Title	Borrowers and lenders in the residential mortgage context: legacy of the financial crisis on regulatory frameworks in Ireland and Spain
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Publication Date	2016-09-27
Item record	http://hdl.handle.net/10379/6323

Borrowers and Lenders in the Residential Mortgage Context

Legacy of the Financial Crisis on Regulatory Frameworks in Ireland and Spain

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Submission: September 2016

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Abstract

The Global Financial Crisis is clearly identifiable as a catalyst for reform of financial regulation and supervision in the period from 2008 onwards. It was also the starting point for the emergence of an indebtedness crisis among mortgage consumers in jurisdictions such as Ireland, which were characterised by significant levels of mortgage market liberalisation and house price inflation. This thesis focuses on the extent to which the crisis related impetus for reform has extended to the frameworks which regulate the interaction of borrowers and lenders in the residential mortgage context. The analysis is undertaken in the comparative context of Ireland and Spain, to facilitate an evaluation of the relative import of economic context and legal culture as causal factors in the process of reform, and the respective national and EU role in the process. It identifies residential mortgage regulation as a composite of obligations stemming from private and public law frameworks and uses a conceptualisation of constitutive and facilitative regulatory spheres to identify the distinction between the nature and function of the respective frameworks. The underlying objective is to identify the nature and extent of reform to the national frameworks over the period from 2008 to 2015. This facilitates analysis of the extent to which the reform can be interpreted as a regulatory response to the financial crisis and the issue of whether post-crisis frameworks represent a change in the paradigm of regulation as compared with their pre-crisis counterpart.

Acknowledgements

I would like to take this opportunity to acknowledge those individuals who in a professional and personal context, offered support and guidance in the course of what is frequently a solitary and lonely research process. I wish to extend my thanks to all those academics whom I have had the pleasure of meeting for the first time over the last four years and whose generosity of spirit was clear in their willingness to take the time to speak with me, listen to my queries and answer my questions on their respective areas of expertise. I am particular grateful to Dr Mary Donnelly, Professor Niamh Maloney, Dr Manuel Aalbers and Professor Katharina Pistor in this regard.

My supervisors for this thesis were Dr Padraic Kenna of the National University of Ireland, Galway and Dr Sergio Nasarre Aznar of the Universitat Rovira i Virgili, Spain. Sergio, I am enormously indebted to you for your patience, stamina and encouragement over the course of multiple lengthy conversations, both in person and via Skype as I attempted to find meaning within a mass of legislation and policy - *muchas gracias*. Padraic, with unfailing good humour and absolute confidence in a successful outcome, you travelled this academic road with me – again – my very sincere thanks. I would also like to thank Professor Alan Ahearne and Dr Ciara Smyth who have offered direction and support as members of my Graduate Research Committee – your contribution over the course of the PhD is much appreciated – and to all the academic and administrative staff at the School of Law, and in particular Carmel Flynn, who has guided me through many administrative minefields over the years.

I wish to express my thanks to NUI Galway and to the Irish Research Council (IRC) who jointly funded this doctoral thesis through their respective Hardiman Scholarship Programme and Government of Ireland Postgraduate Scholarship Scheme. Without your financial support this research could not have been undertaken.

Deirdre Halloran and Sandra Murphy – you have been my pillars of support since 2012, and your friendship is one of the true gifts and great joys of this doctorate - words are insufficient to express my gratitude.

Finally to my husband Alan and our son Matthew without whose love, support and infinite patience I could not have completed this process – I love you both.

Chapter 1

Introduction

1.1. Origins of the Research

The origins of this thesis lie in an earlier effort to identify and assess the extent of the impediment posed by national property law regimes to a Single EU Market in Mortgage Credit. Undertaken between 2006 and 2009, the research provided an insight into the orientation of EU mortgage policy prior to the emergence of the Global Financial Crisis in 2008. In the pre-crisis period, consumer benefit was conceptualised primarily in terms of increased access to mortgage markets via enhanced mortgage product availability and price convergence between EU Member States. Measures to increase the accessibility of capital market based funding and, Mortgage Backed Securities (MBS) in particular, were advocated as a mechanism through which to increase the range of lenders and to expand mortgage product availability. These impacts were predicated on the increased options for market entry and participation due to the negation of any requirement for a deposit base to fund lending, and the flexibility regarding loan characteristics due to the lack of statutory restrictions on qualifying loans as well as the non-retention of default risk inherent in MBS. Consistent with the prevailing neo liberal regulatory ethos, it was suggested that formal regulatory intervention in support of consumer protection was contrary to consumer interests: a 'regulatory straitjacket' which would be counterproductive to the cost efficiency and product diversity sought.[1] Instead a market based approach was advocated where increased competition in the market would allow consumers to 'discipline' lender by changing provider. In support of increased competition which was central to the strategy, there was a focus on removing legal and economic barriers to market entry and participation, and in particular, those stemming from the heterogeneity of national property law frameworks.

The emergence of an indebtedness crisis among consumers in Ireland and Spain in 2008 was set against the backdrop of turmoil and crisis in the global financial market

1 This terminology was used by industry representatives in submissions to the Commission within the context of the Mortgage Credit Initiative.

context. The escalation of affordability issues in respect of residential mortgage loans was contemporaneous with and impacted by the macroeconomic downturn from 2008 onwards, as an increase in unemployment impacted repayment capacity and a reversal of house price trends led to the market value of some mortgaged properties being significantly less than the outstanding loan, i.e. negative equity. The affordability issues experienced by consumers in the residential mortgage context offer a new vantage point from which to evaluate the merits of the pre-2008 policy orientation for consumers. In particular, it contextualises the benefits from enhanced access with the potential detriment arising from consumer over indebtedness due to the potency of the cyclical dynamic between mortgage credit availability and house prices, the market based model of housing provision, and economic developments and financial innovation which lessened the centrality of repayment capacity as a determinative factor in the granting of loans. Notwithstanding that in both the pre and post 2008 context, competition has been linked to stronger consumer outcomes; the crisis highlighted the extent to which competition could be corrosive of market stability and ultimately be detrimental to consumer interests through its negative impact on underwriting standards. The complex dynamic between the economic and social policy objectives inherent in the mortgage product was highlighted by the increased incidence of borrower default from 2008 onwards. The European Mortgage Federation point out that 'the efficiency of mortgage collateral is at the core of mortgage lenders activity' noting that 'efficiency in this context is measured in terms of simplicity, transparency, rapidity and costs…… starting with the constitution of the mortgage collateral and following with its registration and execution'.[2] In a market based model of housing provision, an efficiency of collateral perspective is central to borrower access to housing; however, it also supports the efficiency of repossession which represents the loss of the borrower's home.

The current thesis was born of a curiosity as to the nature and scope of regulatory reform in response to the issues exposed by the affordability crisis among mortgage consumers. It queries whether the post 2008 frameworks represent a significant alteration in the trajectory or content of regulation as compared with their pre-crisis counterpart. The primary research objective is thus to identify and assess the impact

[2] 'EMF Study on the Efficiency of the Mortgage Collateral in the European Union' (European Mortgage Federation 2007) 5.

that the financial crisis has had on the legal frameworks which regulate the interaction of borrowers and lenders in the residential mortgage context of Ireland and Spain. Notwithstanding the use of the term residential mortgage, the current focus is restricted to loans related to the primary dwelling of the debtor and it does not extend to buy to let mortgages. This is in recognition of the fact that the conflict of economic and social policy interests is most acute in respect of such loans as default will result in the loss of the debtors' home.

1.2. Methodology and Challenges

The thesis necessarily adopts a 'law in context' approach to identify the legacy of the financial crisis on residential mortgage regulation in Ireland and Spain. Ireland and Spain were chosen as the comparative jurisdictions due to the economic parallels with respect to pre-crisis developments in national housing and mortgage markets, and the divergence in legal setting in terms of the respective common and civil law systems. It was anticipated that this juxtaposition would offer an insight into the relative import of legal culture and economic context as causal factors in the process of reform. The comparative aspect also provides an opportunity to assess the extent of the EU role with reference to its capacity to promote a convergence in the trajectory of national reform by imposing obligations in respect of the content of national frameworks.

