auction ought to be set against market values at the time of enforcement; alternatively, mechanisms should be in place to allow for corrections to the original value at the time of enforcement.²⁰⁰ Measures adopted to date are insufficient²⁰¹ and probably the system itself can be deemed contrary to the notions underlying the MCD and particularly, art. 26. See also below, part III.

- 11) What measures have been adopted to encourage creditors to exercise reasonable forbearance before foreclosure (art. 28)? Are they effective? Did your system prevent transfer of property in lieu of payment prior to the Directive? If a deficiency judgment may be sought after foreclosure, have any measures been adopted to ensure that the best efforts price of the property is obtained? If these measures had been adopted before the transposition of the Directive and regardless of it, you may wish to deal with them below in Part III.

This question will be dealt with below (Part III).

¹⁹⁹ See A. Luckow, *Roundtable on flexibility, security and Efficiency of the liens in Europe /rights monitoring*, Berlin, 2014, slide 10. Available at:

[https://www.pfandbrief.de/cms/_internet.nsf/0/816C4814E95362C0C1257D7900363E24/\\$FILE/17_10_2014_Vorstellung_RT-Rechtsmonitoring_Programmrat_Warschau_dt.pdf](https://www.pfandbrief.de/cms/_internet.nsf/0/816C4814E95362C0C1257D7900363E24/$FILE/17_10_2014_Vorstellung_RT-Rechtsmonitoring_Programmrat_Warschau_dt.pdf)

²⁰⁰ M. Anderson, 'A general overview of mortgage loans in the context of the crisis in Spain: the effects of the mortgage enforcement legal framework and its recent reforms' (2015) 297 bis *Revista de Derecho Urbanístico y Medio Ambiente* 295-309 at 299; M. Anderson, '¿Dación en pago o segunda oportunidad?', in I. Barral; J. Tornos (eds.), *Vivienda y crisis: ensayando soluciones* (Barcelona: Servicio de Estudios Registrales de Cataluña, 2015) 153-167 at 155-156; J.M. Díaz Fraile, 'La deuda hipotecaria ante su ejecución: la tasación del bien hipotecado', in M. Espejo Lerdo de Tejada; J.P. Murga Fernández (eds.), *Vivienda, préstamo y ejecución* (Pamplona: Aranzadi, 2016) 345-388.

²⁰¹ The entire special mortgage enforcement procedure is tainted by this approach. In a half-hearted attempt to respond to the social claim for *datio in solutum* to be the norm, so that no deficiency judgments could be brought after foreclosure, the Spanish legislature, first in 2011 (RDL 8/2011) and later in 2013 (Law 1/2013) increased the percentage for which, in the event of there being no acceptable bids at auction, the creditor could acquire title of the mortgaged property. Before the reforms, this was 50% of the appraisal value at the time of the mortgage loan; at present, it is 70 % (or 60% if the total debt is under 70%) of the appraisal value, always at the time of the mortgage, when a primary home is at stake (art. 671 of the Law on Civil Procedure). These reforms, although they obviously reduce deficiency, still rely on false values and lead to confusion and unnecessary complexity.

12) Do the provisions regarding charges upon default (art. 28) lead to modifications in your system?

As stated above in Part I, the consequences of declaring a default interest term unfair are a matter of discussion in Spain, and the Spanish Supreme Court does not see eye to eye with the ECJ.²⁰² In any case, we understand that the MCD allows charges upon default to cover (a) the actual costs incurred by the creditor, and (b) a penalty on the borrower, which Member States may permit but should place a cap on. Probably this ought to amount to the same as if we were applying the general rules on compensation for lack of performance. Under the Spanish Civil Code, penalties may be moderated by the court (art. 1154, although it is a matter of discussion whether this norm would apply to default interest rates). However, this does not seem to be sufficient to comply with art. 28.3 MCD, and neither does the already mentioned cap introduced by Law 1/2013. According to the new provision of art. 114.III of the Land Registration Act,²⁰³ default interest rates cannot exceed three times the legal rate of interest, but this applies only to mortgages over primary homes and where the purpose of the credit is to acquire said primary home. Therefore, it does not cover all the mortgage credits within the scope of the MCD, even if Spain made use of the exclusion provided for by art. 3.3 (a) MCD. On the other hand, we believe that, whatever the cap is set at, the rules on unfair terms and the ECJ's doctrine should continue to apply.

Part III. Relevant Issues that Directive 2014/17 Does Not Solve

1. According to art. 28 MCD, creditors should be encouraged to show “reasonable forbearance” before foreclosure proceedings are initiated.

As stated above, the Spanish legislature reacted very late to the mortgage crisis and did not begin to introduce provisions to alleviate the position of borrowers until 2011; from then on many reforms have taken place, but these do not always respond to the same criteria and they may have a different scope. Many of the rules are designed only to protect against first home evictions, some require the credit to have been entered into precisely to finance the acquisition of said first home and most of the new rules apply only when the creditor chooses to foreclose following the specific mortgage enforcement procedure as per arts. 681 ff. LEC, but not if the general enforcement

²⁰² See above fn. 50. Academics are recently questioning whether the ECJ's approach is too extreme; see E. Arroyo i Amayuelas, 'La interacción entre el Derecho europeo y el Derecho nacional en el control de las cláusulas contractuales En particular, el control de oficio y la subsistencia del contrato' (Nomos, forthcoming); E. Arroyo i Amayuelas, 'No vinculan al consumidor las cláusulas abusivas. Del derecho civil al procesal y entre la prevención y el castigo' (Madrid: Marcial Pons, forthcoming).

