

# POST-CRISIS EVOLUTION OF THE MORTGAGE LEGISLATION

A comparative perspective  
Ireland-Spain

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## 1. INTRODUCTION

There are striking parallels between Ireland and Spain from an economic, social and legal perspective. In a pre-crisis economic context, both experienced significant and sustained house price inflation and mortgage market expansion and, in the subsequent reversal of house price trends, they were amongst those countries which experienced the highest consistent price falls in Europe<sup>1</sup>. The bursting of the housing bubble and the ensuing global recession led to a significant increase in national unemployment and exposed an indebtedness crisis amongst mortgage consumers; most notably those who were adversely impacted by increased unemployment and those who contracted in the inflationary pre-crisis context when loan origination was premised less on affordability and sustainability than on assumptions of continued asset price appreciation. In both jurisdictions, the legal framework for residential mortgages, which had been comparatively static in a pre-crisis context, became increasing

dynamic as national legislatures and regulators attempted to respond to the deficits exposed by the crisis and the related social issues. This article identifies the evolution of the post crisis national frameworks and identifies the similarities and distinctions in the objective, form, scope and impact of the responsive provisions.

## 2. POST CRISIS EVOLUTION – DUAL ORIENTATION

In Ireland and Spain, the rights and obligations of the parties to a mortgage loan contract are contained in a variety of constitutional provisions and primary and secondary legislation. Whilst the national constitutional provisions applicable to the mortgage context remain unaltered in both Ireland and Spain, there has otherwise been significant reform of various components of the national statutory framework applicable to mortgages, both through the amendment and /or replacement

of existing statutes and, the introduction of provisions which did not have a pre-crisis equivalent<sup>2</sup>. The comparatively static pre-crisis framework may thus be juxtaposed with its more dynamic post crisis counterpart. A prerequisite to any examination of the post crisis evolution of mortgage legislation is the need to delineate between the dual orientation of relevant reforms. In Ireland and Spain, there were interventions which had, what might be termed, a “retrospective focus”, in that they focused on the legacy of pre-crisis loan origination in response to the social crisis of over indebted mortgage consumers. In addition, there were measures which in contrast, had a “prospective focus”, in that the reform was directed towards the statutory parameters for interaction between lenders and borrowers in the context of post crisis loan origination.

#### A. PRE-CRISIS LENDING – RESPONSIVE MEASURES

The issue of how to respond to over indebted mortgage consumers is one which has by necessity, been addressed in both Ireland and Spain. Statistics compiled by the Central Bank of Ireland highlight a sustained and significant increase in the rate of mortgage arrears in the period from 2009 onwards notwithstanding a comparatively low rate of repossessions<sup>3</sup>. In Spain, notwithstanding comparatively conservative official arrears rates quoted by the Banco De España, statistics from the Consejo General del Poder Judicial España point to an escalation in the number of evictions in the post crisis context<sup>4</sup>. Expressed as a percentage of nominal GDP, household debt in Ireland was 116.6 per cent compared with Spain at 83.8 per cent by the end of 2011<sup>5</sup>. Notwithstanding the common objective in statutory intervention in respect of pre-crisis loan origination, there are distinctions in the quantity, scope and nature of the interventions which merit attention.

## IRELAND

### (i) Code of Conduct on Mortgage Arrears (CCMA)

In Ireland, the statutory response to the issue of distressed mortgagors has been provided through secondary legislation; the Code of Conduct on Mortgage Arrears (CCMA). The CCMA addresses the context where the borrower is having or, anticipates having difficulty, in meeting their repayment obligations under the mortgage contract<sup>6</sup>. The CCMA was first introduced in February 2009, as a temporary measure for a period of 12 months but due to a deepening of the crisis, it was renewed for a further 12 month period. In January 2011, the temporal limitations on the applicability of the CCMA were removed and it became a permanent feature of the regulatory landscape<sup>7</sup>. The current CCMA, (effective as of 1<sup>st</sup> July 2013) applies to “the mortgage loan of a borrower which is secured by their primary residence” and, is applicable to all regulated lenders, except credit unions<sup>8</sup>.

The CCMA imposes a statutory obligation on the lender to engage with the borrower in an attempt to put in place arrangements to resolve the arrears problem<sup>9</sup>. The centrepiece of the CCMA is a four step Mortgage Arrears Resolution Process (MARP), which is comprised of; communication with the borrower, financial information, assessment and resolution<sup>10</sup>. Where a borrower is co-operating with the lender the CCMA imposes a temporary moratorium on the commencement of enforcement proceedings in relation to the primary residence<sup>11</sup>. Notwithstanding the commencement of legal action, it requires lenders to attempt to maintain contact with the borrower or their representative<sup>12</sup>. In the event that agreement can be reached and an alternative arrangement put in place before an order for possession is granted, the lender is obliged to apply to the court to suspend proceedings for the period that the borrower adheres to the terms of the alternative repayment arrangement<sup>13</sup>. Where a borrower is engaged in the process, the CCMA

imposes restrictions on the charges and/or surcharge interest on arrears to prevent an escalation of the borrowers' indebtedness<sup>14</sup>.

The CCMA clearly defines what constitutes a non-co-operating borrower<sup>15</sup>. It also addresses organisational aspects of the arrears process, such as personnel and contact points, staff training and systems requirements<sup>16</sup>. The CCMA mandates the scope and content of information to be provided to borrowers<sup>17</sup>. It requires that processes and justification of options are documented and the lender is required to be able to demonstrate compliance with the Code<sup>18</sup>. It requires lenders to implement a communications policy and regulates the circumstances in which unsolicited personal visits may be made to the borrower's primary residence<sup>9</sup>. The underlying objective of the CCMA is to prevent the loss of homes by facilitating the rehabilitation of viable loans; however there is no suggestion that every loan is viable. The CCMA outlines the requirements imposed on lenders where the MARP process results in a finding that the loan is not viable<sup>20</sup>.

Section 117 of the Central Bank Act 1989 provides the statutory basis for the CCMA, (as it does for the Consumer Protection Code (CPC) which is addressed elsewhere in this article)<sup>21</sup>. Ostensibly, breach of the provisions of either of the Codes incurs administrative sanction, but, significantly, does not affect the validity of the loan contract. However, the question of whether the provisions of the CCMA are implied contractual terms and the implication of breach on the rights of the lender in the context of repossession proceedings has been subject to judicial analysis in recent Irish case law. In *Stepstone Mortgage Funding v Fitzell*, Laffoy J. in the High Court, refused an order for repossession on the basis that the provisions of the CCMA had not been complied with:

*I find it impossible to agree with the proposition that, in proceedings for possession of a primary residence by way of enforcement of a mort-*

*gage or charge to which the current code applies, which comes before the court for hearing after the current code came into force, the plaintiff does not have to demonstrate to the Court compliance with the Current Code<sup>22</sup>.*

In a subsequent High Court decision, *Irish Life and Permanent PLC v. Malcolm Duff and Susan Duff*, Hogan J. following the reasoning of Miss Justice Laffoy in *Stepstone* refused an order for possession on the basis of non-compliance by the lender with the provisions of the Code<sup>23</sup>. In 2013, the report of a Government appointed expert group on repossession observed in respect of this thread of case law, "it appears therefore that under the law as it currently stands compliance with the CCMA is a necessary condition for lenders seeking to obtain court orders for repossession of primary residences"<sup>24</sup>.

## SPAIN

In contrast to the singular Irish framework, the Spanish approach has been more fragmented. This observation is premised on the introduction of a series of successive legislative enactments with varying objectives, approaches and durations from 2008 onwards.