The methodology employed was to review legislation, case law and policy documents in the national and EU context in the period from 2008 to 2015. The purpose of this review was to establish the structure and content of relevant frameworks of residential mortgage regulation in the respective jurisdictions at the onset of the financial crisis in 2008, and to trace the evolution of the frameworks thereafter. This process would facilitate analysis of the role of the financial crisis as a catalyst for reform, and of the orientation of the post-crisis regulatory frameworks. However, there were a number of distinct challenges encountered in the research process. Central to these was the dynamic nature of the subject matter. The research for this thesis commenced in September 2011, three years after the collapse of Lehman Bros and two years into the European sovereign debt crisis. In both Ireland and Spain, significant issues of arrears and indebtedness began to emerge in 2008, and the process of reform in the national frameworks which are the focus of this

thesis began at that juncture. Upon commencement of the research in September 2011, an underlying assumption was that the bulk of responsive measures had been taken and that the reform process was coming to an end. However, this was an erroneous assumption and it was in the period from 2011 to 2015 that the most significant developments were to occur. The ongoing nature of the reform process throughout the period of this PhD has roots in both national and EU developments. In the national context, the impact of deteriorating macro-economic conditions on over indebted consumers was a catalyst for intervention in the period from 2009 to 2011. However, the efficacy of these initial responsive measures in providing relief to mortgage consumers was a pivotal factor in determining the intensity and trajectory of reform from 2012 onwards. In this regard, a contrast may be drawn between the extent of enforcement activity in the Irish and Spanish context in the period up to 2011. The initial Irish response, the Code of Conduct on Mortgage Arrears of 2009 and 2010, did not address the underlying issue of the affordability and sustainability of the residential mortgage loan to any greater extent than the equivalent Spanish measures, Real Decreto 1975/2008. In practical terms it amounted to a temporary freezing of legal rights, thereby preserving the status quo in an economically and politically turbulent period. However, the Irish CCMA framework was of mandatory and universal applicability and to the extent that it was one of the factors which led to what the Troika (EU/IMF/ECB) described as 'an abnormally low rate of repossession'[3] in Ireland, it can be contrasted with the early Spanish interventions which did little to stem the loss of debtors' homes. The extent of the social crisis in Spain in the years from 2008 to 2011 due to the loss of debtors' homes and the post enforcement liability of debtors can be viewed as having ignited social and judicial activism which was central to developments in the period from 2012 onwards. In the period from 2008 to 2011, when the locus of relevant reform was at national level, the primary focus of EU and global efforts was on the broader financial market context and the efficacy of existing frameworks of prudential regulation and supervision in securing systemic stability. Although as will be noted in chapter five, this was to have an impact on the institutional frameworks relevant to the mortgage context, it did not in any sense focus on the frameworks which directly regulate the

[3] 'Report of the Expert Group on Repossessions' (Department of Justice and Equality December 2013) 3. The low rate of repossessions is not just a function of the moratorium contained in the CCMA but a confluence of economic and legal factors which are averted to throughout the thesis.

interaction of borrower and lender. From 2011 onwards, the capacity of conduct of business to support the objective of systemic stability was a manifest focus of attention by the G20 through the mandates provided to the Financial Stability Board (FSB) and the Organisation for Economic Co-operation and Development (OECD). This was reflected in the EU context by the adoption of a draft directive in 2011 which proposed regulation of national conduct of business frameworks. This proposal came to legislative fruition in 2014, and accordingly, as the national reform process was easing in the jurisdictions under review, the EU provided an additional stimulus for reform of national frameworks to ensure compliance with the requirements of EU Law.

1.2.1.1. Limitations in the Availability of Relevant Materials

The dynamic subject matter and the inclusion of a comparative dimension increased the complexity of the research process. This assertion reflects limitations in the availability of secondary materials such as textbooks and journal articles due to the current nature of the subject matter. This latter issue was compounded in the Spanish context by the comparative lack of both primary and secondary materials in the English language. There are official translations of a limited number of key pieces of legislation e.g. *Constitución Española* (Spanish Constitution), *Código Civil* (Spanish Civil Code), *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil* (Civil Procedure Law) and *Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias* (Consolidated Law for the Protection of Consumers and Users). However, the legislation and case law required for the thesis was otherwise available only in the Spanish language. The mechanism used to counter this limitation was to use a free online tool to translate the required documents, i.e. Google Translate.[4] Although this translation tool was central to the completion of the Spanish profile, it was not without its difficulties as a significant deciphering and interpretation of the translated output was required. In a bid to ensure that my interpretation of the translated legislation was accurate, I cross referenced the translated provisions with the content of the Quarterly Bulletins of the Banco De España; however, there were again limitations in the utility of the bulletins due to the generalised rather than detailed nature of the information contained

[4] https://translate.google.ie

therein. To further assist in the research process, I completed a two year diploma in the Spanish language whilst undertaking the PhD. This was of particular benefit for the purposes of viewing legislation through the *Boletín Oficial del Estado*, (i.e. Official State Gazette) which is wholly in Spanish, and for navigating the Banco de España website which has limited English content. It was also beneficial in interpreting legislation in its original form for the purposes of clarifying an ambiguity contained in the translated output, where there was no source with which to cross reference the provision. The time consuming and laborious nature of the foregoing activities added to the complexity of the research process. Over the course of the PhD, I also made a number of research visits to and had multiple conversations with Dr Sergio Nasarre Aznar, Chair of the Cátedra d'Habitage - Cátedra de Vivienda de la Universidad Rovira i Virgili in Catalonia and co-supervisor of this thesis. These consultations were invaluable in gaining an insight into the Spanish legal system, and in assessing the validity of my interpretations and assessments of regulatory developments.

1.2.1.2. Theoretical Framework

Identifying the scope and content of regulatory reform in terms of changes to the legal frameworks is insufficient of itself to fulfil the stated research objective. There must also be a theoretical frame of reference through which the process and content of reform can be analysed. This was a particular challenge in the current work. It had been anticipated that the literature review for the thesis would unearth materials containing analysis of residential mortgage regulation by legal academics and that in conjunction with generic regulatory theory, this would offer a theoretical prism through which to analyse crisis related reform. The assumption was that such materials would represent a niche within academic materials on financial regulation. Searches of discipline specific databases, such as Lexus Nexus, Westlaw and Hein on Line, using terms comprised of the words: regulation, financial market, financial system, mortgages and residential mortgages, proved fruitless. As will be observed in chapter two, there were significant materials containing academic perspectives on varying aspects of financial market regulation but a dearth of materials which addressed aspects relevant to the current analysis. The inability to locate theoretical perspectives on residential mortgage regulation was a significant issue which had to be addressed to progress the research objective. Ultimately the key to overcoming

this impediment was to acknowledge the tangential relevance of frameworks of 'financial regulation' and instead to contextualise the residential mortgage with reference to its legal construction and policy objectives.

Financial regulation is relevant to residential mortgage by virtue of obligations imposed on the banking sector. O'Sullivan and Kennedy identify regulation of the banking system as being divided into prudential and conduct of business aspects and cite the focus of prudential regulation on aspects that are central to the stability and well-being of the financial sector. 'Issues such as licensing and ownership control, risk management requirements and entry restrictions are all matters, which must be regulated in order to maintain stability. Its aim is to minimize the possibility of a breakdown in the financial sector and prevent any adverse effects on the long-term growth rate in the economy'.[5] They note that 'conduct of business regulation focuses on the protection of consumers' dealings with regulated financial services providers. Its objective is to set down guidelines and rules of acceptable behaviour and business practices between banking institutions and their customers'.[6] With reference to the foregoing distinction between prudential and conduct of business, it is clear that whilst both have the inherent capacity to 'regulate' the residential mortgage they do so in different ways. Prudential regulation impacts residential mortgage markets with reference, for example, to the solvency of the lenders, the range of market participants and the capacity for capital or liquidity regulations to alter the economic desirability of mortgage loan origination as compared with other forms of lending etc. In contrast, the focus of conduct of business measures is on the interaction of demand and supply side participants in the market. Accordingly, the prudential framework is not of direct relevance to the current analysis as it does not impact the legal framework of rights and obligations which regulate the interaction of the borrower and lender in the context of loan origination. In the pre-crisis context, prudential regulation was the dominant instrument of banking regulation and this is the most significant factor in the dearth of relevant materials within the scholarship on 'financial regulation'.

[5] Kevin PV O'Sullivan and Tom Kennedy, 'A Model for Regulatory Intervention in Irish Banking' (Department of Economics Working Paper No 123, National University of Ireland Galway 2007) 2.
[6] ibid.