²⁰³ Ley hipotecaria, Decree 8 February 1946, which also contains the substantive provisions on mortgages. Updated version available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1946-2453>.

procedure is elected by the creditor. Although the former is the most usual, since it is fast and enshrined in the creditors' systems, reforms should have had a broader scope. In any event, a number of provisions have been enacted, with the aim to quiet the social complaints concerning a mortgage system that is perceived to be unfair. As well as the already mentioned reforms (including those that we have considered when dealing with potential obstacles to foreclosure; see above part II), it is now relevant to highlight others²⁰⁴:

- a) Probably the most "daring" measure taken by the Government was the establishment of a voluntary "Code of Good Banking Practices" by means of RDL 6/2012, 9 March, as amended by Law 1/2013 and RDL 1/2015.²⁰⁵ When the primary home is mortgaged, the debtor meets certain (rather restrictive) economic and personal conditions so as to be considered to risk social exclusion, and the creditor has adhered to the Code (the vast majority of Spanish credit institutions has done so²⁰⁶), the debtor has the right to require the creditor to restructure the debt. This means that, for five years, no principal will be repaid and the monthly instalments of the mortgage will comprise interest only, at a very low Euribor+0.25%. This can give the debtor a breather, not only for the five years (which is relevant enough) but even for when the loan recovers its normal functionality after the five years, since the loan has to be extended up to 40 years. Thus, usually when mortgage repayment is reinstated in full, the monthly instalment may not have increased or may have even decreased substantially. If all the conditions are met for this measure to apply, the interest rate floor is eliminated for good. However, not a huge number of people can benefit from these measures, since another factor plays an important role: the purchase price of the property. This aspect has been modified various times and now it should finally reflect the differences in housing prices throughout Spain, but still the cap is set by reference to the tables of prices published by the Ministry of Development,²⁰⁷ which can be lower than the actual market price was, especially for those who bought during the property boom. In any event, if the debtor is not even able to pay the much

²⁰⁴ See also S. Nasarre Aznar, 'A decade of changes in the Spanish mortgage market (2005-2015)', in T. Lasse; A. Lucko; M. Thurner (eds.), *Grundpfandrechte in Europa und darüber hinaus* (Berlin: Verband Deutscher Pfandbriefbanken, 2016) (Band 54) 163 ff.; I. Zurita Martín, 'Reformas legales hipotecarias en España desde el estallido de la crisis' (2014) 16 *Teoría & Derecho. Revista de pensamiento jurídico* 53 ff.; and H. Simón-Moreno, 'El cumplimiento del derecho a la vivienda en España. Especial referencia a la asequibilidad, estabilidad y accesibilidad en el acceso a la vivienda' (2015) 169 *CEF Legal. Revista Práctica de Derecho* 105 ff.

²⁰⁵ BOE n. 60, 10 March 2012; available at:

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-3394.

²⁰⁶ The latest list published is available at:

<http://www.mineco.gob.es/stfls/mineco/prensa/ficheros/noticias/2015/Anejo5.pdf>

²⁰⁷ These tables are available at: <http://www.fomento.gob.es/be2/?nivel=2&orden=35000000>

reduced monthly interest because that still amounts to more than 50% of the household's income, the creditor may voluntarily remove part of the principal. Otherwise, the debtor may force the creditor to accept *datio in solutum*, whereby the mortgaged property is transferred to the creditor in exchange for complete discharge of the loan. For some, this reform has put the Spanish mortgage law at the vanguard of the European countries as far as the *datio in solutum* is concerned.²⁰⁸ The debtor may also force the creditor to rent the property to him for two years and for a limited rent.²⁰⁹

Since its entry into force, more than 50,000 households have requested the application of the Code,²¹⁰ of which only 23,640 were resolved (the remaining applications were rejected). The option that was agreed upon the most was the debt restructuring (18,200), followed by the *datio in solutum* (5,014) and the debt removal (6). The European Parliament resolution 8 October 2015²¹¹ called into question the success of this Code by stating that the Code "has mostly been ignored by financial bodies owing to its voluntary status²¹² and has had very limited results in avoiding evictions or prompting 'datio in solutum', as the eligibility requirements disqualify more than 80 % of those affected". Be that as it may, a number of transfers in payment of debts take place on a voluntary basis, i.e. after an agreement between the parties. As a matter of fact, the *datio in solutum* accounted for almost 50% of voluntary assignments of dwellings to mortgagees in 2014 and 2013.²¹³

²⁰⁸ According to a study carried out by the London School of Economics, "Study on means to protect consumers in financial difficulty: Personal bankruptcy, *datio in solutum* of mortgages, and restrictions on debt collection abusive practices" (December 2012) 201, "*The only country in the world where we can identify a weak application of datio in solutum enshrined in legislation is Spain*". This, in our view, is a somewhat simplified version of the worldwide solutions in this area.

²⁰⁹ However, the rent is set in proportion to the amount owed at the time of the *datio in solutum*, and not in proportion to the family's income; therefore, it can often be too expensive for the debtor.

²¹⁰ Source: el Derecho 23-10-15, *El Código de Buenas Prácticas ha permitido a 23.640 familias reestructurar su deuda hipotecaria* (http://www.elderecho.com/actualidad/Codigo-Buenas-Practicas-reestructurar-hipotecaria_0_875625112.html).

²¹¹ European Parliament resolution of 8 October 2015 on mortgage legislation and risky financial instruments in Spain (based on petitions received) (2015/2740(RSP)).

²¹² This is debatable; as already stated, the fact that adhering to the Code is voluntary for creditors has not impeded most of the Spanish credit institutions to adhere to it. A different matter is how they apply it. See above fn. 99 and corresponding text, on the number of claims before the Bank of Spain in this respect.