### (i) Royal Decree 1975/2008

The initial legislative response came in the form of Royal Decree 1975/2008 of 28th November, which introduced a partial moratorium on the payment of mortgage loans by debtors subject to the fulfilment of certain criteria in respect of employment, income status and loan characteristics. The objective of the legislation was to contain the extent of mortgage default and prevent the loss of their home for mortgagors whose capacity to meet on-going financial obligations had deteriorated due to the downturn in the Spanish economy. The scheme had temporal limitations and although Law 97/2009 of 6th February 2009, extended the duration of the moratorium on payment

and also extended the offset period, the moratorium ended as of February 2011<sup>25</sup>. To the extent that these early measures contained a moratorium and were intended to prevent the loss of homes, there are parallels between the Irish and Spanish responses. However, a significant distinction can be made between the nature and scope of the moratorium and its applicability; in the CCMA it is applicable to loans secured by the primary residence without further pre-requisites and it operates to suspend for a specified period the lenders right to initiate an action for enforcement of the mortgage security. In Royal Decree 1975/2008 and its successors, the moratorium relates to a specific quantum of the repayments due under the loan contract and, as eligibility for relief was predicated on satisfying economic criteria and temporal limitations, the measures had targeted applicability (i.e. consumers whose capacity to meet their financial obligations has been adversely impacted by the change in economic conditions and satisfied those conditions as of 1<sup>st</sup> January 2010).

### (ii) Royal Decree Law 8/2011

The second initiative was Royal Decree Law 8/2011 of 1<sup>st</sup> July which addressed the preservation of income for those who had lost their homes<sup>26</sup>. Its objective was to minimize the residual debt obligation in the context of sale of the residence. This was achieved through reform of provisions of the Ley Enjuiciamiento Civil (LEC) which addressed the attachment of income where auction of the mortgaged property was insufficient to fully discharge the debt<sup>27</sup> and the provisions relating to the auction process itself e.g. threshold at which the asset could be adjudicated to the creditor and quantum of deposit required by bidders<sup>28</sup>. Whereas the provisions of RD 1975/2008 were directed at a specific niche and were of limited duration, the changes pursuant to RDL 8/2011 were made to the procedural framework regulating the realization of the security by the lender thereby having

broader applicability i.e. no temporal limitation and although the provisions in respect of preservation of income were to provide relief to lower income families, the reforms to the auction process to prevent underselling of assets were universally beneficial.

### (iii) Royal Decree Law 6/2012

The third Spanish initiative was Royal Decree Law 6/2012 of 9<sup>th</sup> March 2012. The statute attempted to provide a statutory framework to facilitate debt restructuring and provide alternatives where this was not a viable option<sup>29</sup>. The centerpiece of the statute is a *voluntary* code of practice for the “viable restructuring of mortgage debts on the principal residence” to which it was *hoped* credit institutions and other entities providing mortgage loans would adhere<sup>30</sup>. The scheme was limited to loans which predated the introduction of the legislation and satisfied the eligibility criteria as of that date<sup>31</sup>. In order to benefit from the legislation, the debtor had to fall within the “exclusion threshold” as defined in article three<sup>32</sup> and in addition, the purchase price of the property had to fall within the values specified in the statute (which were determined with reference to the municipality in question)<sup>33</sup>. In addition to these provisions the law also amended the procedure for out of court mortgage foreclosure on the *principal residence* of a debtor with a view to preventing abuse via the underselling of assets<sup>34</sup>. A commonality between Law 6/2012 and the CCMA is that both impose limitations on the financial penalties applicable to mortgagors in default. Article 4 of the former impose a cap on the charges which can be imposed on a debtor in default where the debtor has satisfied the conditions of article 3 citing a remunerative interest of 2.5% of the outstanding principal of the loan as the maximum additional interest payable in respect of loans covered by the Royal Decree. In addition both clearly provide for penalization of debtors who do not act in good faith<sup>35</sup>. However, once again a distinction can be made regarding the

issue of scope and temporal applicability and the issue of mandatory as opposed to voluntary compliance<sup>36</sup>. Notwithstanding its stated objective, in practice the cumulative eligibility criteria and loan value restrictions contained in RDL 6/2012 limited its capacity to offer relief to distressed debtors.

#### (iv) Royal Decree Law 27/2012

Notwithstanding the foregoing legislative responses, incidents of suicide amongst distressed mortgagors facing eviction led to the introduction of an emergency measures in late 2012, in the form of Royal Decree Law 27/2012 of 15<sup>th</sup> November<sup>37</sup>. The law imposed a two year moratorium on the execution of an eviction order arising from enforcement proceedings by the creditor<sup>38</sup>. Consistent with the targeted approach of previous measures the moratorium is restricted to loans granted for the purpose of and, secured on the debtors' primary residence and there are additional eligibility requirements which manifest an intention to limit relief to a specific subset of mortgage consumers<sup>39</sup>. The debtor must be classified as "vulnerable", a term which is defined with parameters such as the size and composition of the household, the employment and income status of the debtor and, the capacity of members of the family unit to work<sup>40</sup>. In addition, the debtor must fulfil specified economic criteria; the focus of which is on aggregate household income and the proportion of income required to sustain the mortgage obligation.<sup>41</sup>

#### (v) Law 1/2013

The most recent evolution of the legislative framework is contained in Law 1/2013 of 14<sup>th</sup> May which contains multiple provisions which are intended to "improve and strengthen the framework for the protection of debtors"<sup>42</sup>. Accordingly, it contains provisions which are intended to respond to criticism of gaps in the protections offered by existing frameworks

and to consolidate protections for "primary residences"<sup>43</sup>. To the extent that it addresses the context of pre-crisis loans, the most significant measures are the provision of an immediate two year moratorium on evictions; an "exceptional temporary measure" which is applicable to judicial and extra judicial proceedings in respect of the primary residence of a "vulnerable" debtor who fulfills certain economic criteria<sup>44</sup>. Fundamentally, the provisions re-enact the contents of RDL 27/2012 subject to one variation in the eligibility criteria which increases the maximum income threshold<sup>45</sup>. In addition it contains amendments to aspects of RDL 6/2012 which were subject to criticism; although notably without broadly extending the scope of applicability (i.e. slightly more scope within the same niche)<sup>46</sup>. One notable extension of the protection is the inclusion of mortgage guarantors for the main debtor<sup>47</sup>. It redefines the parameters of "at risk of social exclusion" in a manner which is broadly comparable with the eligibility criteria to benefit from the moratorium on eviction contained in Law 27/2012 and Law 1/2013 itself; thereby providing a manifest degree of statutory consistency in the addressee of Spanish provisions. The existing maximum thresholds regarding the purchase price of the property have been increased and the previous universal value applicable to municipality ranges has been replaced by a range of values linked to the composition of the household<sup>48</sup>. Significantly, there are new provisions pertaining to the obligation of credit institutions to apply the code and to inform customers of its existence and the introduction of sanctions for non-compliance<sup>49</sup>. Law 1/2013 requires entities who subscribe to the code to "inform customers in writing of its existence, giving a detailed description of its contents, and the possibility of customers failing to meet their mortgage payments or having any other difficulty meeting their mortgage payments, might have of being covered by the code"<sup>50</sup>.

## B. POST CRISIS LENDING – REFORM OF LEGAL FRAMEWORK

In addition to addressing issues raised by pre-crisis loan origination, there was a requirement in both Ireland and Spain, to respond to those regulatory deficits exposed by the crisis. This issue of appropriate underwriting standards in particular was subject to consideration not just at national or European level but also globally, with the publication of principle based international benchmarks<sup>51</sup>. In Ireland and Spain, reform of the legal framework applicable to the mortgage context has been undertaken through primary and secondary legislation which provide the legislative parameters for the substantive rights and obligations of the mortgagor/mortgagee, the procedural frameworks for enforcement of the mortgage security and the conduct of business requirements imposed on lenders by the national regulatory authority.