In the jurisdictions under review, the residential mortgage loan contract fuses contract and property law rights and broadly speaking the private law framework 'regulates' the scope of the rights and obligations of the parties to the contract. The private law transaction may be subject to public law intervention, as noted in the context of conduct of business imposed via 'financial regulation' intervention which has as its objective the protection of market confidence through the support of market efficiency, transparency and integrity.[7] The transaction may also be the subject of obligations imposed by Consumer Law, which as noted in chapter two, can be characterised by a consumer protection or an economic consumerist approach with implications for the nature of the 'protections' offered. Understanding residential mortgage regulation as a composite of obligations stemming from both public and private law, appreciating the comparatively limited role of the broader framework of 'financial regulation' and, identifying the centrality of the dynamic between economic and legal aspects was pivotal in expanding the scope of the search for materials to other academic disciplines to source a composite of perspectives to inform the current analysis.

1.3. Structure of the Thesis

This thesis contains seven chapters including the current introduction. Chapter two provides a review of literature containing theoretical perspectives relevant directly and indirectly to analysis of 'residential mortgage regulation'; a term which for current purposes, is used to refer specifically to the legal frameworks which regulate the engagement of borrower and lender. The literature offers a cross disciplinary prism through which to analyse the process and content of reform in the Irish and Spanish context. The chapter acknowledges both the relevance and the limitations of generic regulatory theory in explaining the stimulus for and, the trajectory of, post-crisis reform in the residential mortgage context. In contrast, materials from the fields of sociology, consumer law and policy, and law and finance are identified as offering discrete perspectives which have explanatory potential with reference to the instrumental role of law in the mortgage context, the distinction between the

[7] Niamh Moloney, 'The Legacy Effects of the Financial Crisis on Regulatory Design in the EU' in Eilís Ferran, Niamh Moloney, Jennifer G Hill and John C Coffee Jr, *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge University Press 2012) 119.

orientation of the spheres from which regulation emerges and, the extent to which the neo liberal regulatory paradigm persists in the post-crisis context. The Legal Theory of Finance provides a theoretical basis upon which to conceptualise private law as being constitutive of residential mortgage markets whilst perspectives from financial sociology and EU financial market law highlight the role of consumer law and financial services regulation as being instrumental in promoting contemporary economic policy objectives. Analysis within the socio-geographic literature offers an understanding of the dynamic between financialisation and globalization and the manifestations and implications of these related developments for the residential mortgage context. With reference to the regulatory paradigm applicable to consumer credit, the field of consumer law and policy assert the persistence of a neo liberal ethos in the post-crisis financial stability model of consumer protection citing 'continuity rather than rupture' with the pre-crisis model.

Chapter three provides a contemporary legal and economic contextualisation of residential mortgages. The chapter juxtaposes the demand and supply side perspectives of the residential mortgage as a financial product and it explores the legal and regulatory dynamic between primary and secondary mortgage markets. It identifies the role of capital market based funding in enhancing access to mortgage credit, and it contrasts the benefits for consumers of enhanced access, with the capacity for detriment where insufficient attention is given to the dynamic between the availability of mortgage credit and the house price cycle. The chapter conceptualises regulation relevant to the current analysis as emanating from dual spheres, a conceptualisation consistent with legal and sociological institutionalist perspectives. Applying the Legal Theory of Finance to the residential mortgage context, the private law frameworks of contract and property law are conceptualised as being 'constitutive' of the primary market. This conceptualisation is premised on the provision of enforceable contractual rights and the existence of such rights as being the basis upon which lenders and borrowers are willing to enter into transactions. The public law 'facilitative' sphere which is comprised of regulatory frameworks of consumer law and financial services regulation is characterised as the regulatory mechanism through which contemporary policy objectives are promoted.

It had been anticipated that the profiles of the national and EU regulatory frameworks would be undertaken through successive chapters which identified the

regulatory frameworks in the respective jurisdictions with reference to a pre and post-crisis temporal distinction. Pursuant to this approach, there would have been individual chapters on Ireland, Spain and the EU which identified regulatory frameworks in 2008 and reforms to these frameworks undertaken from 2009 onwards. However, as the research progressed, this structure was changed to one which appeared to be more meaningful and relevant to the observations of the author regarding the trajectory and locus of reforms. The profile chapters of the thesis are thus structured with reference to successive temporal phases and contain parallel profiles of the respective national and EU frameworks with reference to the period in question. Chapter four identifies the frameworks in the national and EU context in 2008 when the financial crisis emerged; i.e. pre-crisis frameworks. The period of reform covered in the thesis is divided into two phases addressed respectively in chapter five, i.e. Post Crisis Stage One: 2009-2012, and chapter six, i.e. Post Crisis Stage Two: 2013-2015. The delineation of the post-crisis period into two phases seemed the most appropriate mechanism through which to juxtapose the nature and content of national and EU developments in the first and second phases. The degree of convergence in the focus of national reforms in the first post-crisis period can thus be contrasted with the divergence in national trajectory thereafter and, the incidental regulatory impact of EU institutional developments in the first stage may be distinguished from the direct focus of EU measures in the second phase.

Chapter four profiles the pre-crisis institutional and legislative frameworks of residential mortgage regulation in Ireland and Spain using the constitutive and facilitative conceptualisation identified in chapter three. It identifies the balance of rights and obligations contained in national mortgage law and, the nature and extent of consumer law and financial services regulation in the respective jurisdictions. It also identifies the limited nature of the EU role with reference to national regulatory frameworks. The lack of a formal EU regulatory role is contextualised with reference to the pre-crisis neo liberal regulatory paradigm, the strategy for integration devised within the context of the Mortgage Credit Initiative and the legal nature of the residential mortgage product. Chapter four establishes the form, content and scope of residential mortgage regulation in the pre-crisis context and thus it offers a benchmark from which to identify the nature and content of reform in the period from 2009 onwards.

Chapter five identifies the evolution of national frameworks of residential mortgage regulation in the period from 2009 to 2012. Notwithstanding the comparability of the affordability issues arising among mortgage consumers and the consequent exposure of a related deficit in regulatory frameworks for loan origination, the chapter highlights the divergence in national responsive measures. The institutional reforms undertaken in Ireland were not paralleled in Spain and the singular framework of universal applicability for distressed mortgagors in Ireland is contrasted with varying focus of the multiple measures in Spain. The distinction in these aspects is linked to distinctions in economic context and the balancing of policy interests. The chapter identifies a significant variation in the extent of enforcement activity in the respective jurisdictions and in the judicial response to the unfolding social crisis. Despite a convergence in the imposition of responsible lending obligations in both jurisdictions, the chapter highlights differences in the scope of applicability and the content of obligations. It also profiles changes to the EU institutional framework for financial market supervision to address deficits exposed by the crisis. Although the institutional reform is a response to concerns regarding systemic stability, it has an incidental regulatory impact on the residential mortgage context through the vesting of supervisory competence in the European Banking Authority (EBA).

Chapter Six identifies the further evolution of national and EU frameworks in the period from 2013 to 2015. It identifies the locus of Irish reforms in the expansion of the enforcement powers of the Central Bank of Ireland and the potential redress options for consumers. It identifies changes to the statutory Code of Conduct on Mortgage Arrears which could be viewed as representing a rebalancing of social and economic policy interests in response to external institutional stimulus. The chapter identifies the use of pre-existing EU consumer law to stimulate a rebalancing of rights and obligations in the constitutive private law framework in Spain, thereby amplifying the role of the judiciary as a conduit to reform. It further highlights the introduction of an EU legislative framework directly applicable to the residential mortgage context and identifies the relevance of this ‘Mortgage Credit Directive’ for existing frameworks in Ireland and Spain.

Chapter seven reviews the evolution of the legislative and institutional frameworks for residential mortgage regulation profiled in chapters’ four to six. The resulting synthesis of regulatory developments provides a basis upon which analysis of crisis

related reform in the period 2009-2015 is undertaken. The analysis identifies the stimulus to reform arising from the financial crisis and it assesses the nature, function and scope of the constitutive and facilitative spheres in Ireland and Spain from the pre to post-crisis period. It identifies the extent of the national and supranational role in the process of reform and the role of legal and economic factors as a catalyst for reform. The chapter also queries the extent to which the post-crisis frameworks constitute a new paradigm of residential mortgage regulation with respect to the dynamic between market and consumer objectives. The thesis concludes by identifying the primary impact of the crisis on frameworks of residential mortgage regulation.

The law in the respective jurisdictions is stated as of 1 January 2016 and it does not encompass any developments subsequent to this date. The deadline for transposition of the Mortgage Credit Directive was 21 March 2016, and in neither Ireland nor Spain had transposition been undertaken by January 2016. It is also relevant to note that the institutional and legislative profile of Spain is premised on frameworks and bodies at the national level and does not address regional frameworks or institutions.