²¹³ Banco de España, *Nota informativa sobre los procesos de ejecución hipotecaria sobre viviendas* (30 July 2015). Available at:

http://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/Briefing_notes/es/notabe300715.pdf.

However, this measure is temporary and crisis-based: it only applies to mortgages entered into prior to 10 March 2012. Therefore, it is not a long-term solution. On the other hand, it should be noted that no public money goes directly into compensating credit institutions for the losses that the application of the Code can generate for them. Obviously the banking system has had public money injected into it, but not for specific schemes like this one. Thus, as in so many instances, it is a scenario where the private parties involved fight to preserve their best interests. This is one of the reasons why the application of the Code has led to so many claims.

- b) The same year (2012), another measure was introduced: a moratorium on evictions (not on foreclosures), for an initial period of two years, which has been extended to up to 4.5 years and ends in May 2017 (RDL 27/2012²¹⁴, 15 November, repealed by Law 1/2013, as amended by RDL 1/2015). Only debtors who meet the conditions to be considered in risk of social exclusion (currently similar to those laid down for the application of the Code of Good Banking Practices) and who have lost their primary home through a mortgage enforcement proceeding following arts. 681 ff. LEC can apply for the moratorium. A study carried out by FUNCAS concluded that this measure would have little impact in practice (it would affect only 0.9% of all households based on the economic requirements eventually laid down by Law 1/2013)²¹⁵, so the success of this measure may be called into question. In any event, this is a type of solution that satisfies no-one. The debtor has lost title to his home and cannot recover it unless his fortune unexpectedly turns and he is able to repurchase it. On the other hand, the creditor has acquired a property (for which provisions will be in place) that cannot be accessed but has to be maintained; taxes upon it need to be paid, and no rent whatsoever will be received.

What will happen come May 2017 remains to be seen.

In any event, it seems clear to us that these measures are temporary and crisis-oriented; they do not ensure that the creditor shows “reasonable forbearance” prior to foreclosure. No mechanism providing for compulsory mediation or intermediation before initiating proceedings is in place; the Draft Bill formally allows adhesion to the Consumer Arbitration System, but does not impose it; the Catalan provision on compulsory mediation (Consumers Code, art. 132-4.3) is in force, but it has been

²¹⁴ BOE n. 276, 16 November 2012; available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-14115.

²¹⁵ M. Romero, ‘Desahucios y dación en pago: estimación del impacto sobre el sistema bancario’ (2013) 233 *Cuadernos de Información Económica* 27.

challenged by the Spanish Government before the Constitutional Court. Other measures that delay the initiation of proceedings, stay the eviction or may render the proceedings longer do not ensure that the creditor behaves proactively to search an alternative solution, as per recital 27 MCD. However, perhaps the MCD itself can be blamed for being too vague and too uncompromising in this respect.

On the other hand, the Spanish legislation does not promote coordination between the courts and social services so as to detect situations where there is a risk of social exclusion and where public housing ought to be allocated prior to eviction. However, some courts and some social services have established informal channels of communication and, in some instances, the judiciary has reached cooperation agreements with regional and local authorities to this effect (this is the case in Andalusia, where an agreement between the *Consejo General del Poder Judicial*, the Andalusian Government and the federation of municipalities is in place since 1 March 2016).

2. According to art. 28.5 MCD, “where after foreclosure proceedings outstanding debt remains, Member States shall ensure that measures to facilitate repayment in order to protect consumers are on place”.

The *leitmotif* of the social protest against the mortgage foreclosure system was that there should be no deficiency judgment once the creditor has acquired title to the property. *Datio in solutum* was perceived to be the ideal remedy; it was held that deeds in lieu of payment should be imposed on the creditor under all circumstances. The system was perceived to be unfair insofar as “the bank had appraised the property” at a higher value than the value it was deemed to acquire it upon foreclosure and then, on top of having lost the property, the debtor was left with very large outstanding obligations. The false basis upon which the auction system operates (as described below, and in Part IV and footnote 200) did not contribute to clarify the technical functioning of securities, as ancillary to the main obligation, and a certain “consumer irresponsibility” can be detected in many instances (the debtor is happy to gain when the value of the property goes up, but thinks that he should not be asked to honour the obligations arising from the loan if the value drops). Moreover, the social movement was radically opposed to negotiating loan restructuring with the credit institutions, which were perceived to be the enemy and 100% responsible for the debtor’s predicament. In our view, compulsory *datio in solutum* is not the adequate solution from many perspectives (it is inconsistent with the concept of real securities; it interferes with the normal operation of banking and it promotes irresponsible and/or opportunistic behaviour from borrowers, as well as lying the entire risk of property market fluctuation on the creditor), but perhaps the most definitive reason is that it is not the best solution for the debtor either in most cases: the property is

surrendered irrevocably to the creditor; except for speculative investments, one would think that retaining the asset (especially if it is the family home) would be the preferred option.

In any event, the Spanish legislature has made certain concessions to these claims, but has not (and is not foreseen to) adopt such a radical measure. Some of the reforms in this respect have already been mentioned. For instance, the percentage by which the creditor may acquire title to the property in the event of there being no acceptable bids at the auction, which was initially 50% for any type of property, was raised in 2011 and later in 2013 so that it is now, 70% (or 60%) of the appraisal value at the time of entering into the mortgage loan when the debtor's habitual home is concerned; the higher this value is, the lower the outstanding debt after foreclosure. Caps on default interest rates and on costs have the same effect when the primary home is concerned. For certain debtors and insofar as a number of other requirements are met, the 2012 Code on Good Banking Practices provides for mandatory *datio in solutum*, as already explained.