### IRELAND

#### (i) Primary Legislation – Mortgage Law

##### Land and Conveyancing Law Reform Act (LCLRA) 2009

In Ireland, although the constitutional and consumer credit frameworks remained unchanged in the post crisis period, there was reform of Irish mortgage law<sup>52</sup>. The overhaul of the legal framework was under review prior to the financial crisis but it came to fruition in the Land and Conveyancing Law Reform Act 2009 (LCLRA 2009) in a post crisis context<sup>53</sup>. Until 2009, the statutory framework for the rights, duties and obligations of mortgagors and mortgagees was contained in the Conveyancing Acts 1881-1911. However, in respect of mortgages created from December 1, 2009 onwards, the relevant framework is contained in Part 10 of the LCLRA (2009). Pursuant to its provisions, pre-existing Irish mortgage law has continued applicability, subject to any reform introduced in the LCLRA itself. The most significant feature of the LCLRA in this regard, is its esta-

blishment of a new and differential treatment of “housing loan mortgages”, which differentiates them from other mortgages<sup>54</sup>. The term “housing loan” includes all credit agreements secured by a mortgage over what is currently, or will be in the future, the principal residence of the borrower or his or her dependents and, any credit granted to a consumer which is secured by a mortgage over land on which there is or will be a residence<sup>55</sup>. Setting aside the established tenets of consolidation, it provides that a mortgagor can now redeem a “housing loan” without having to redeem any other mortgage with the mortgagee, whether in respect of the same or another property<sup>56</sup>. A general power of leasing is conferred on the mortgagor, and contractual restrictions on the sale or transfer by the mortgagor of their interest in the property are prohibited<sup>57</sup>. Section 97 LCLRA provides that a mortgagee cannot take possession of the property without a court order unless the mortgagor “consents in writing to such taking not more than 7 days prior to such taking”<sup>58</sup>. The exercise of a mortgagee’s power of sale similarly necessitates a court order, unless the mortgagor consents in writing to the exercise of the power no more than seven days prior to the sale<sup>59</sup>. The LCLRA provides that the Circuit Court has exclusive jurisdiction to deal with orders for possession or sale in the context of housing loans, compared to the High Court for all other mortgages<sup>60</sup>. The mortgagee is under a statutory obligation to obtain the best price which can reasonably be obtained when selling a re-possessed property, among other obligations<sup>61</sup>. The benefit for mortgagors arise from the fact that for housing loan mortgages unlike other mortgages, the statutory rights and protections conferred cannot be varied by contract.

#### (ii) Secondary Legislation – Consumer Protection

##### Consumer Protection Code (CPC)

In addition to reform of mortgage law, the Irish Consumer Protection Code (the CPC)

underwent a significant evolution in the post crisis period. The CPC was first introduced in 2006 and it was therefore, a feature of the pre-crisis regulatory landscape. However, the provisions of the original code did not fully come into effect until July 1<sup>st</sup>, 2007 and, accordingly; it had a negligible impact on lending in the pre-crisis context. The CPC has been subject to significant reform in the intervening period and the current CPC is applicable as of January 1<sup>st</sup>, 2012. It addresses the requirements imposed on lenders in the provision of “mortgage credit”, to personal consumers, whether in respect of a principal private residence or investment property<sup>62</sup>. A recent introduction is the concept of the “vulnerable consumer”, as a subset of the personal consumer. A vulnerable consumer is defined in the CPC as “a natural person who: (a) has the capacity to make his or her own decisions but who, because of individual circumstances, may require assistance to do so (for example hearing impaired or visually impaired persons); and or (b) has limited capacity to make his or her own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health difficulties)”. A guidance document which accompanied the CPC gives further examples of potential vulnerability such as “age, poor credit history, low income, serious illness bereaved etc”<sup>63</sup>. An obligation is imposed on the lender to ensure that where a personal consumer has been identified as a vulnerable consumer, he/she is provided with “such reasonable arrangements and or assistance that may be necessary to facilitate him or her in his or her dealings with the regulated entity”<sup>64</sup>. This, of course, raises questions of contracting capacity and/or undue influence. The CPC is applicable to the “regulated activities of regulated entities operating in the State” and in a mortgage context this includes all lenders, irrespective of classification, except credit unions<sup>65</sup>.

The CPC regulates the provision of pre-contractual information to mortgage consumers both in respect of the lender and the

mortgage products, specifying the content, format, presentation and timing of information and warnings to be provided<sup>66</sup>. The CPC also imposes disclosure requirements to increase transparency regarding the existence, basis and quantum of charges and the commercial arrangements between mortgage intermediaries and product producers<sup>67</sup>. It imposes restrictions and prohibitions on market practices, such as product bundling, product tying, contingent sales, and consolidation of charges<sup>68</sup>. It identifies post sale information requirements<sup>69</sup> and regulates the manner and extent of contact that the lender can have with consumers who are existing or potential customers<sup>70</sup>.

The CPC imposes a substantive obligation on the lender to assess the suitability of the products offered to consumers, where an assessment of affordability is a central component<sup>71</sup>. The provisions address the issues of affordability, sustainability and suitability and stipulate the minimum requirements in the assessment of product suitability<sup>72</sup>. There is a requirement to maintain consumer records such that any material change is noted, and the regulated entity is prohibited from supplying products or services to a consumer who has refused to provide the information required to make a suitability assessment<sup>73</sup>. It is mandatory to take account of assessments of affordability when deciding whether a personal consumer is likely to be able to comply with the terms of the credit agreement<sup>74</sup>. However this does not amount to a prohibition on the provision of credit in the context of a negative assessment of affordability<sup>75</sup>. There has been judicial consideration of the issue of “reckless lending” in recent Irish case law, although not with reference to the obligations contained in the CPC but within the broader civil law framework. In *ICS Building Society v Grant* Charleton J held that the tort of reckless lending does not exist in Irish law<sup>76</sup>. The CPC states that its provisions “are binding on “regulated entities” and must, at all times, be complied with when providing financial services”<sup>77</sup>. The Central Bank has power to issue administrative sanctions for

contravention of the CPC pursuant to Part III C of the Central Bank Act 1942<sup>78</sup>.

## SPAIN

### (i) Primary Legislation – Mortgage Law

As in Ireland, the provisions of the Spanish constitution which are relevant to the mortgage context remain unchanged in the post crisis period<sup>79</sup>. In a pre-crisis context, the primary legal framework applicable to the mortgage loan contract and the related security right consisted of the principles contained in the Spanish Civil Code<sup>80</sup> as developed through the Ley Hipotecaria (LH) and subsequent implementing regulations i.e. Reglamento Hipotecario (RH)<sup>81</sup>. These provided the pre –crisis statutory framework for the constitution and registration of the mortgage and the framework of mortgagor/mortgagee rights and obligations<sup>82</sup>. The Ley Enjuiciamiento Civil (LEC) provided the statutory framework in respect of enforcement related aspects of the mortgage security<sup>83</sup>. To the extent that there has been post crisis reform of this framework, it had, prior to 2013, been directed towards the enforcement aspects regulated by the LEC as exemplified by the changes undertaken in RDL 8/2011 and more recently by Law 1/2013; the stated objective of which was to ensure that “the rights and interests of the mortgagor are protected and that the foreclosure proceedings are speedier and more flexible”<sup>84</sup>. In addition, to amending provisions regarding the auction process, Law 1/2013 also address the extent of the liability of the mortgagor when realization of the asset is insufficient to discharge the debt<sup>85</sup>. Where the enforcement is premised on non-compliance with scheduled payments, (from the entry into force of law 1/2013), the creditor can seek enforcement where there is a default of three monthly payments (or the equivalent of three monthly payments) and this is provided for in the mortgage contract. Law 1/2013 confers a statutory right on the mortgagor where the mortgage relates to the

usual residence of the debtor i.e. He/she has the right to stop the proceedings up to the auction date by depositing the outstanding amount with the courts (in all other cases this would only be possible if the creditor agreed to it). The exercise of this right is limited to 3 yearly intervals<sup>86</sup>.