Chapter 2

Literature Review

2.1. Introduction

This chapter reviews academic literature relevant to the regulation of residential mortgages, thereby providing a theoretical frame of reference for the analysis of post-crisis reforms in Ireland and Spain. It identifies the absence of theoretical perspectives of residential mortgage regulation by legal scholars in the literature on financial regulation. It explains the dearth of materials from this source by identifying the nature and focus of frameworks of financial market regulation and the comparatively limited role which these play in the residential mortgage context. This does not impute a lack of academic materials which can be used to analyse residential mortgage regulation but merely that the relevant theoretical perspectives are fragmented across multiple disciplines and that mortgage markets may or may not be the direct subject of analysis. The chapter highlights in particular, the value and significance of interdisciplinary perspectives in conceptualising the role of law in the financial market context and it further identifies a significant emerging literature for residential mortgage regulation in the nascent research on the Europeanisation of private law.

2.2. Contextualisation of Sourced Literature

The literature review for the current work has been challenging. The research objective is to identify and analyse the impact that the financial crisis has had on residential mortgage regulation, where this term refers to the legal frameworks which regulate the interaction of borrowers and lenders in Ireland and Spain. The locus of mortgage markets at the epicentre of the global financial crisis, and the prominence of residential mortgages in economic and social policy discourse at national and EU level since 2008, had given rise to an expectation that mortgage markets would be a fertile area of legal academic analysis. It was anticipated that a discrete body of

material on mortgage regulation would be located within the financial regulation literature and that this would serve as a theoretical framework for the current analysis. However, this objective was frustrated by the apparent lack of such materials in discipline specific databases such as Westlaw, Lexus Nexus and Hein on Line. The question which followed was whether the deficit was in respect of the materials sought, or the search methodology employed. In support of the former explanation, Patrick McAuslan noted that even in fields most closely linked with mortgage market analysis, there were similar issues; 'There is a paucity of writing about mortgages from economists and financial experts, apart from some writing about securitisation and official reports on mortgages. Even now with books and articles pouring forth on the credit crunch, mortgages as such are not seen as a central part of the story'.[8]

Whilst I did not locate a discrete body of literature containing legal theoretical analysis of mortgage regulation, I did locate a significant body of legal scholarship analysing regulation in the broader financial market context, including analysis of the causal link between regulation and the financial crisis and the implications for financial regulation.[9] Other prominent themes within the articles were issues pertaining to credit ratings agencies,[10] cyclical aspects of regulation,[11] paradigms of

[8] Patrick McAuslan, 'Whose Mortgage is it Anyway? Producers, Consumers and the Law in the UK Mortgage Market' (Paper presented at the ISA International Housing Conference *Housing Assets, Housing People*, September 2009) 3. The observation was in respect of the UK and he noted a significant distinction in the US context; 'quite apart from Shiller, a good deal of writing is beginning to appear on mortgages with special reference to both securitisation and to default and the need for reforms on both aspects of mortgages'.

[9] See for example; Bruno Nikolić, 'Rise and Fall of Regulatory State in Financial Markets' (2013) 28(1) Journal of International Banking Law and Regulation 1; Phoebus Athanassiou, 'The Role of Regulation and Supervision in Crisis Prevention and Management: A Critique of Recent European Reflections' (2009) 24(10) Journal of International Banking Law and Regulation 501; Tony Ciro and Michael Longo, 'The Global Financial Crisis: Causes and Implications for Future Regulation: Part 2' (2010) 25(1) Journal of International Banking Law and Regulation 9; Jean Baptiste Zufferey, 'Regulating Financial Markets in Times of Stress is a Fundamentally Human Undertaking' (2011) 8(2) European Company and Financial Law Review 259; Nicholas Dorn, 'The Governance of Securities' (2010) 50(1) The British Journal of Criminology 23.

[10] Andrew Johnston, 'Corporate Governance is the Problem, Not the Solution: A Critical Appraisal of the European Regulation on Credit Rating Agencies' (2011) 11(2) Journal of Corporate Law Studies 395; Nicolas Petit, 'Credit Rating Agencies, the Sovereign Debt Crisis and Competition Law' (2011) 7(3) European Competition Journal 587; Peter Yeoh, 'Self-Regulation, Regulation, Co-Regulation: The Credit Rating Industry Case' (2013) 2 Journal of Business Law 186; Harry McVea, 'Credit Rating Agencies, The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back' (2010) 59(3) International and Comparative Law Quarterly 701.

[11] Elisabetta Bellini, 'Triggers of Financial Markets Regulation' (2009) 3(2) Law and Financial Markets Review 168.

regulation,[12] theoretical perspectives of financial markets and or financial regulation,[13] political and legislative processes and regulation, although this is notably directed at the US context,[14] systemic risk and regulation,[15] prudential and macro prudential aspects,[16] international comparative perspectives and,[17]a small body of work addressing criminal law perspectives[18] and human rights.[19] There is also legal scholarship analysing post-crisis developments in European capital

[12] David Rouch, 'Self-Regulation is Dead: Long Live Self-Regulation' (2010) 4(2) Law and Financial Markets Review 102; Emilios Avgouleas, 'The Global Financial Crisis and the Disclosure Paradigm in European Financial Regulation: The Case for Reform' (2009) 6(4) European Company and Financial Law Review 440; Emilios Avgouleas, 'The Global Financial Crisis, Behavioural Finance and Financial Regulation: In Search of a New Orthodoxy' (2009) 9(1) Journal of Corporate Law Studies 23.

[13] Julia Black, 'Reconceiving Financial Markets - From the Economic to the Social' (2013) 13(2) Journal of Corporate Law Studies 401; Joanna Benjamin, 'The Narratives of Financial Law' (2010) 30(4) Oxford Journal of Legal Studies 787; Kern Alexander, 'Rebuilding International Financial Regulation' (2011) 8 Journal of International Banking and Financial Law 489; Paul Sebastianutti, 'What is this thing called International Financial Law' (2009) 3(5) Law and Financial Markets Review 461; Giulio Napolitano, 'The Two Ways of Global Governance after the Financial Crisis: Multilateralism versus Cooperation among Governments' (2011) 9(2) International Journal of Constitutional Law 310.

[14] Robert Kenagy, Tracey A Anderson and Mark Fox, 'Regulation and the Impact of Political Lobbying on the Investment Banking Industry' (2013) 28(5) Journal of International Banking Law and Regulation 171; James F. Gilsinan et al, 'The Conundrum of Legislating Risk Reduction through Financial Regulatory Reform: The Case of Dodd-Frank and FASB Accounting Changes' (2013) 21(2) Journal of Financial Regulation and Compliance 150; Muhammad Islam et al, 'Fannie Mae and Freddie Mac: A Case Study in the Politics of Financial Reform' (2013) 20(2) Journal of Financial Crime 148.

[15] Luis Garicano and Rosa M Lastra, 'Towards a New Architecture for Financial Stability: Seven Principles' (2010) 13(3) Journal of International Economic Law 597; Mads Andenas and Iris H-Y Chiu, 'Financial Stability and Legal Integration in Financial Regulation' (2013) 38(3) European Law Review 335; Michael Gadbaw, 'Regulation of Global Trade and Finance: A Tale of Two Systems' (2010) 13 (3) Journal of International Economic Law 551; Peter Yeoh, 'The Challenges and Implications of Systemic Risks for Financial Regulation' (2010) 31(12) Company Lawyer 389.

[16] Iris H-Y Chiu, 'Macroprudential Supervision: Critically Examining the Developments in the UK, EU and Internationally' (2012) 6(3) Law and Financial Markets Review 184; Emily Lee, 'Basel III: Post-Financial Crisis International Financial Regulatory Reform' (2013) 28(11) Journal of International Banking Law and Regulation 433; Alison Lui, 'Macro and Micro Prudential Regulatory Failures between Banks in the United Kingdom and Australia 2004-2009' (2013) 21(3) Journal of Financial Regulation and Compliance 241; Marianne Ojo, 'Risk Management by the Basel Committee' (2010) 18(4) Journal of Financial Regulation and Compliance 305; Gillian G H Garcia 'Ignoring the Lessons for Effective Prudential Supervision, Failed Bank Resolution and Depositor Protection' (2009) 17(3) Journal of Financial Regulation and Compliance 186.

[17] Pelma Rajapakse and Suri Rajapakse, 'Impact of the Regulatory Regime on Promoting the Housing Finance Market in Australia' (2011) 5(4) Law and Financial Markets Reveiew 290; M H Ogilvie, 'How Canada Regulates its Banks: An Institutional Overview (2014) 1 Journal of Business Law 54; Isaac Ofoeda, Joshua Abor and Charles K D Adjasi, 'Non-bank financial institutions regulation and risk-taking (Ghana) (2012) 20(4) Journal of Financial Regulation and Compliance 433; Hui Huang, 'Institutional Structure of Financial Regulation in China: Lessons from the Global Financial Crisis' (2010) 10(1) The Journal of Corporate Law Studies 219.