Neither the Spanish legislature nor the MCD provide for effective measures to encourage creditors to voluntarily accept *datio in solutum*. The MCD will have disappointed many by merely forbidding that voluntary *dation in solutum* is eliminated from the system.

But there are still other measures that may fall within the requirements of art. 28.5 MCD. We will mention three.

- a) In 2011 (RDL 8/2011, 1 July²¹⁶) increased the threshold from which income can be seized in deficiency judgments following foreclosure of the primary home by means of the special mortgage enforcement procedure of arts. 681 ff. LEC. This raises the question as to why the same increase does not apply when the mortgagee has followed the general enforcement procedure and why is it worse to have one's income seized after losing the family home and not if foreclosure affected other assets (perhaps the debtor rented his home anyway).
- b) One of the reforms introduced by Law 1/2013 included provisions on debt release in art. 579.2 LEC in the event of a deficiency judgement been sought. According to this article, the outstanding debt may be reduced by 35% if the debtor pays the remaining 65% within 5 years following the auction – or it may be reduced by 20% if the debtor manages to pay 80% within 10 years. This only

²¹⁶ BOE 7 July 2011, n. 161, p. 71548; available at:
https://www.boe.es/diario_boe/txt.php?id=BOE-A-2011-11641

applies when the primary home has been foreclosed upon, and it does not stay the enforcement proceedings (if the debtor pays in excess of the amounts stated above, the excess will be returned to him). In the normal scenario, debtors who have lost their family homes are nowhere near to being in a position to pay these amounts.

- c) Finally, RDL 1/2015, 27 February,²¹⁷ and Law 25/2015, 28 July,²¹⁸ amended the Spanish Bankruptcy Act 22/2003, allowing the individual debtor to be exonerated from unsatisfied debts once the bankruptcy procedure is concluded. Unlike companies, which are dissolved and liquidated in the insolvency proceedings, insolvent (natural persons) debtors were left with pending debts even after bankruptcy. No fresh start option was in place for them up until the 2015 reforms, in spite of the fact that it had been envisaged as a necessary modification of the system at least since 2011 (additional provision 2 bis, Law 22/2003, introduced by Law 38/2011, 10 October). The new framework provides for a notarised mechanism by means of which the debtor seeks to reach an agreement with the creditors; if such an agreement is not possible, the insolvency proceeding takes place – albeit slightly faster than in the normal scenario – and if it concludes with remaining debt, the debtor may apply to the court for the “benefit of debt exoneration”. If certain requirements are met (the law establishes a list of conditions that define what it considers to be a *bona fides* debtor) and the debtor presents a plan designing how debts are to be paid, the debtor will be definitely exonerated after 5 years if: a) the plan has been complied with; or b) the debtor has destined at least half of the income exceeding the amount that cannot be seized to paying the debts (or a quarter of that income if the debtor meets the requirements laid down by RDL 6/2012). Because this procedure is an insolvency procedure and this area of law is remarkably complex, it is not certain that it will appeal to many debtors, especially when they have one main creditor (the mortgagee) and perhaps a few other minor debts. Although it grants the possibility to actually start afresh, perhaps it does not fit in with the Spanish social and cultural makeup.

We think the Spanish Government must believe that these reforms already comply with art. 28.5 MCD, which again is too vague in its wording. We are not sure whether the measures in place in Spain do actually prevent long-term over-indebtedness (recital 27). However, it should also be borne in mind that the more the creditors’

²¹⁷ BOE n. 51, 28 February 2015, available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-2109.

²¹⁸ BOE n. 180, 29 July 2015; available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2015-8469>.

position is debilitated and risk allocated to them, the more difficult it will be to obtain financing in order, for instance, to purchase a primary home. Since rent is not an affordable and stable enough alternative in Spain, the approach to these issues needs to be adequately balanced and reforms must be designed to endure both periods of growth and of recession.

3. The MCD does not touch upon unfair contractual terms, since this is the scope of Directive 93/13/EU. However, the amount of requests for preliminary rulings submitted by the Spanish courts to the ECJ²¹⁹ suggest that the issue of unfair terms is not properly solved, either from a domestic point of view (see above on the amount of time it can take for a case to be decided and for a firm declaration of unfairness to reach notaries and land registrars) or from the European one. Many reforms have been carried out in this area, as shown throughout the report, which have often been prompted by the ECJ's rulings and doctrine, but still new problems arise constantly. It does not help that the MCD does nothing towards standardising (or at least defining) a minimum content for mortgage loans. Instead, the Spanish Draft Bill does suggest (arts. 5.1.a) and 12) that the Ministry of Economy should lay down what is to be considered the essential content of such agreements, as well as the ancillary terms they may include. It is one of the few instances (as well as with regards to the scope of the protective measures) where Spain appears to go further than the MCD demands.

4. In relevant areas covered by the MCD, it appears to be either too vague (art. 28 is an example of this, as already mentioned) or to impose many obligations, but leave remedies entirely down to domestic law. Such is the case with the creditworthiness assessment, the pre-contractual information or the independence of advisory services. Although many Directives follow the same pattern, it seems clear that a European solution against breach of its own norms would be more efficient, so as to avoid Member States from considering, for example, that administrative sanctions are sufficient in all instances.

5. On the other hand, certain issues, such as securitisation or the modification of existing mortgage loans, are not specifically addressed by the MCD. Although we understand that the latter is included in its scope, the problems that can arise in a few years in Spain due to the amount of mortgage loans that have been restructured or refinanced would have called, we feel, for closer attention.