Law 1/2013 also modified provisions of the Ley Hipotecaria (LH) with the objective of enhancing protections offered to mortgagors in respect of their primary residence. It requires mortgage deeds created from 15<sup>th</sup> May 2013, onwards to specify whether or not the property subject to the mortgage is the principal private residence of the debtor creating a rebuttable presumption that it remains so at the time of enforcement<sup>87</sup>. It imposes requirements for verification of warnings given to the mortgagor in the context of “housing loan mortgages”<sup>88</sup> as well as limiting the penalties which can be imposed on arrears<sup>89</sup>. The act also limits the scope of enforcement proceedings which can be taken extra judicially, to those in which the debt is determined at the conclusion of the contract<sup>90</sup>. It stipulates that extra judicial sales are to be undertaken through a single electronic auction and imposes a minimum threshold on the auction price of the property<sup>91</sup>. The option of extra judicial enforcement has always been predicated on the parties to the contract providing for this mechanism in the mortgage contract, however it is now necessary for stipulation of this in a separate clause in the mortgage deed which also stipulates whether or not the property is intended to be the primary residence of the mortgagor<sup>92</sup>.

### (ii) Primary and Secondary Legislation - Consumer Protection

In Spain, consumer protection had provided a basis for statutory intervention in a pre-crisis context by virtue of the mandate contained in Law 26/1988, article 48.2 of which empowered the Minister for Finance to impose transparency and related requirements



on credit institutions<sup>93</sup>. Contemporary regulation of mortgage loan contracts pursuant to this mandate had been in the form of specific transparency regimes for mortgage loans and provisions in respect of interest rates, fees, charges and advertising applicable to retail financial services<sup>94</sup>. In the post crisis period, the scope of these regulatory provisions increased significantly when pursuant to regulatory reform, a responsible lending obligation was introduced for the first time into Spanish law. However, in contrast to the universality of the Irish obligations contained in the CPC, a differentiated approach based on classification of lender is evident in Spain as a dual legislative framework is utilised to specify the requirements imposed on credit institutions and non-credit institutions<sup>95</sup>. In respect of the former the relevant provisions are contained in Order EHA2899/2011 of 28<sup>th</sup> October 2011, whilst for non-credit institutions the applicable statute is Law 2/2009 of 31<sup>st</sup> March 2009<sup>96</sup>.

#### (a) Order EHA 2899/2011

Order EHA2899/2011 serves a dual purpose; it consolidates pre-existing provisions in respect of transparency and consumer protection in financial services and also implements new provisions per article 29 of Sustainable Economy Law 2/2011 of 4<sup>th</sup> March 2011 (SEL 2/2011)<sup>97</sup>. The provisions of EHA/2899/2011 are applicable in respect of banking services offered or supplied to existing and potential customers by credit institutions<sup>98</sup>. The provisions applicable to mortgage consumers are contained in Title III, which contains chapters on “responsible lending” and “rules on loans and mortgages”, the latter comprising of six sections<sup>99</sup>. Article 29(1) of SEL 2/2011 imposes an obligation on the credit institution to provide, “in an accessible manner and in particular, through the appropriate pre-contractual information, adequate explanations enabling them to assess whether the products they are being offered are in line with their interests, needs and financial situation”<sup>100</sup>. Although

there were existing transparency requirements in respect of the “financial conditions of mortgage loans”, they have significantly increased under the new legislation. The current requirements of general and personalized information cards (FIPRE & FIPER) and the mortgage loan access guide were not provided for under exiting provisions nor was there a transparency regime for reverse mortgages. In addition, the requirement to enhance the visibility of floor and ceiling clauses via inclusion in an annex to the FIPER is an improvement on the prior requirement to merely include in the contractual documentation. A new development in Spanish mortgage protection is the imposition of a statutory requirement on credit institutions to assess the creditworthiness of a borrower prior to the conclusion of a credit or loan agreement<sup>101</sup>. This statutory obligation is given effect by Order EHA2899/2011 which mandates the development of internal procedures by credit institutions for the purpose of assessing the clients’ ability to meet the obligations under the agreement<sup>102</sup>. Similarly to the Irish CPC, breach of the provisions of the Order does not affect the validity of a notarized and registered contract, however pursuant to Article 30(3), a notary may refuse to authorize a contract which does not comply with the provisions of the law<sup>103</sup>.

#### (b) Law 2/2009

Whilst the rights accorded to a Spanish mortgage consumer who sources a loan from a credit institution are identified in EHA2899/2011, in the context of loans or other intermediation services from non-credit institutions (i.e. those who do not fall within the prior classification), Law 2/2009 is applicable<sup>104</sup>. There is an overlap between the framework for credit and non-credit institutions, in that the latter are expected to comply with the transparency regime in respect of general and personalized pre-contractual information contained in EHA 2899/2011, thus establishing a minimum threshold regarding the

content and format of information. However, Law 2/2009 imposes disclosure and transparency requirements not just to the products, services and costs but also in relation to the entity itself. As compared with the corresponding provisions in respect of credit institutions there is an additional emphasis placed on transparency and clarity in respect of costs and charges. Echoing the provision of the Unfair Contract Terms Directive and the provisions of the general text for the protection of consumers and users<sup>105</sup>, article 11 confers standing on the National Consumer Institute or any other consumer association or users who meets the requirements of Royal Decree 1/2007 or of regional consumer protection legislation where applicable, to apply for an injunction against conduct which adversely affects the collective consumer interest<sup>106</sup>. Another feature of the Law which appears to improve the protection offered to consumers is the prohibition in article 18, pursuant to which notaries and registrars are expressly prohibited from authorizing and registering “loan or home equity” that “does not comply with the law and in particular with the requirements of this act”<sup>107</sup>. Notaries are obliged to inform consumers of the “value and scope of the obligations assumed”. They are required to check for any inconsistency between the pre-contractual information, the financial terms of the binding offer and the legal and financial terms of the contract and in the event an inconsistency is discovered, they are required to inform the consumer of the differences and their right to cancel the transaction. In the context of variable rate loans there is a requirement to warn the consumer in circumstances which do not comply with article 17(3). It is of note that there are no obligations imposed in respect of responsible lending. Law 2/2009 predates the introduction of the statutory obligation under SEL 2/2011, and from a temporal perspective it is thus unsurprising. However, from a policy perspective, the failure to subsequently extend the applicability of the statutory obligation to such entities would appear to be a deliberate

policy choice. This is however one which will be subject to reform under the new EU Mortgage Credit Directive 2014/17/EU.

### 3. EU PROVISIONS AND NATIONAL LEGAL FRAMEWORKS

In March 2014, the EU Mortgage Credit Directive was adopted and became the first binding EU regulation of origination in the context of mortgage loans<sup>108</sup>. The directive is a targeted harmonisation measure which imposes maximum thresholds in respect of certain provisions and otherwise provides latitude to Member States to determine the appropriate national threshold<sup>109</sup>. The Directive applies to mortgage and housing loans but does not encompass equity release agreements<sup>110</sup>. There is a two year transposition period for Member States and the provisions of the Directive apply to loan granted from March 21<sup>st</sup>, 2016 onwards<sup>111</sup>. The extent to which the Directive will necessitate reform of the legal framework in Member State frameworks depends on the degree of inconsistency between the Directive and the existing frameworks. Certainly, it will necessitate equalisation of the responsible lending obligation in a Spanish context and the imputed prohibition on the provision of credit in the context of a negative assessment of creditworthiness may necessitate change in both Ireland and Spain<sup>112</sup>. However, a comprehensive assessment of the impact of the Directive on national frameworks will not be possible until Member States have disclosed proposals for transposition.