[18] Roman Tomasic, 'The Financial Crisis and the Haphazard Pursuit of Financial Crime' (2011) 18(1) Journal of Financial Crime 7.

[19] Mary Dowell Jones, 'Financial Institutions and Human Rights' (2013) 13(3) Human Rights Law Review 423.

markets, in particular with respect to the EU role in terms of regulatory policy and institutional reform. Of particular note in this regard are articles by Niamh Moloney and Eilis Ferran.[20] In as much as there are materials containing analysis of retail financial services, it pertains more to the retail investment side, and again, Niamh Moloney is a significant author in this regard.[21]Notwithstanding the absence of specific analysis on mortgage regulation, some of the foregoing materials are relevant to the current work. This is true of the theoretical perspectives on financial market regulation where the regulatory paradigm is applicable to mortgage markets, as in the context of the disclosure and self-regulate paradigm. It is particularly true of EU securities markets literature to the extent that it addresses institutional aspects which are also applicable to the banking sector, as is the case with the emergence and role of the European Supervisory Authorities.[22]

The absence of legal academic analysis on residential mortgage regulation within the voluminous body of materials which analyse financial regulation seems almost illogical. However, if the nature and extent of the role of 'financial regulation' in the regulation of residential mortgages is identified, it becomes clear why the materials appear to be of tangential relevance to the current work. The residential mortgage is one of a range of products and services in the retail financial services sector. The primary relevance of financial regulation is through a framework of prudential regulation which has as its objective, the solvency of the individual institutions and the stability of the financial system.[23] The focus of the current analysis is on legal frameworks which regulate the rights and obligations of the borrower and lender and, with reference to this perspective prudential regulation has no direct impact or role. There is a further component of banking regulation in the form of conduct of business regulation and, in contrast to the foregoing, it is of direct relevance; since as

[20] Eilis Ferran, 'Crisis-Driven Regulatory Reform: Where in the World is the EU going?'; Niamh Moloney, 'The Legacy Effects of the Financial Crisis on Regulatory Design in the EU' in Eilís Ferran, Niamh Moloney, Jennifer G Hill and John C Coffee Jr, *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge University Press 2012).

[21] Niamh Moloney, 'The Investor Model Underlying the EU's Investor Protection Regime: Consumers or Investors? (2012) 13(2) European Business Organisation Law Review 169.

[22] Niamh Moloney,'The European Securities and Markets Authority and Institutional Design for the EU Financial Market -A Tale of Two Competences: Part (2) Rules in Action' (2011) 12 European Business Organization Law Review 177.

[23] Notably the prudential framework is not of universal applicability to retail market participants. Non-bank lenders (i.e. non-credit institutions) who originate mortgage loans do not accepts deposits from the public and consequently are not subject to the prudential requirements of their deposit taking counterpart.

noted in the introduction, its objective 'is to set down guidelines and rules of acceptable behaviour and business practices between banking institutions and their customers'.[24] To the extent that this was a significant component of the pre-crisis global and European frameworks of financial regulation, then it is to be expected that it would be the subject of analysis and commentary. However, a particular distinction between the pre and post-crisis context is the perceived systemic import of conduct of business. Whereas the framework of prudential regulation was agreed at the global level in the Basel Accords and given effect through an EU regulatory framework implemented by Member States i.e. the Capital Requirements Directive; conduct of business was not the subject of frameworks beyond those of national origin and, it was not therefore a feature of the literature on financial regulation.

The limited relevance of materials on 'financial regulation' has been established so the question which arises is through what means is the regulation of residential mortgages subject to academic analysis. A response to this question necessitates a contextualisation of the mortgage product within the matrix of national legal frameworks and policy interests. In the national policy context, the mortgage has a social policy dimension through its role in the provision of access to housing; however, it also has an economic policy dimension arising from the role and impact of mortgage market activity on the macro economy through the consumer and the financial services sector. In legal terms, the residential mortgage loan consists of *rights in rem* and *rights in personam*, thus it fuses national private law frameworks of property and contract law and, in the contemporary context, this private law transaction has been subject to a degree of public law intervention, notably through EU consumer law. This contextualisation is of benefit in understanding that the residential mortgage is a locus for the interface of policy interests and academic disciplines, and it suggests the need for a search methodology which responds to the resulting fragmentation of theoretical perspectives. Using this approach it is clear that there are housing related, economic, sociological and legal perspectives on the residential mortgage and, that these adjacent academic fields may offer to varying degrees, theoretical perspectives useful for the current analysis. Using this rationale, the scope of the literature search was extended beyond legal resources to encompass

[24] Kevin PV O'Sullivan and Tom Kennedy, 'A Model for Regulatory Intervention in Irish Banking' (Department of Economics Working Paper No 123, National University of Ireland Galway) 2.

other social sciences, including sociology and economics. This was undertaken via databases for the social sciences (e.g. SSRN), universities which had research centres with potential relevance to residential mortgage regulation (e.g. the European University Institute, Florence; the Joint Centre for Housing Studies Harvard University and the Utrecht School of Economics) and to bodies or organisations with a policy focus relevant to the mortgage context, for example the Centre for European Policy Studies (CEPS), the Institute for International and European Affairs (IIEA), the European Mortgage Federation (EMF) etc.

2.3. Literature Relevant to Residential Mortgage Regulation

The limited utility of literature on financial regulation does not impute a dearth of academic materials which address mortgage policy, structural changes in the market and other relevant developments or aspects. However, the vast majority of academic materials, in which mortgage markets are the focus of analysis stem not from legal scholars, but from sociologists, economists and housing researchers. The distinction in the focus of analysis in each of these fields reflects the variation in the respective interests. However, this is not to suggest that academic literature relevant to the current analysis is restricted to mortgage specific materials. On the contrary, generic regulatory theory, materials from the fields of new comparative economics, and subfields within sociology offer theoretical insights into the stimulus for and the nature of the legal frameworks which are the focus of this thesis.

2.3.1. Regulatory Theory

The current analysis is focused on pre and post-crisis regulation of residential mortgage markets and, in the absence of literature containing theoretical perspectives on residential mortgage regulation by legal academics, it seemed appropriate to review generic theories of regulation as a potential source of insights into the stimulus for, and the orientation of, post-crisis residential mortgage regulation. A theory of regulation may be viewed as a hypothesis about 'why regulation emerges, which actors contribute to that emergence and typical patterns of interaction between regulatory actors'.[25] Among the seminal textbooks in what is a comparatively recent

[25] Bronwyn Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 16.

academic field are those of Morgan & Yeung and Baldwin, Cave and Lodge.[26] Whilst the latter differentiate regulatory approaches with reference to the relative emphasis placed on exogenous and endogenous factors in the process i.e. interest groups or institutional culture, the former distinguish the multiple existing theories of regulation according to whether there is a clear dividing line between public and private institutions and actors, and whether the focus is restricted to economic goals or extends more broadly.[27]

Pursuant to the approach adopted by Morgan and Yeung, which is the most helpful in the current context, theories of regulation can be placed into three categories; public interest, private interest and institutionalist.[28] The public interest theory has both economic and political variants but the common core is that it attributes 'to legislators and others responsible for the design and implementation of regulation a desire to pursue collective goals with the aim of promoting the general welfare of the community'.[29] In contrast, private interest theories of regulation 'are premised on an assumption that regulation emerges from the actions of individuals and groups motivated to maximise their own self-interest'.[30] This approach to regulation stresses the degree to which regulatory developments may be attributable to the pluralistic concerns of interest groups.[31] As with the public interest approach, the private interest has variants including public choice theory, principal agent theory and positive political economy and, notwithstanding differences, there are core characteristics common to all.[32] The concept of regulatory capture arises in the

[26] ibid, xiii. Morgan and Yeung highlight the comparatively recent nature of the field in their observation regarding the lack of textbooks in 1999 for a proposed course on Regulation at Oxford University; 'In short, there was an acute need for a text that provided an organising frame for interrogating the variety of disciplinary approaches to regulation, and this provided us with the impetus to write this book'. Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, Oxford University Press 2012).
[27] Bronwyn Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 16.
[28] ibid. The authors reject the notion that the theories are either explanatory or prescriptive pointing out that any theory may contain a mixture of elements; although, this fluidity is manifest most clearly in the institutionalist approach
[29] ibid, 17-18. The economic variant is known as the welfare economics approach whilst the political variant may focus on substantive goals (e.g. Cass Sunstein) or deliberative process (e.g. Tony Prosser).
[30] ibid, 43.
[31] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, Oxford University Press 2012) 43.
[32] Bronwyn Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 44.