6. As a sign of feeble consumer protection, it is surprising that art. 11.6 MCD does not make it mandatory for domestic legislation to include warnings related to the risk of losing the property in the event of default, as well as to the possibility of deficiency

²¹⁹ See F. Gómez Pomar; K. Lyzcowska, 'Spanish Courts, the Court of Justice of the European Union, and Consumer Law' (2014) 4 *InDret*, available at: <http://www.indret.com/pdf/1093.pdf>

judgments being sought. Catalan Law 20/2014 did require such warnings to be included in advertising.

7. Despite the constant efforts made, since the 1960's, towards creating a Eurohypothech (a common mortgage for Europe)²²⁰ little development was achieved at EU level. This is even more relevant when considering that 51% of the European GDP is composed by mortgage loans, which makes it difficult to understand the idea of a "common internal market" if harmonization or, at least, convergence relates only to the other 49%. In this sense, two studies carried out by the *London School of Economics*²²¹ in 2005 and *Mercer Oliver Wyman* in 2003²²² showed the benefits of harmonising the European mortgage market. The Green Paper on EU mortgage loans in 2005²²³ asked countries and stakeholders about the idea of the eurohypothech, with massively positive answers. Following the 2007 White Paper,²²⁴ all the goals to be achieved by the eurohypothech were present but the institution itself was paradoxically and unjustifiably abandoned. Indeed, neither consumers nor lenders obtain the legal certainty needed to carry out cross-border mortgage loans. Since then, seven years of discussions in relation to the mortgage market seem to have ended up in the "decaffeinated" Mortgage Credit Directive which has little to do with the harmonization or convergence of mortgage markets in Europe and more to do with consumer protection, a traditional field of legislation developed by the EU. As a result, it does not come as a surprise that the Report *Border Acquisitions of Residential Property: Problems that Arise for Citizens*²²⁵ strongly recommended regarding the MCD as the

²²⁰ See more details on this project and how it evolved since then at

<http://housing.urv.cat/en/cover/research/project/eurohypothech/>. About the eurohypothech, see S. Nasarre Aznar, 'The Eurohypothech and the Eurotrust: the answers to the goals of the EC White Paper 2007 on the Integration of EU Mortgage Credit Markets', in S. Van Erp *et al.* (eds.), *The future of European Property Law* (Berlin- Boston: Sellier, 2012) 79-122; and H. Simón-Moreno, 'The Eurohypothech. A Perspective from Spanish Law' (2012) 2 *European Property Law Journal* 191 ff.

²²¹ *The Costs and Benefits of Integration of EU Mortgage Markets*, August of 2005: "Gains for the EU25 overall in 2015. The gains for the EU25 overall in 2015 are shown in the first row. The OEF model predicts integration would raise overall EU25 consumption in 2015 by 0.5% and GDP by 0.7%. The gain in consumption is smaller than that in GDP since some of the increase in GDP reflects additional efforts spent maintaining housing. As section 3.4 explains, the OEF model may slightly overstate the likely gain in EU consumption, since it assumes any increase in profits from mortgage lending in the EU accrues to EU citizens. It is more likely that some of these profits would accrue to US citizens, due to the likely role of US lenders in the development of EU mortgage markets", 91-92. Available at http://ec.europa.eu/internal_market/finservices-retail/home-loans/integration_en.htm.

²²² *Study on the Financial Integration of European Mortgage Markets*, October of 2003. However, it pointed out that "this estimate is for the benefits accruing to mortgage borrowers and producers only and do not include any externalities associated with changes to the mortgage markets", 78. Available at <http://www.hypo.org>.

²²³ Green Paper on Mortgage Credit in the EU. COM(2005) 327 final, Brussels, 19-07-2005.

²²⁴ White Paper on the Integration of EU Mortgage Credit Markets, COM(2007) 807 final, 18-12-2007.

²²⁵ P. Sparkes, Lead author of the report: *Cross-Border Acquisitions of Residential Property: Problems that Arise for Citizens*, 150.

“Resuscitation of the proposal for a common mortgage instrument for Europe (the Eurohypothech) to facilitate cross-border mortgage lending operations”.

Part IV. Conclusions

Having worked on the Directive for a few months, we feel that little is achieved by it and we are still not sure whether it really is (as stated above) a mere consumer protection norm, in the line of so many other EU enactments, or rather an instrument to protect the banking system against its own reckless behaviour. In any event, consumer protection has always been conceived as an instrument to attain an efficient internal market, and not necessarily a goal in itself.

In our view, the Directive brings modifications in different areas, but it is so vague when it (partially) addresses especially relevant issues; Member States may consider that most of the reforms required by it are already in place or may ignore what could lead to important changes.

In fact, its “star” (the ESIS) is only mentioned in passing in the Spanish Draft Bill dated 26 July 2016 and it will be down to the Ministry of Economy to approve whatever changes are necessary in the existing pre-contractual information sheets (very inspired already by the 2011 MCD Proposal). In other areas, such as staff remuneration, the Spanish Draft Bill takes a restrictive view of the reform – and perhaps the wording of the Directive allows it. Such a relevant aspect as the creditworthiness assessment is also left in the hands of the Ministry, so not much more than an administrative sanction is to be expected if the creditor grants the loan in spite of a negative or inadequately carried out assessment.

In light of the Draft Bill, we do not expect the Spanish legislature to undertake a serene and profound analysis of the mortgage system and consider its possible comprehensive review. The Draft Bill does not intend to put some order in the amount of rules that have been produced since the crisis, with different scopes, diverse effects and poor drafting. It does not decide whether mortgages over primary homes require a separate treatment or not (we believe solutions should be found elsewhere, but multiple post-crisis rules refer only to primary homes in the context of mortgage enforcement); it does not make an effort to adapt consumer protection norms to the mortgage market and it generally stems from the idea that no major changes are required, save for certain aspects of the regulation of intermediaries, representatives and advisory services and staff remuneration. The Draft Bill does not question a mortgage system that has generally been considered to have failed when faced with a sharp recession. Perhaps the system is not as bad as it is sometimes portrayed to be,

but the analysis should be undertaken whatsoever. It is probably true, though, that the MCD does not impose it. Thus, it is just another missed opportunity.