Aside from the MCD, EU legislation has been relevant to the mortgage context by virtue of provisions which address the broader context of consumer contracts, via Directive 93/136/EEC on unfair terms in consumer contracts. This directive imposes restrictions on the terms which may be incorporated into consumer contracts by providing for the invalidation of an unfair term; a concept which is primarily defined by reference to the absence of good faith and a corresponding imbalance

in the parties' rights and obligations which is detrimental to the consumer. There is a notable distinction, of comparatively recent origin, in respect of the impact of this directive in the jurisdictions under review. The Directive is transposed in Ireland via the EC (Unfair Terms in Consumer Contracts) Regulations 1995<sup>113</sup>, and in Spain via Law 7/1998 of 13<sup>th</sup> April<sup>114</sup>. Notwithstanding the applicability of the Directive to mortgage loan contracts in both jurisdictions it had appeared of tangential relevance until 2011. Whilst this is still true of Ireland, the significance of the Directive has increased in Spain due to a ruling of the CJEU in *Aziz v Caixa Catalunya*<sup>115</sup>. The court held that the restricted scope of the permissible defenses against an action for enforcement, permitted under Spanish mortgage law, was inconsistent with the objectives of the Directive; since the declaratory proceedings before which broader challenges could be raised did not have the power to stay the Spanish enforcement proceedings<sup>116</sup>. Law 1/2013 amends the judicial and extra judicial enforcement procedures to implement the changes required consequent to the CJEU decision in *Aziz*.

#### 4. CONCLUSION

The post crisis parallels between Ireland and Spain are not limited to those in the economic or social spheres. In the period from 2008 onwards, there has been an increased dynamism in the legal framework pertaining to residential mortgages in both jurisdictions as legislatures and regulators sought responses to twin challenges; addressing the legacy of pre-crisis loan origination and creating parameters for future lending which would prevent simi-

lar issues in the future. Notwithstanding, commonality in the objective of statutory intervention, there are distinctions in the form and effect of measures, most strikingly in respect of measures responding to pre-crisis lending. In Ireland and Spain, the reliefs offered were directed towards the primary residence although a significantly more targeted approach is manifest in the Spanish provisions as additional eligibility requirements were utilised to restrict the scope of applicability to low income and vulnerable debtors and there were temporal restriction to ensure that the frameworks were applicable only to prior lending. The Spanish provisions also focus on reforms to the judicial and extrajudicial enforcement context with the aim of preventing the underselling of assets and minimizing the residual debt obligation of the debtor.

The statutory provisions to reform future lending have a similar impetus and central to this are responsible lending obligations; although at present a point of difference between the jurisdictions if the differentiation in the applicability of the obligation in Spain. It would appear that the EU Mortgage Credit Directive will provide a greater convergence in the national regimes by requiring an equalisation of the responsible lending obligation in Spain and, potentially necessitating reform in both Ireland and Spain to the extent that transposition may require a prohibition on lending in the context of a negative creditworthiness assessment. A significant recent development is the emergence of the unfair contract terms directive as a force in shaping the post crisis legal framework in Spain, in contrast it has played no part in either a pre or post crisis Irish context.

#### NOTES

1. HJ Dübel and M Rothemund, A New Mortgage Credit Regime for Europe, Centre for European Policy Studies (CEPS) Special Report (Brussels, CEPS, June 2011) 8. Although Latvia suffered an even sharper house price to income correction than Ireland, there has been a recovery in Latvian house prices, which increased by 9.8 per cent in Q4 2012 compared to the same quarter in 2011.

2. The relevance of the national constitutions to the contemporary mortgage context stems from provisions addressing legal, human rights and social policy dimensions i.e. articles pertaining to property rights, the inviolability of the dwelling, and principles governing economic and social policy. In the Constitución Española, adopted in 1978, the provisions are contained in Article 33 CE (Private Property), Article 18.2 CE (Inviolability of the dwelling) and under the Principles on Economic and Social Policy contained in Chapter III, Article 47 (Housing Rights) and Article 51 (Consumer Protection). In the Irish constitution, Bunreacht na hEireann, adopted in 1937, (replacing the previous Irish Constitution 1922) the relevant provisions are contained in Articles 40.3 ('Personal Rights' which includes reference to property rights of citizens), Article 43 (Private Property), Article 40.5 ('Personal Rights' with reference to inviolability of the dwelling) and, Article 45 (2)(iv) (Directive Principles of Social Policy which includes a provision which requires the State to direct its policy to securing that 'in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole'.

3. *Residential Mortgage Arrears and Repossessions Statistics: Q1 2014* (Dublin: Central Bank of Ireland, 2014). Notwithstanding an improvement in the rate of arrears from Q3 2013 onward, as of Q1 2014, 17.3 per cent (132,217) of all mortgage accounts for principal dwelling houses (PDH) were in arrears, of which 12.2 per cent (93,106) were in arrears of more than 90 days. The low rate of reposessions from 2009 to 2013 is attributable in part to an inadvertent *lacuna* in the law relating to repossession of registered land, created by the LCLRA 2009, which was ultimately remedied in the Land and Conveyancing Law Reform Act (2013). In the period from Q1 2010 to Q4 2013 only 2,341 properties were taken into possession by lenders, of which only 753 were pursuant to a court order.

4. *Datos sobre el efecto de la crisis en los organos judiciales 1T 2013*, Consejo General del Poder Judicial España, (Madrid, 2013). In the period from Q1 2008 to Q1 2014, there have been 522,023 mortgage foreclosures in Spain, although the data does not indicate what proportion of orders relate to principal private dwellings. *Irish Mortgage Arrears Analysis* (Dublin, Davy Research, August 2012) 41. The report cites an arrears figure of 3.07 per cent based on data from the *Banco De Espana* for Q1 2012.

5. *Irish Mortgage Arrears Analysis* (Dublin, Davy Research, August 2012).

6. Chpt 1, 2.

7. The original CCMA 2009 imposed a moratorium on the commencement of actions for repossession for a period of 6 or 12 months dependent on whether the lender had been recapitalised by the State. In the CCMA 2010, the moratorium was extended to 12 months for all lenders. Notwithstanding the consistency of a moratorium of some duration in all incarnations of the CCMA, there has been a significant evolution in the detail and prescription regarding the processes and procedures utilised in addressing arrears cases.

8. Chpt 1, 2 and Chpt. 2, 3. It is not necessary to be in occupation of the property if it is the sole property owned by the borrower.

9. Chpt. 3, ss 9 & 10.

10. *Ibid.*, ss. 16 - 48. Lenders are required to establish a MARP which conforms to the requirements of the CCMA.

11. *Ibid.*, s.56. Depending on the specific context, the moratorium may be either eight months from the time when the arrears first arose or three months after the borrower has been notified that they are outside the MARP.

12. *Ibid.*, s.59.

13. *Ibid.*, s.59.

14. *Ibid.*, s.11.

15. Chpt. 2, 4. In addition to forgoing the protections of the CCMA, non-co-operating borrowers are potentially ineligible for a Personal Insolvency Arrangement (PIA) under the Personal Insolvency Act 2012.

16. Chpt. 3, ss. 1 - 11.

17. *Ibid.*, s. 12 - 15.

18. *Ibid.*, ss. 40 & 61.