context of private interest theories and Stigler opined that 'as a rule regulation is acquired by industry and is designed and operated primarily for its benefit' whilst Baldwin et al contend that 'regulation is inherently about (degrees of) capture'.[33] Iain Ramsay has observed that 'public choice literature suggests that diffuse groups such as consumers are unlikely to be successful in the market for regulation' but noted that 'James Q Wilson modified this in his political theory of regulation, arguing that success for groups depends on the distribution of costs and benefits of particular policies'. [34] Ramsay applies this to the financial market context and concludes that 'where costs are concentrated but benefits are diffuse, as in the case of financial regulation, 'entrepreneurial politics' was necessary, where an individual/group could exploit a scandal or crisis to mobilize public opinion'.[35] There are similarities and distinctions in the role of law in the public and private interest theories of regulation. The similarities stem from what Morgan and Yeung describe as the facilitative role of law within regulation.[36] The differences relate both to the conception of law as a regulatory good and the proposition that the regulatory outcomes promote collective welfare.[37] Morgan and Yeung opine that 'it may be that private interest approaches to regulation have provided a necessary corrective to the excessive optimism or naïveté of public interest theories, pointing to the desirability of the judicious mix of the two combined with an appreciation of when and why limits to either approach emerge'.[38]

In addition to public and private interest theories, there are 'institutionalist' theories of regulation. The term 'institutionalist is taken to refer to any theory in which rule based spheres or the relationship between different rule based spheres play an

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[33] George Stigler, 'The Theory of Economic Regulation' (1971) 2 Bell Journal of Economics and Management Science 3, 3 ; Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice*, (2nd edn, Oxford University Press 2012) 44.

[34] Iain Ramsay, 'Culture or Politics? Models of Consumer Credit Regulation in France and the UK' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis* (Ashgate 2013) 106 – 107.

[35] ibid, 107.

[36] Bronwyn Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 51 and 75. Morgan and Yeung note that 'law continues to play a facilitative role …..in so far as that role has an instrumental dimension'. Law referring in this sense to 'authoritative rules backed by coercive force, exercised by a legitimately constituted (democratic) nation'.

[37] ibid, 51 -52.

[38] ibid, 52. In terms of critiques of the private interest approach, it is noted that the premise of public choice theory that legislators supply demanded regulatory goods in exchange for resources that secure their position is considered 'not altogether plausible'.

important role in explaining how or why regulation emerges'.[39] Baldwin et al assert that 'institutionalism has become such a broad church that it is hard to find anyone who would not claim to be an institutionalist'.[40] It is pointed out that beyond the agreement that 'institutions matter' the theories within the classification diverge, some emphasise the importance of formal rules in shaping behaviour, others stress the importance of political rules of the game in shaping diverse actors behaviour while others regard all human action as embedded in their social context.[41] Although institutionalist theorists may not agree on where preferences come from, there is consensus that institutional structure, arrangements and social processes, have a significant role in shaping regulation and that regulatory developments are more than the sum of individual preferences.[42] Notwithstanding the diversity of the theories within the class, Morgan and Yeung cite two commonalities between the variants. The first 'is that they consider institutional dynamics to have (in a sense) a 'life of their own' in regulatory regimes, such that they will often shape the outcomes of regulation in surprising ways given the preferences and interests of regulatory participants'. The second is that, in contrast to the other theories, they blur the distinction between public and private actors and interests.[43] Morgan and Yeung cite Tripartism, Regulatory Space and Systems Theory as the main theories within the institutionalist category.[44]

Ayres and Braithwaites 'tripartism' has been identified as 'a bridge between the actor centred approaches' of the public and private interest theories and the 'more systems focused approaches that operate at a higher level of abstraction'.[45] 'Ayres and

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[39] ibid, 53. The authors identify the concept of rule based spheres as encompassing 'formal organisations, (e.g. regulatory agencies, corporations, states) embedded norms and routines, (e.g. risk analysis, cost benefit accounting) or systems as understood by systems theory (legal, economic or political systems)'.

[40] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, Oxford University Press 2012) 53.

[41] ibid.

[42] ibid.

[43] Bronwyn Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 53.

[44]ibid. Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice*, (2nd edn, Oxford University Press 2012) 54. Baldwin et al identify three strands within institutionalist literature. 'those that focus respectively on inter institutional relations….those primarily interested in intra institutional forces…and those that emphasise the network and regulatory space understandings of regulation'.

[45] Bronwyn Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 53.

Braithwaite do not take a systems approach but blend public and private interest approaches in a manner which highlights institutional dynamics'.[46] The model focuses on the capacity for cost benefit analysis by regulatory actors to produce public interest outcomes and asserts that deliberative process are compatible with cost benefit analysis provided that co-operation pays i.e. 'efficient capture'.[47] In contrast Regulatory Space moves away from consideration of the individual or group in the regulatory process to a consideration of 'how the actions and intentions of regulatory participants are embedded in larger systems and institutional dynamics'.[48] The first proponents of the theory, Hancher and Moran identify 'regulatory space as an analytical construct defined by the range of regulatory issues subject to public decision'.[49] They observe of economic regulation in advanced capitalist economies '..that the most important actors in the process are organisations, ….which…regardless of their formal status have acquired important attributes of public status…none is more important than the large firm…..large firms cannot be described as private 'takers' of regulation….they have acquired the status of governing institutions'.[50] Colin Crouch similarly asserts the potency of the large firm noting that '..actually existing, as opposed to ideologically pure,…neoliberalism is …..devoted to the dominance of public life by the giant corporation….the confrontation between the market and the state…conceals the existence of this third force which is more potent than either and transforms the workings of both'.[51] Morgan and Yeung note that while 'regulatory space tends to emphasise the complexity and contingency of how regulation emerges, it is still very concrete, grounded in history, formal institutions and detailed attention to power dynamics'.[52] In contrast systems theory is cast as 'the most abstract' of the institutionalist approaches.[53] The origins of systems theory, as a theory of society, lies in the biological sciences concept of autopoeisis, i.e. the self-regulation of living organisms

[46] ibid.
[47] ibid, 54.
[48] ibid, 59.
[49] Leigh Hancher and Michael Moran, 'Organising Regulatory Space' in Leigh Hancher and Michael Moran (eds) *Capitalism, Culture and Regulation* (Clarendon Press 1989) as cited in Bronwyn Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 63.
[50] ibid, 62.
[51] Colin Crouch, *The Strange Non-Death of Neoliberalism* (Polity Press 2011) viii.
[52] Bronwyn Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 69.
[53] ibid.

and the dynamic between this self-regulation and the environment in which it takes place.[54] Morgan and Yeung observe that 'a central finding of systems theory is that systems tend to be closed self-referential spaces that perpetuate their own existence by a series of operations and a system of language that is only comprehensible internally to those who speak the language of the system and understand its workings'.[55] Systems theory identifies the capacity for dissonance between the languages of different systems in its conceptualisation of 'legal authority (hierarchical) as an external irritant to the economic system, one to which it will respond if it can translate its meanings to one that makes sense within the internal logic of its own system'.[56]

Morgan and Yeung identify the law as serving a facilitative role in institutionalist theories, as it does in the public and private interest variants. However, in the institutionalist context the facilitative role is deemed to have a 'proceduralist' dimension. The form varies according to the model and in the tripartism context 'law might help create and maintain the tripartite structure that brings together public and private actors for example by mandating third party participation in regulatory rule making'. [57] With reference to this example, Saule T Omarova has argued for the establishment of a new tripartite system of regulation for financial services through the creation of a statutory 'public interest' body in response to the financial crisis.[58] Hancher and Moran suggest that the 'character of a legal culture mediates the regulatory process fixing the scope of regulatory space and influencing who gains entry and on what terms'.[59] In systems theory Teubner suggests that 'the law's contribution… is the resolution of inter system conflicts by procedural regulation which he stresses is not only a matter of fostering dialogue….. but also of

[54] ibid.
[55] ibid.
[56] ibid.
[57] ibid, 74.
[58] Saule T Omarova, 'Bankers, Bureaucrats and Guardians: Towards Tripartism in Financial Services Regulation' (2012) 37(3) Journal of Corporation Law 621, 623. Omarova proposes a designated public interest representative as an equal third party in the regulatory process, noting that the current underlying conceptualisation of regulation in the financial sector is as a process involving two principals; the financial services industry and the government agencies overseeing it.
[59] Bronwyn Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 74.