Before the Draft Bill was published, we had had the chance to point out some of the problems of the Spanish mortgage system that should be addressed. The MCD does not impose direct obligations in these areas, but it can be held that Spanish law is not in line with its underlying principles (or mere assumptions).

First, as already explained, in our view the MCD assumes that the value of the property for foreclosure purposes is the market value at the time of enforcement. This is not the case in Spain and a reform is necessary. Although seized properties are appraised if a creditor initiates a general enforcement procedure, the same does not apply when the creditor chooses to follow the special mortgage enforcement procedure laid down by arts. 681 ff. LEC. In this case, the value of the property for auction purposes needs to have been set at the time when the mortgage agreement was entered into (or modified later). Therefore, all values are, by definition, false at the time of enforcement and no mechanisms are in place to correct this. Law 1/2013 modified art. 682 LEC requiring appraisal by a recognised appraisal company and provided that the value for auction purposes could not be lower than 75% of the appraisal. However, this rule was modified by Law 19/2015 and now it is not clear whether this rule applies only where creditors securitise mortgages.²²⁶ In any event, the new rule has the advantage – if applied universally – of impeding agreements whereby the value given to the property equalled the amount loaned, however low this were. But it is still an outdated evaluation and it may be detrimental to the debtor, since a further 30% or 40% (for primary homes) or 50% (for other properties) reduction over that value will be applied at auction, this being especially negative when the creditor acquires the property due to there not being acceptable bids (arts. 670 and 671 LEC).²²⁷ Moreover, the same property will have different starting prices at auction depending on the procedure that is followed and this price will not correspond to the (updated) one it would be given in insolvency proceedings (art. 94.5 Law 22/2003). We strongly believe that in this respect Spanish legislation needs to be brought into line with that of all other EU countries.

Second, we have just mentioned that the creditor may choose what procedural path to follow upon default. The most generalised route is the special mortgage enforcement procedure laid down by arts. 681 ff. LEC, but the creditor may decide to use a general

²²⁶ See, for instance, S. Álvarez Royo-Villanova, '¿Seguirá siendo necesaria la tasación oficial en las hipotecas tras la entrada en vigor de la Ley 19/2015?', available at:

<http://www.notariosyregistradores.com/web/secciones/doctrina/articulos-doctrina/seguira-siendo-necesaria-la-tasacion-oficial-en-las-hipotecas-tras-la-entrada-en-vigor-de-la-ley-192015/>.

²²⁷ See above Part III and fn. 200.

procedure on the merits or (and this is more likely) the general enforcement procedure (arts. 517 ff. LEC). This means that the creditor may choose to address enforcement against all the debtor's assets and not only against the mortgaged property. Also, the creditor may choose to enforce against personal guarantors instead of foreclosing on the mortgaged property. We believe that the MCD (especially art. 28.5) assumes that the mortgaged property will be foreclosed upon first. Even if this is perhaps arguable, it would have been a good opportunity to decide whether the choice that Spanish law allows for is justified or not. We believe that in normal scenarios it can be, but, once again, it looks like the debate simply will not take place.

In this line of missed opportunities, Spain should also question whether auction is the adequate mechanism to obtain the best efforts price for the property. In practice it has not been and, in spite of recent reforms addressed at promoting electronic auctions,²²⁸ it is probably fair to say that the general feeling is that private (supervised) sales would render better results for all parties concerned. However, the Spanish legislature still clings to auctions.²²⁹ Especially at a time when the property market is still very slow, other mechanisms should be considered.

To sum up, we hoped that, using the MCD as an excuse, a more profound debate on different aspects of the mortgage loan system would ensue. Disperse and (mostly) provisional reforms (such as the already mentioned moratorium on evictions or the Code on Good Banking Practices) are not sufficient.²³⁰ However, since the Directive is not assertive enough, it would probably be asking too much to go further than the actual EU has dared to go.



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²²⁸ See again Law 19/2015, 13 July.

²²⁹ See, for instance, Law 15/2015, 2 July, on non-contentious judicial acts.

²³⁰ See, for instance, the Central European Bank Report 22 March 2013, available at: https://www.ecb.europa.eu/ecb/legal/pdf/es_con_2013_33_f_sign.pdf.

ANNEX I

FIPRE (Pre-contractual information sheet as per Order EHA/2899/2011)