19. *Ibid.*, s. 21 & 26.
20. Provision 45.
21. The broad applicability of the CPC to the financial services sector means that it is also premised on ss. 23 & 37 Investment Intermediaries Act 1995, s.8(h) Consumer Credit Act 1995 and s.61 Insurance Act 1989.
22. [2012] IEHC 142, at page 8, para 5.5.
23. [2013] IEHC 43. The Court held that the defendants could not be classified as non co-operating borrowers and that the bank had not complied with the requirement in the CCMA not to seek an order for possession until “every reasonable effort has been made to agree an alternative repayment schedule”.
24. Report of the Expert Group on Repossession, (Dublin: Department of Justice and Equality, December 2013), 17.
25. Article 4 (as amended) provided that the moratorium applied to monthly fees charged, (subject to the 50% or €500 maximum threshold), between 1st March, 2009 and the 28th February, 2011 and that the offset period commences from 1st March, 2012 for a maximum 15 year period. This effectively provided a 12 month grace period from the termination of the moratorium to the commencement of the offset period.
26. Royal Decree Law 8/2011 of 1st July 2011 (BOE of 7th July 2011). The stated objective was to protect low income families and ensure that ‘foreclosures are conducted without causing abusive situations or underselling of affected assets’.
27. Article 607.1 LEC
28. Articles 670 (4), 671 and 669 LEC
29. Preamble to RDL 6/2012 acknowledges the dual policy priorities in responding to the issue of distressed mortgagors i.e. the desire to create flexibility in ‘the implementation of the collateral’ although ‘without impairing the basic elements of the mortgage’. Where debt restructuring was not viable, the debtor may request a rebate on the outstanding principal amount, a request which the institution must reject or accede to within a one month period and where neither the restructuring plan nor the supplementary measures were viable alternatives a measure referred to as ‘dation’ was proposed i.e. delivery of the mortgage asset to the institution which is obliged to accept same in settlement of the debt including any personal liability in respect thereof. (i.e. *datio in solutum*)
30. Financial Regulation:2012 Q1, Banco de Espana, Economic Bulletin April 2012,147.
31. The provisions were applicable to the ‘secured loan or mortgage debtor whose property is located at the ‘threshold of exclusion’ at the date of entry into force of the decree’ i.e. 11/3/2012.
32. Article 3 stipulates that members of the household must lack income from employment or economic activity and the mortgage payment must be greater than 60% of the net revenue received by all members of the household unit. The members of the family unit must lack any other property or proprietary rights sufficient to deal with the debt and in the context of joint debtors, where a debtor is not part of the family unit they are subject to the same requirements in respect of income, mortgage payments relative to income and absence of other rights sufficient to deal with the debt. Where there is a guarantor, they must fulfil the latter two requirements.
33. Article 5(2) For assessments pursuant to the decree the statute provided that population figures can be verified in the Municipal register.
34. Which had been the purpose of the reform to judicial execution in the RDL 8/2011.Extrajudicial execution of the mortgage property regulated in article 129 of the Ley Hipotecaria (LH) and subject to the procedure set out in Articles 234 – 236 of the Reglamentos Hipotecarias (RH), shall be subject to the provisions of Article 12 of the Law 6/2012 in cases where the procedure is followed against a debtor’s residence.
35. Article 7.
36. The statute provided that complaints regarding alleged failure by the participating institutions were to be made to the Banco de Espana which would deal with them in the same manner as other complaints received.

37. Royal Decree Law 27/2012, of 15th November, (BOE 276 of 16/11/2012). The suicide of Amaia Egana on Friday 9th November, 2012, as officials arrived to evict her from her home in the Basque country was the catalyst for public demonstrations and international media coverage. Spanish Prime Minister Mariano Rajoy announced hours after Egana's death. "I hope that on Monday we'll be able to talk about a temporary suspension of evictions for the most vulnerable families."

38. Article 1 (1). The law applies both to judicial and out of court enforcement commenced prior to the entry into force of the law i.e. 16/12/2012. The law also contained a proposal for a collaborative scheme, between the government and the financial sector to provide social housing on a rental basis. The proposal envisaged the use of the unoccupied housing stock held by credit institutions to offer access to those vulnerable debtors, who fall within the scope of the law, but have already been evicted from their homes.

39. Article 1(3)(d). Must be the sole residence owned by the debtor.

40. Article 1(2)(a) – (g).

41. Article 1(1) & (3).

42. Ley 1/2013, of 14<sup>th</sup> May (BOE of 15th May), preamble.

43. Issues such as the potential for enforcement at an undervalue and subsequent disposal at a profit whilst imposing liability on debtor for outstanding loan, the restricted applicability of relief measures contained in RDL 6/2012 and the potential for spiralling indebtedness due to punitive arrears charges.

44. Preamble substantiates that the policy behind the moratorium is to protect the most vulnerable from eviction in the expectation that at the end of the time period, their economic circumstances will have improved, although it is unclear what the policy response will be if there is no significant change in conditions.

45. Article 1(3)(a).

46. The amendments contained in Law 1/2013 do not change the temporal restrictions on the applicability of the provisions – with the exception of arts. 12 & 13 which are generally applicable, the provisions apply to debtors who are at the threshold of exclusion at the date of entry into force of the statute'.

47. Art. 8(1) amending art. 2 RDL 6/2012. The provisions are applicable to guarantors as per mortgagors. Art. 8(3) inserts a new art.3 (a) which provides that mortgage guarantor who is above the exclusion threshold may 'require the entity to exhaust the main debtors assets first....before claiming the guaranteed debt'.

48. Art. 8(5) amending art.5(2)(a) – (d). Municipalities with up to 100,000 inhabitants the maximum purchase price is €150,000 for a property with one or two inhabitants (previously €120,000) with an additional €30,000 for each financially dependent up to a maximum of three (€240,000). Municipalities of between 100,001 and 500,000 inhabitants the base threshold is €187,500 (previously €150,000) with additional allowances of €37,500 for up to three dependents (maximum value €300,000). Municipalities with inhabitants from 500,001 to 1,000,000 or integrated townships in metropolitan areas with over 1,000,000 inhabitants the base limit is €225,000 (€180,000) and the allowance is €45,000 (maximum value €360,000). Municipalities with population in excess of 1,000,000 inhabitants, the base value is €250,000 (previously €200,000) and the additional allowances of €50,000 (maximum value €400,000).

49. Art. 8(7) inserts a new chapter VI Penalties. It consists of art. 15 which provides that 'the provisions of paragraph 4 and 9 of article 5 and article 6.5 shall have the status of rules of order and discipline in accordance with the provisions of law 26/1988... and breach of the obligations arising therefrom shall be deemed a serious offence which is punishable under the provisions of that act'.

50. Art. 5(9) as inserted by art. 8(5) Law 1/2013. Banco De Espana, Economic Bulletin – Financial Regulation 2013 Q2,

51. Thematic Review on Mortgage Underwriting and Origination Practices – Peer Review Report, (Basel: Financial Stability Board (FSB), 17<sup>th</sup> March 2011). Principles for Sound Residential Mortgage Underwriting Practices, (Basel: Financial Stability Board (FSB), April 2012).

52. In Ireland, the Consumer Credit Act 1995 (CCA) is one of two statutes which provide the statutory framework for consumer credit and, Part IX of the CCA applies to “housing loans” made by a mortgage lender. The CCA regulated the content and format of information and regulated market practices. Breach of the provisions of the CCA in a ‘housing loan’ context can result in administrative sanctions for the lender. However the provisions of the CCA have not been reformed in the post crisis period and from a mortgage context it is not central to analysis of the evolution of post crisis legislation.

53. Reform and Modernisation of Land Law and Conveyancing Law, (LRC CP34-2004), (Dublin, Law Reform Commission, 2004), 29 (at 1.31) and 141 (at 9.04). In 2004, the Irish Law Reform Commission asserted that existing mortgage law, which had remained substantially unchanged for over a century, created unnecessary complications and militated against the true function of the mortgage i.e. to provide security for a loan

54. S.96(3) The provisions take effect subject to the mortgage in all other cases unless otherwise stated.

55. Definition of ‘housing loan’ is derived from s.2 of Consumer Credit Act (1995) as amended by Part 12, Schedule 3 of the Central Bank and Financial Services Authority of Ireland Act 2004.