understanding that regulatory actors operate in semi-autonomous social subsystems'.[60]

In the context of the current research, generic regulatory theory has limited capacity to assist in analysis of post-crisis residential mortgage regulation in Ireland and Spain. However it provides a starting point from which to contextualise theoretical perspectives on markets, and in particular financial markets, from other academic fields. Colin Scott has observed that whereas theories from the fields of economics and political science had followed economic thinking in 'positing a sharp distinction between markets and regulation', sociological analysis 'oriented towards the analysis of power in its diverse forms' has a longstanding rejection of such a distinction; noting that in 1993, Shearing had identified regulation 'as a central factor in shaping conduct generally' and as being constitutive of markets.[61] Julia Black with reference to institutionalist theorists from the fields of economics and sociology and their conceptualisation of financial markets observes, 'whatever their position on the issue of the "over socialised" and the "under socialised" actor, for all institutionalist theorists, the market and organisational structures which evolve over time are those which are most able to create stability and survive in conditions of uncertainty, even though they may not lead to economic efficiency'. Black further observes with reference to both economic and sociological new institutionalism, a point of convergence is that 'markets are constituted by social institutions'; noting that social institutions 'comprise norms of behaviour, cognitive or interpretative frameworks, regulative rules, including law and decision making rules and organisations such as firms or indeed the state'.[62] With reference to the current work, a significant point of convergence in the materials from the fields of financial sociology and law and finance is the assertion that 'markets are constituted by the State, including law and the legal system'. [63] Within the latter field, Katharina Pistors Legal Theory of

[60] ibid.
[61] Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post Regulatory State' (National European Centre Paper No 100, Australian National University 6 June 2003) 3. Scott identifies the softening of the sharp distinction between State and Market, public and private as a defining characteristic of 'post regulatory state thinking' and notes that Julia Black has labelled this rethinking of regulation as 'de-centring'.
[62] Julia Black, 'Reconceiving Financial Markets - From the Economic to the Social' (2013) 13(2) Journal of Corporate Law Studies 401, 412-413.
[63] ibid, 413.

Finance offers a more precise theoretical analysis of the constitutive role of law in financial markets.

2.3.2. New Comparative Economics – Law and Finance

Within the field of new comparative economics is a body of literature known as 'Law and Finance', which is described as having dominated policy-making and academic debates in the decade from 2000 onwards.[64] The significance of the literature in a policy context is substantiated by its role in assessing countries legal systems in the World Bank 'Doing Business' reports.[65] Pistor cites the origins of the literature in 'a series of papers co-authored by Andrei Shleifer, Rafael La Porta, Florencio Lopez-de-Silanes and other researchers, including Robert Vishny, Simeon Djankov et al'.[66] She identifies the literature as offering a theory of how law relates to finance and opines that its major contribution was 'to introduce systemic empirical analysis into the analysis of law and economics and to show that law matters to finance mostly by vindicating investors rights: legal systems that better protect these rights tend to have more developed financial systems'.[67] In 'Rethinking the Law and Finance Paradigm', Pistor reviewed the law and finance literature and she asserts that although the literature 'made a major contribution in bringing the analysis of law and legal institutions to the forefront of comparative economics….an open question is whether these statistics indicate that we are closer to an understanding of the interplay of economic and legal change'.[68] With reference to this question a particular critique of Pistor is that the literature '…treats law and finance as two separate spheres that are related in a causal unidirectional manner and not as structurally intertwined'.[69] In late 2012, Pistor published a paper which 'develops the

[64] Katharina Pistor, 'Rethinking the "Law and Finance" Paradigm' (2009) 6 Brigham Young University Law Review 1647, 1647. Pistor notes that 'Law and Finance' literature was preceded by 'Law and Economics' literature which sought to explain legal rules and the development of law in terms of efficiency. 'Some authors postulated that the common law trends towards efficiency (Priest, 1977; Rubin, 1977) while others pointed to biases in the selection of cases for litigation (Bailey and Rubin, 1994)'.

[65] ibid, 1656 – 57.

[66] ibid, 1647. Pistor identifies the literature as emerging in 'recognition of the difficulties of developing financial markets in the former socialist world and emerging markets'.

[67] Katharina Pistor, 'A Legal Theory of Finance' (2013) 41(2) Journal of Comparative Economics 315, 325.

[68] Katharina Pistor, 'Rethinking the "Law and Finance" Paradigm' (2009) 6 Brigham Young University Law Review 1647, 1662 and 1670.

[69] Katharina Pistor, 'A Legal Theory of Finance' (2013) 41(2) Journal of Comparative Economics 315, 325. Pistor notes that 'Law and Finance is a theory for good times – not for bad – it assumes that knowledge is perfect and liquidity is a free good'.

contours of a legal theory of finance (LTF) for contemporary financial systems'.[70] The LTF is relevant to the current analysis as it provides a conceptualisation of the role of law in financial markets which may offer insights into the role of law in the residential mortgage market context.

The LTF asserts that financial markets are legally constructed and do not stand outside the law and, as a result, they occupy an essentially hybrid place between state and market, public and private.[71] This assertion reflects the nature of financial assets 'as contracts, the value of which depends in large part on their legal vindication' and the fact that 'the more a financial system moves from relational finance to entities and ultimately markets, the more it depends on a formal legal system with the capacity to authoritatively vindicate the rights and obligations of contractual parties or to lend its coercive powers to the enforcement of such claims'.[72] However, due to fundamental uncertainty and volatility of liquidity, financial markets are 'inherently unstable' and as a result, they exhibit dynamics which put them in direct tension with the commitments enshrined in law or contracts.[73] Pistor suggests that 'law and finance stand in an uneasy, paradoxical relation to one another'.[74] This 'law and finance paradox' arises because 'law lends credibility to financial instruments by casting the benevolent glow of coercive enforceability over them. But the actual enforcement of all legal commitments made in the past irrespective of changes in circumstances would inevitably bring down the financial system. If, however, the full force of law is relaxed or suspended to take account of such change, the credibility law lends to finance in the first place is undermined'.[75] She observes that this law-finance paradox tends to be resolved by suspending the full force of law, i.e. relaxation or suspension of contractual obligations. However, this 'elasticity of law' is not evenly applied and in the hierarchical financial system, 'law tends to be relatively elastic at the system's apex, but inelastic on its periphery. It is thus at the periphery where default is most likely to result in involuntary exit. In contrast, at the apex where the very survival of the system is at stake, law tends to be more elastic by design and/or because the system's ultimate backstop abrogates the discretionary

[70] ibid, 315.
[71] ibid.
[72] ibid, 315 and 321.
[73] ibid, 315 and 316.
[74] ibid, 323.
[75] ibid.

power to do what it takes to rescue the system'.[76] Although the theory is primarily contextualised within the broader financial market, Pistor highlights the implications of the apex /periphery distinction in the mortgage market context by noting that in jurisdictions with full recourse mortgages, '..if property value is under water, homeowners still carry the burden of the entire amount they had contracted for. The global market for real estate finance thus also exhibits an apex and a periphery, where homeowners at the periphery carry not only the full credit risk, but frequently also the currency risk. If anything, the difference between apex and periphery is more pronounced, because in the transnational realm there are fewer mechanisms to redistribute loss'.[77]

Pistor points out that although a differential application of law is objectionable on rule of law grounds, 'in the context of a highly instable financial system, the elasticity of law has proved time and again critical for avoiding a complete financial meltdown'.[78] She suggests that the degree of elasticity and discretion required to stabilize a financial system depends, to a large extent on how much instability it tolerates in the first place, i.e. on its legal construction. 'The greater the tolerance for financial instability ex ante, the more likely that law and contracts will have to be suspended ex post – even though this undermines the credibility of financial contracting on which the system rests'.[79] With reference to the capacity for ex poste alteration or relaxation of contractual obligations to address changes in circumstance, Pistor suggests that 'one of the major lessons LTF holds is that we need more safety valves of this kind – not only at the apex where law tends to be relatively more elastic, but also on the periphery of the system'.[80] The point she makes is that a full scale crisis may not develop if the law – finance paradox is addressed at an earlier stage. 'Obviously this raises important questions about how best to design such safety valves; whether courts, regulators or other agents are best placed to perform such a role; who should be empowered to initiate an intervention; and how to ensure

[76] ibid. The elasticity of law is linked to the political economy of finance 'where law is elastic decisions are not predetermined by legal rules but left to the discretion of ''power wielders''. …..Power is exercised throughout the financial system…..by those who have the resources to extend support to others without being legally obliged to do so. Those who have access to unlimited resources have the most power..sovereigns with control over their own currency and debt'.
[77] ibid, 321.
[78] ibid.
[79] ibid, 329.
[80] ibid.