(Texto introductorio)
<p>El presente documento se extiende el [fecha corriente] en respuesta a su solicitud de información, y no conlleva para [nombre de la entidad] la obligación de concederle un préstamo. La información incorporada tiene carácter meramente orientativo.</p> <p>Se ha elaborado basándose en las condiciones actuales del mercado. La oferta personalizada posterior puede diferir en función de la variación de dichas condiciones o como resultado de la obtención de la información sobre sus preferencias y condiciones financieras.</p>
1. ENTIDAD DE CRÉDITO.
<ul style="list-style-type: none"> ▪ Identidad / Nombre comercial. ▪ Domicilio social ▪ Número de teléfono. ▪ Correo electrónico. ▪ Dirección de página electrónica. ▪ Autoridad de supervisión: [Identidad de la autoridad de supervisión y dirección de su página electrónica.] ▪ Persona de contacto: [Datos completos de la persona de contacto.] ▪ Datos de contacto del servicio de atención al cliente.
2. CARACTERÍSTICAS DEL PRÉSTAMO
<ul style="list-style-type: none"> ▪ Importe máximo del préstamo disponible en relación con el valor del bien inmueble. ▪ Finalidad. ▪ Tipo de préstamo. ▪ <i>(Si ha lugar)</i> Préstamo en divisa. ▪ Plazo de amortización. ▪ Periodicidad de los pagos.
3. TIPO DE INTERÉS
<ul style="list-style-type: none"> ▪ Clase y nivel del tipo de interés aplicable <ul style="list-style-type: none"> ○ Fijo. ○ Variable (expresado en tipo de interés de referencia + diferencial). ○ Variable limitado (expresando el tipo de interés mínimo y máximo y el tipo de interés de referencia + diferencial) ▪ En caso de que durante el plazo de amortización se modifique la clase de tipo de interés se deberá reflejar el plazo en que se aplicará cada tipo.
4. VINCULACIONES Y GASTOS PREPARATORIOS
<ul style="list-style-type: none"> ▪ Listado de productos o servicios vinculados para obtener el préstamo en las condiciones ofrecidas. ▪ Gastos preparatorios.
5. TASA ANUAL EQUIVALENTE Y COSTE TOTAL DEL PRÉSTAMO
<p>La TAE es el coste total del préstamo expresado en forma de porcentaje anual. La TAE sirve para ayudarle a comparar las diferentes ofertas.</p> <ul style="list-style-type: none"> ▪ La TAE aplicable a su préstamo es [TAE]. Comprende: <ul style="list-style-type: none"> ○ Tipo de interés. ○ Otros componentes de la TAE. ○ Coste total del préstamo en términos absolutos. ○ El cálculo de la TAE y del coste total del préstamo se basan en los siguientes supuestos: <ul style="list-style-type: none"> ▪ Importe. ▪ Tipo de interés. ▪ Otros supuestos.
6. AMORTIZACIÓN ANTICIPADA
<ul style="list-style-type: none"> ▪ <i>(Si ha lugar)</i> Compensación por desistimiento. ▪ <i>(Si ha lugar)</i> Compensación por riesgo de tipo de interés

ANNEX II

FIPER (Personalised information sheet as per Order EHA/2899/2011)

(Texto introductorio)
<p>El presente documento se extiende el [fecha corriente] en respuesta a su solicitud de información, y no conlleva para [nombre de la entidad] la obligación de concederle un préstamo hipotecario.</p> <p>Se ha elaborado basándose en la información que usted, [nombre del cliente], ha facilitado hasta la fecha, así como en las actuales condiciones del mercado financiero. La información que sigue será válida hasta el [fecha de validez]. Después de esa fecha, puede variar con arreglo a las condiciones del mercado.</p>
1. ENTIDAD DE CRÉDITO
<ul style="list-style-type: none"> ▪ Identidad / Nombre comercial. ▪ Domicilio social. ▪ Número de teléfono. ▪ Correo electrónico. ▪ Dirección de página electrónica. ▪ Autoridad de supervisión: [Identidad de la autoridad de supervisión y dirección de su página web]. ▪ Persona de contacto: [Datos completos de la persona de contacto].
2. CARACTERÍSTICAS DEL PRÉSTAMO
<ul style="list-style-type: none"> ▪ Importe y moneda del préstamo: [valor] [moneda] ▪ <i>(Si ha lugar)</i> El presente préstamo no se expresa en [moneda nacional] ▪ Duración del préstamo. ▪ Tipo de préstamo. ▪ Clase de tipo de interés aplicable. ▪ Importe total a reembolsar. ▪ Importe máximo de préstamo disponible en relación con el valor del bien inmueble. ▪ <i>(Si ha lugar)</i> Garantía.
3. TIPO DE INTERÉS
<p>La TAE es el coste total del préstamo expresado en forma de porcentaje anual. La TAE sirve para ayudarle a comparar las diferentes ofertas.</p> <ul style="list-style-type: none"> ▪ La TAE aplicable a su préstamo es [TAE]. Comprende: <ul style="list-style-type: none"> ○ El tipo de interés [valor en porcentaje o en tipo de referencia más diferencial si se tratase de un tipo variable o variable limitado] ○ [Otros componentes de la TAE]
4. PERIODICIDAD Y NÚMERO DE PAGOS
<ul style="list-style-type: none"> ▪ Periodicidad de reembolso: [periodicidad] ▪ Número de pagos: [número]
5. IMPORTE DE CADA CUOTA HIPOTECARIA
<ul style="list-style-type: none"> ▪ [Importe] [moneda] ▪ <i>(Si ha lugar)</i> Las cuotas hipotecarias calculadas en diferentes escenarios de evolución del tipo de interés cuando el préstamo aplica un tipo de interés variable o variable limitado. ▪ <i>(Si ha lugar)</i> El tipo de cambio utilizado para la conversión del reembolso en [moneda del préstamo] a [moneda nacional] será el publicado por [nombre del organismo encargado de la publicación del tipo de cambio] el [fecha].