56. S.92 altering s.17 of the Conveyancing Act 1881.

57. S.94 and s.112.

58. S.97. Per S.98 an emergency possession order may be sought “where a mortgagee has reasonable grounds for believing that the mortgagor has abandoned the mortgaged property and urgent steps are necessary to prevent deterioration of, or damage to, the property or entry on it by trespassers or other unauthorised persons”. Under a possession order pursuant to S.98 the mortgagee is not strictly liable to account to the mortgagor.

59. S. 100(2).

60. S.101(5). The Land and Conveyancing Law Reform Act 2013 (LCLRA 2013) has extended the jurisdiction of the Circuit Court in this regard to include mortgages predating the commencement of the LCLRA 2009 (i.e. 1/12/2009) subject to a principal private residence requirement.

61. S.103.

62. Consumer Protection Code 2012 Guidance (Dublin: Central Bank of Ireland, December 2011), 3, 4 & 73. The CPC defines a ‘personal consumer’ as “a natural person acting outside his or her business, trade or profession”.

63. Ibid, 75.

64. Provision 3.1.

65. Consumer Protection Code 2012, (Dublin: Central Bank of Ireland, December 2011), 3 & 4. Retail credit firms and home reversion firms became subject to the code following the introduction of legislation governing their authorisation.

66. Provisions 4.7 – 4.45 .

67. Provisions 4.54-4.61.

68. Provisions 3.17-3.23.

69. Provisions 6.5 –6.19.

70. Provisions 3.37 – 3.45.

71. Provisions 5.1 - 5.15.

72. Provisions 5.16-5.23. A written statement of suitability must be provided to the consumer.

73. Provisions 5.3 & 5.4. The 2006 Code required only that the refusal was noted on the consumers’ record.

74. Provision 5.13.

75. The new EU Mortgage Credit Directive 2014/17/EU infers a prohibition on the provision of credit in the context of a negative creditworthiness assessment, and this will require a change to existing Irish law.
76. [2010] IEHC 17 at 6.
77. *Op. cit.* 65.
78. As inserted by s.10 Central Bank and Financial Services Authority of Ireland Act 2004.
79. In contrast to the Irish CCA 1995, the Spanish consumer credit framework is not relevant to the context of mortgage or housing loans.
80. Spanish Civil Code; Book IV address Obligations and Contracts. Title XV is titled Contracts of Pledge, Mortgage and Antichresis, Chapter I contains provisions common to both pledges and mortgages and chapter III provisions specifically applicable to the mortgage.
81. Ley Hipotecaria of 8<sup>th</sup> February 1946
82. The Ley Hipotecaria is divided into 13 sections which address various aspects of the constitution of the mortgage and the associated registration system and Title V (arts. 104 – 197) pertain to the mortgage itself. This structure is replicated in the Reglamentos Hipotecaria which provides additional provisions to facilitate implementation of the Ley Hipotecaria, Title V RH comprises arts. 215-271.
83. Ley 1/2000 of 7th January.
84. Law 1/2013 preamble references the desire to increase the pool of bidders and prevent underselling of assets which echoes previous reform and represents a further refinement of Articles 647 and 670 LEC.
85. Article 7(5) inserting article 579 (2) (a) and (b) LEC.
86. Art. 7(13) amending art. 693 LEC. Previously once every 5 years.
87. Art. 3(1) amending art. 21 of Mortgage Law 8th February 1946.
88. Art. 4(7). E.g. Where the contract contains floor or ceiling clauses in respect of interest rate variability, an interest rate hedging instrument or the loan is in one or more foreign currencies.
89. Art. 3(2) amending art. 114 of Mortgage Law 8th February 1946. The maximum interest payable is three times the legal interest rate on the outstanding principal amount and there is a prohibition on the capitalization of default interest. Where the disposal of the asset is insufficient to discharge the entire liability, the law requires that the proceeds are applied to the interest on arrears last so as to reduce the accrual of interest to the maximum extent possible. The prohibition on the capitalisation of default interest does not apply in the context of Art. 579(2)(a) LEC. Second transitional provision provides that the cap is applicable to mortgages created after 15th May 2013, and in respect of mortgages prior to that date the cap is applicable to payments which accrued after that date, and to interests accrued prior to that date which have not yet been discharged.
90. Art. 3(3) inserting art. 129 (2)(c) LH.
91. Art. 3(3) inserting Arts. 129(2)(d) LH and 129(2)(a) respectively. It requires an auction value which is equal to the enforcement amount and must in all cases, be no less than 75% of the appraised value of the property at the time the loan was granted; appraisal conducted in accordance with law 2/1981 of 25th March regulating the mortgage market. The auction is to take place on the online auctions portal managed by the Agencia Estatal del Boletín Oficial del Estado.
92. Art. 3(3) inserting art. 129(2)(b).
93. Art. 48(2).
94. The first transparency regime on the financial condition of mortgage loans was contained in Order 5 May 1994 and Circular 5/1994. This has been repealed and replaced by Order EHA/2899/2011 and the related Circular 5/2012.



95. At present this may be more of a theoretical than practical concern due to the lack of participation of non-credit institutions in the Spanish mortgage market, even prior to the stagnation of the market post crisis. *Study on the Role and Regulation of Non-Credit Institutions in EU Mortgage Markets*, Report for the EU Commission (London Economics, September 2008). In the report, it was asserted on the basis of information provided by the Spanish Public Treasury and the Spanish Mortgage Association that any lending in the Spanish market by non-credit institutions is marginal.

96. EHA2899/2011 in force from April 2012 with exception of title III, chapter II rules on loans and mortgages which is to come into force 9 month from publication in official gazette.

97. Fundamentally SEL 2/2011 is framework legislation and Article 29 elaborates principles which identify the parameters for the subsequent implementation of measures to promote responsible lending and consumer protection in financial services.

98. The provisions are applicable to domestic credit institutions and branches of foreign banks operating in the territory.

99. Section one general provisions delineates the scope of the subsequent measures, section two addresses pre-contractual information, section three contains provisions on interest rates and reference indices, section four contractual documentation, section five the Annual Percentage Rate (APR) and its calculation and section six specifically addresses reverse mortgages.

100. BDE Quarterly Bulletin 2011, Q1, 161. Particular reference is made to the essential characteristics of the product and the 'specific effects they may have on the consumer, especially the consequences in case of default'.

101. Section 29(1) of SEL 2/2011 requires the credit institution to consider applicable legislation in respect of risk management and internal control. It further stipulates that the rules designed to promote responsible lending practice per 29 (2)(a) must be incorporated in written form and this document must be referenced in the institutions annual report. The obligations in article 29 are stated to be without prejudice to the obligations under Law 2/1981, of 25th March and its implementing regulations in respect of mortgage market activity.

102. Article 18.

103. Law 26/1988 of 29 July (BOE 182 of 30 July 1988) contains the sanctions for breach of the provisions of the Order.

104. BdE Quarterly Bulletin, Q2 2009, 197. The law applies to firms, other than credit institutions, which conduct the following professional activities with consumers; '(a) granting of mortgage loans and credits under the deferred payment formula, of credit facilities or of any other equivalent means of credit, without prejudice to the specific regulations on certain products such as consumer credit or hire purchase. (b) provision of financial intermediation services for loan or credit agreements for any purpose, including, where appropriate, making said agreements available to consumer for signing'.

105. Title V, chapter 1, article 54.

106. Injunction for cessation of conduct and to prohibit recurrence or to prohibit actions which have been completed at the time the application is brought but where there are reasonable grounds for fearing an immediate reiteration.

107. Article 18(3) 'The officer's decision denying the authorization of the loan or home equity, or the registration of any of its provisions, shall be made in writing reasoned facts and legal arguments. This decision may be appealed to the Directorate General of Registries and Notaries under specific legislation'.

108. Directive 2014/17/EU of 4 February 2014, on credit agreements for consumers related to residential immovable property. (O.J. L.60/34 28.2.2014).

109. Article 2.

110. Article 3.

111. Article 42(2).

112. Article 18(1) and 18 (5).

113. S.I. No. 127 of 1995, as amended by S.I. No. 307 of 2000 the EC (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000 which gives consumer organisations the right to apply for an order to prohibit the use of an unfair term.

114. In Spain, the provisions regulating unfair terms in consumer contracts are contained in Book II (Contracts and Guarantees), Title II (General Conditions and Unfair Terms), Chapter II (Unfair Terms) of RLD 1/2007.

115. C - 415-11 Judgement of the Court, 14th March 2013. Notably there are a number of preliminary references before the CJEU which challenge further provisions of Spanish mortgage law with reference Directive 93/13/EEC.

116. Council **Directive** 93/13/EEC of 5 April 1993 on **unfair terms** in consumer **contracts**. **Under Spanish law**, Art. 695 (LEC) permits a challenge to enforcement proceedings only on the following grounds; (a) extinguishment of the security or secured obligation, (b) an error in determining the amount due or (c) the existence of another guarantee or mortgage registered before the security subject to the proceedings. Art. 698 (LEC) provides that challenges on any other grounds shall be settled in subsequent proceedings without having the effect of staying or terminating the judicial enforcement proceedings. The court held that payment of damages were insufficient in the circumstances to compensate for the loss of a home.

## BIBLIOGRAPHIC NOTE

Banco de España, “Economic Bulletin: Financial Regulation Q2 2013” (Madrid, July 2013)

Banco de España, “Economic Bulletin: Financial Regulation Q1 2012”, (Madrid, April 2012)

Banco de España, “Economic Bulletin: Financial Regulation Q1 2011”, (Madrid, April 2011).

Banco de España, “Economic Bulletin: Financial Regulation Q2 2009”, (Madrid, July 2009).

Central Bank of Ireland (CBI), “Residential Mortgage Arrears and Repossessions Statistics: Q1 2014” (Dublin, CBI, 2014).

Central Bank of Ireland (CBI), “Consumer Protection Code 2012: Guidance” (Dublin, CBI, December 2011).

Consejo General del Poder Judicial España (CGPJ), “Datos sobre el efecto de la crisis en los órganos judiciales 1T 2013” (Madrid, CGPJ, 2013).

Dübel HJ and Rothemund M, “A New Mortgage Credit Regime for Europe”, Centre for European Policy Studies (CEPS) Special Report (Brussels, CEPS, June 2011)

Financial Stability Board (FSB), “Principles for Sound Residential Mortgage Underwriting Practices”, (Basel, FSB, April 2012).

Financial Stability Board (FSB), “Thematic Review on Mortgage Underwriting and Origination Practices; Peer Review Report”, (Basel, FSB, 17<sup>th</sup> March 2011).

“Irish Mortgage Arrears Analysis” (Dublin, Davy Research, August 2012)

Law Reform Commission (LRC), “Reform and Modernisation of Land Law and Conveyancing Law”, (LRC CP34-2004), (Dublin, LRC, 2004).

London Economics (LE), “Study on the Role and Regulation of Non-Credit Institutions in EU Mortgage Markets”, Report for the EU Commission (London, LE, September 2008)

“Report of the Expert Group on Repossession”, (Dublin, Department of Justice and Equality, December 2013).

## LEGISLATION

### Ireland

Land and Conveyancing Law Reform Act 2013

Code of Conduct on Mortgage Arrears 2013

Personal Insolvency Act 2012

Consumer Protection Code 2012

Land and Conveyancing Law Reform Act 2009

Central Bank and Financial Services Authority of Ireland Act 2004.

Investment Intermediaries Act 1995

Consumer Credit Act 1995

European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, S.I. No. 127 of 1995  
Central Bank Act 1989  
Insurance Act 1989  
Central Bank Act 1942

### Spain

Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (BOE núm. 116, de 15 de mayo de 2013).

Real Decreto-ley 27/2012, de 15 de noviembre, de medidas urgentes para reforzar la protección a los deudores hipotecarios (BOE núm. 276, de 16 de noviembre de 2012).

Circular 5/2012, de 27 de junio, del Banco de España, a entidades de crédito y proveedores de servicios de pago, sobre transparencia de los servicios bancarios y responsabilidad en la concesión de préstamos (BOE núm. 161, de 6 de julio de 2012)

Real Decreto-ley 6/2012, de 9 de marzo, de medidas urgentes de protección de deudores hipotecarios sin recursos (BOE núm. 60, de 10 de marzo de 2012).

Orden EHA/2899/2011, de 28 de octubre, de transparencia y protección del cliente de servicios bancarios (BOE núm. 261, de 29 de octubre de 2011)

Real Decreto-ley 8/2011, de 1 de julio, de medidas de apoyo a los deudores hipotecarios, de control del gasto público y cancelación de deudas con empresas y autónomos contraídas por las entidades locales, de fomento de la actividad empresarial e impulso de la rehabilitación y de simplificación administrativa (BOE núm. 161, de 7 de julio de 2011).

Ley 2/2011, de 4 de marzo, de Economía Sostenible (BOE núm. 55, de 5 de marzo de 2011).

Ley 2/2009, de 31 de marzo, por la que se regula la contratación con los consumidores de préstamos o créditos hipotecarios y de servicios de intermediación para la celebración de contratos de préstamo o crédito (BOE núm. 79, de 1 de abril de 2009).

Real Decreto 97/2009, de 6 de febrero, por el que se modifica el Real Decreto 1975/2008, de 28 de noviembre, sobre las medidas urgentes a adoptar en materia económica, fiscal, de empleo y de acceso a la vivienda (BOE núm. 33, de 7 de febrero de 2009).

Real Decreto 1975/2008, de 28 de noviembre, sobre las medidas urgentes a adoptar en materia económica, fiscal, de empleo y de acceso a la vivienda. (BOE, núm. 290, de 2 de diciembre de 2008).

Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (BOE núm. 7, de 8 de enero de 2000).

Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación (BOE núm. 89, de 14 de abril de 1998).

Orden de 5 de mayo de 1994 sobre transparencia de las condiciones financieras de los préstamos hipotecarios (BOE núm. 112, de 11 de mayo de 1994).

Circular 5/1994, de 22 de julio, a entidades de crédito, sobre modificación de la circular 8/1990, sobre transparencia de las operaciones y protección de la clientela (BOE núm. 184, de 3 de agosto de 1994).

Ley 26/1988, de 29 de julio, sobre Disciplina e Intervención de las Entidades de Crédito (BOE núm. 182, de 30 de julio de 1988).

Ley 2/1981, de 25 de marzo, de regulación del mercado hipotecario (BOE núm. 90, de 15 de abril de 1981).

Decreto de 8 de febrero de 1946 por el que se aprueba la nueva redacción oficial de la Ley Hipotecaria (BOE núm. 58, de 27 de febrero de 1946).

Decreto de 14 de febrero de 1947 por el que se aprueba el Reglamento Hipotecario (BOE núm. 106, de 16 de abril de 1947).

### EU

Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 Text with EEA relevance (O.J. L 60, 28.2.2014, p. 34-85)

Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (O.J. L 095, 21/04/1993 p. 29-34).

## CASES

### EU

Case C-415/11 Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) [2013] 3 CMLR 5

### **Ireland**

Irish Life and Permanent PLC v. Malcolm Duff and Susan Duff [2013] IEHC 43, [2013] 8 ICLMD 15

Stepstone Mortgage Funding v Fitzell [2012] IEHC 142, [2013] 5 ICLMD 7

ICS Building Society v Grant [2010] IEHC 17, (Unreported)

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