6. TABLA DE AMORTIZACIONES
<p>La siguiente tabla muestra el importe que ha de pagarse cada [periodicidad]</p> <ul style="list-style-type: none"> ▪ Las cuotas (columna [nº pertinente]) son iguales a la suma de los intereses pagados (columna [nº pertinente]), el capital pagado (columna [nº pertinente]) y, <i>si ha lugar</i>, otros costes (columna [nº pertinente]). ▪ <i>Si ha lugar</i>, Los costes de la columna «otros costes» corresponden a [lista de costes]. El capital pendiente (columna [nº pertinente]) es igual al importe del préstamo que queda por reembolsar. ▪ [Importe y moneda del préstamo] ▪ [Duración del préstamo] ▪ [Tipo de interés] ▪ [Tabla] ▪ (<i>Si ha lugar</i>) [Advertencia sobre la variabilidad de las cuotas]
7. VINCULACIONES Y OTROS COSTES
<p>Si desea beneficiarse de las condiciones del préstamo descritas en la presente ficha, debe cumplir las obligaciones que, a continuación, se indican.</p> <ul style="list-style-type: none"> ▪ Obligaciones ▪ (<i>Si ha lugar</i>) Observe que las condiciones de préstamo descritas, incluido el tipo de interés aplicable, pueden variar en caso de incumplimiento de las citadas obligaciones. ▪ Además de los costes ya incluidos en las cuotas [periodicidad], este préstamo conlleva los siguientes costes: <ul style="list-style-type: none"> ○ Costes que deben abonarse una sola vez. ○ Costes que deben abonarse periódicamente. ▪ Asegúrese de que tiene conocimiento de todos los demás tributos y costes (p.ej., gastos notariales) conexos al préstamo.
8. AMORTIZACIÓN ANTICIPADA
<p>Si decide amortizar el préstamo anticipadamente, consúltenos a fin de determinar el nivel exacto de la compensación en ese momento.</p> <ul style="list-style-type: none"> ▪ Este préstamo puede amortizarse anticipadamente, total o parcialmente. <ul style="list-style-type: none"> ○ [Condiciones] ○ [Procedimiento] ▪ (<i>Si ha lugar</i>) Compensación por desistimiento.
(SI HA LUGAR) 9. DERECHO DE SUBROGACIÓN
<p>Si lo desea puede llevarse a a otra entidad de crédito (subrogar) su préstamo aún sin el consentimiento de [nombre de la entidad].</p>
10. DEPARTAMENTO DE ATENCIÓN AL CLIENTE
<ul style="list-style-type: none"> ▪ Departamento de Atención al Cliente: nombre, dirección geográfica, número de teléfono, correo electrónico, persona de contacto y sus datos de contacto. ▪ (<i>Si ha lugar</i>) Defensor del cliente: nombre, dirección geográfica, número de teléfono, correo electrónico, persona de contacto y sus datos de contacto.
11. SERVICIO DE RECLAMACIONES DEL BANCO DE ESPAÑA
<p>En caso de desacuerdo con el departamento de atención al cliente de la entidad de crédito, o transcurridos dos meses sin respuesta del mismo, puede dirigir una reclamación (o, siempre que lo desee, formular una consulta o queja) al Servicio de Reclamaciones del Banco de España (91.338.65.30):</p> <ul style="list-style-type: none"> ○ Por escrito dirigido al Servicio de Reclamaciones C/ Alcalá, 48; 28014 Madrid. ○ Por vía electrónica en la página http://www.bde.es

12. INCUMPLIMIENTO DE LOS COMPROMISOS VINCULADOS AL PRÉSTAMO: CONSECUENCIAS PARA EL CLIENTE
<ul style="list-style-type: none"> ▪ [Tipos de incumplimiento] ▪ [Consecuencias financieras y/o jurídicas] <p>Si tiene dificultades para efectuar sus pagos [periodicidad], póngase en contacto con nosotros a la mayor brevedad posible para estudiar posibles soluciones.</p>
(SI HA LUGAR) 13. INFORMACIÓN ADICIONAL, EN EL CASO DE VENTAS A DISTANCIA
<ul style="list-style-type: none"> ▪ <i>(Si ha lugar)</i> La legislación escogida por la entidad de crédito como base para el establecimiento de relaciones con usted con anterioridad a la celebración del contrato de crédito es [legislación aplicable]. ▪ La información y documentación contractual se facilitarán en [lengua]. Con su consentimiento, durante la vigencia del contrato de préstamo, nos comunicaremos con usted en [lengua o lenguas].
14. RIESGOS Y ADVERTENCIAS
<p>Le rogamos tome nota de los riesgos que conlleva un préstamo hipotecario.</p> <ul style="list-style-type: none"> ▪ Sus ingresos pueden variar. Asegúrese de que si sus ingresos disminuyen aún seguirá pudiendo hacer frente a sus cuotas hipotecarias [periodicidad]. ▪ Tiene usted derecho a examinar el proyecto de documento contractual en el despacho del notario autorizante, con la antelación de 3 días hábiles previos a su formalización ante el mismo. ▪ <i>(Si ha lugar)</i> Puede usted perder su vivienda si no efectúa sus pagos puntualmente. ▪ <i>(Si ha lugar)</i> Responde usted ante [nombre de la entidad] del pago del préstamo no solo con su vivienda sino con todos sus bienes presentes y futuros. ▪ <i>(Si ha lugar)</i> Debe tener en cuenta el hecho de que el tipo de interés de este préstamo no permanece fijo durante todo su período de vigencia. ▪ <i>(Si ha lugar)</i> Debe tener en cuenta el hecho de que el tipo de interés de este préstamo a pesar de ser variable nunca se beneficiará de descensos del tipo de interés de referencia por debajo del [límite mínimo del tipo de interés variable limitado]. ▪ <i>(Si ha lugar)</i> El presente préstamo no se expresa en euros. Tenga en cuenta que el importe en euros que necesitará para pagar cada cuota variará en función del tipo de cambio de [moneda del préstamo/euro]. ▪ <i>(Si ha lugar)</i> Este es un préstamo de solo intereses. Ello quiere decir que, durante su vigencia, necesitará reunir capital suficiente para reembolsar el importe del préstamo en la fecha de vencimiento. ▪ Al margen de lo recogido en la presente ficha, tendrá que pagar otros tributos y gastos <i>(si ha lugar)</i>, p.ej., gastos notariales.