that the relief safety valves would offer in times of distress is not abused or weakens ex ante commitments. These are difficult questions that require further research and analysis. LTF's contribution is to put such questions up front and center for research and reform agendas'.[81]

2.3.3. Other Economic Perspectives

Although the literature from the field of new comparative economics has particular theoretical significance due to its conceptualisation of the role of law in the contemporary financial market context, it is clear that theoretical and applied analysis within other streams of economic literature is relevant to the mortgage context. There is a body of economic analysis which addresses house price dynamics, and within this literature, mortgage markets are conceptualised with reference to their role as a demand side determinant of price dynamics. This analysis is utilised in chapter three to contextualise the potential conflict between access and responsible lending with reference to the dynamic between mortgage and housing markets.[82] There is also literature on the use of macro prudential policy tools to reduce 'the occurrence and consequences of cyclical financial risks, by …dampening the expansionary phase of the cycle'.[83] This literature is relevant to issues of access and, in particular, to understanding the role of Loan to Value (i.e. LTV) and Loan to Income (LTI) ratios in responding to credit and repayment risks respectively, within regulatory regimes. A further aspect of economic analysis is that emanating from the field of behavioural economics. Broadly speaking behavioural economics recognises the deficit in the neoclassical model of market participants as rational actors and the assumptions regarding behaviour which stem from this conceptualisation.[84] Black

[81] ibid. For some of the implications of the LTF for empirical research see Simon Deakin, 'The Legal Theory of Finance: Implications for Methodology and Empirical Research' (2013) 41(2) Journal of Comparative Economics 338.

[82] See Peter Hoeller and David Rae, 'Housing Markets and Adjustments in Monetary Union' (Economics Department Working Paper No 550, OECD 2007); Nathalie Girouard, Mike Kennedy, Paul van den Noord and Christophe Andre, 'Recent House Price Developments: The Role of Fundamentals' (Economics Department Working Paper No 475, OECD 2006); Kostas Tsatsaronis and Haibin Zhu, 'What Drives Housing Price Dynamics: Cross-Country Evidence', March (2004) BIS Quarterly Review 65.

[83] Stijn Claessens, Swati R Ghosh and Roxana Mihet, 'Macro-Prudential Policies to Mitigate Financial System Vulnerabilities' (Working Paper WP/14/155, IMF August 2014) 6. See also Niamh Hallissey, Robert Kelly and Terry O'Malley,' Macro-Prudential Tools and Credit Risk of Property Lending at Irish Banks' (Economic Letter Series Volume 2014 No 10, Central Bank of Ireland 2014).

[84] See Julia Black, 'Reconceiving Financial Markets - From the Economic to the Social' (2013) 13(2) Journal of Corporate Law Studies 401, 406 for the behavioural implications of the 'homo economicus'.

identifies two stages in the infiltration of the field into economic analysis; the first being the introduction of the boundedly rational actor, and the second being the use of insights from the field of cognitive psychology into the decision making process, particularly in the context of risk and uncertainty.[85] She observes the use of behavioural insights as informing the approach of regulators to retail financial regulation in the UK, Australia and Canada since 2000, and notes that 'in 2006 the European Commission also turned its attention to this work, again in the context of retail markets', noting that it is most easily applied 'in the context of disclosure regulation where policy makers are relying on consumers or other counterparties in the market to drive optimal market outcomes'.[86] In terms of applied analysis with reference to behavioural economics, there is 'borrower choice' literature in which analysis has been undertaken of factors impacting the selection of different types of mortgage product, in particular, differences in interest rate options.[87] In Ireland, the national economic significance of developments in mortgage and housing markets is manifest in a stream of post-crisis economic analysis of related issues from economists within the Central Bank of Ireland.[88]

2.3.4. Socio Geographic Analysis of Mortgage Markets

Fligstein and Dauter assert that 'the sociology of markets has been one of the most vibrant fields in sociology in the past 25 years' and Pistor identifies 'a rapidly expanding field of financial sociology'.[89] The significance of the latter is manifest in a 2013 article by Julia Black which presents a social conception of financial markets

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[85] ibid, 407.

[86] ibid, 409 - 410.

[87] John Y Campbell and João F Cocco, 'Household Risk Management and Optimal Mortgage Choice' (2003) 118(4) Quarterly Journal of Economics 1449. This model was the basis of the analysis contained in the Miles Report, i.e. David Miles, 'The U.K. Mortgage Market: Taking a Longer Term View - Final Report and Recommendations (U.K. Treasury March 2004). Daniel Bergstresser and John Beshears, 'Who Selected Adjustable Rate Mortgages? Evidence from the 1989-2007 Surveys of Consumer Finances' (Working Paper 10-083, Harvard Business School 2010).

[88] Yvonne McCarthy and Kieran McQuinn, 'Deleveraging in a Highly Indebted Property Market: Who does it and are there Implications for Household Consumption?' (Research Technical Paper 05/RT/14, Central Bank of Ireland March 2014). Yvonne McCarthy and Kieran McQuinn, 'Credit Conditions in a Boom and Bust Property Market (Research Technical Paper 08/RT/13, Central Bank of Ireland October 2013). Yvonne McCarthy and Kieran McQuinn, 'Attenuation Bias, Recall Error and the Housing Wealth Effect' (Research Technical Paper 06/RT/14, Central Bank of Ireland March 2014).

[89] Neil Fligstein and Luke Dauter, 'The Sociology of Markets' (Institute for Research on Labour and Employment (IRLE) Working Paper 145-07, University of California Berkeley August 2006). Katharina Pistor, 'Rethinking the "Law and Finance" Paradigm' (2009) 6 Brigham Young University Law Review 1647.

as a counterpoint to the neo classical economic model, and identifies the implications of such a conceptualisation for financial regulators.[90] The role of sociological literature in providing theoretical perspectives on regulation and financial market regulation must thus be acknowledged. However, with reference to the current analysis and the relevance of sociological literature to the mortgage market context, a notable contribution has been made by the socio-geographic field, in particular the publications of Manuel Aalbers.

Aalbers contextualises the socio-geographic literature by noting that 'traditionally, the mortgage market has been the domain of economists…other social scientists, most notably geographers, sociologist and political scientists have studied it but generally they were considered to be outside the mainstream and their work was largely ignored by economists'.[91] He notes that the most significant contribution of sociologists and geographers has been through enhancing the understanding of mortgage markets in times of 'turmoil and change, as well as when exclusion in these markets was an important issue'; a contribution which he suggests, may reflect the fact that 'mainstream economics, with its obsession with equilibriums has trouble understanding change'.[92] Aalbers is at the forefront of contemporary theoretical socio geographic perspectives on European mortgage markets and his publications contain analysis of a broad range of issues. For current purposes, the most relevant articles are those which address financialization[93] and globalisation of mortgage markets, the causal link between these developments and the global financial crisis, and the nature of neo liberalism and its fate in the post-crisis context.[94]

Aalbers observes that 'the financialization of mortgage markets demands that not just homes but also homeowners become viewed as financially exploitable' and he

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[90] See Julia Black, 'Reconceiving Financial Markets - From the Economic to the Social' (2013) 13(2) Journal of Corporate Law Studies 401.

[91] Manuel B Aalbers, 'The Sociology and Geography of Mortgage Markets: Reflections on the Financial Crisis' (2009) 33(2) International Journal of Urban and Regional Research 281, 282. Aalbers notes that there is a large body of work by social scientists on home ownership but only a small part of this deals with mortgage markets.

[92] ibid.

[93] 'A pattern of accumulation in which profit making occurs increasingly through financial channels rather than trade or commodity production'.

[94] Manuel B Aalbers, 'The Sociology and Geography of Mortgage Markets: Reflections on the Financial Crisis' (2009) 33(2) International Journal of Urban and Regional Research 281. See also Manuel B Aalbers, 'The Financialization of Home and the Mortgage Market Crisis' (2008) 12(2) Competition and Change 148.

identifies a synergistic relationship between the globalization of mortgage markets and the financialization of borrowers and markets.[95] In examining exclusion and discrimination in the context of predatory lending and red lining, the literature identifies relevant developments in policy and technology which are related to financialization and, which have a significant impact on the capacity of certain socio-economic groups to access credit. Aalbers points out that 'although credit scoring can be thought of as a way to control over-expansion in the mortgage market, it has in effect contributed to over accumulation, because it has widened access to capital for high risk borrowers. Credit scoring has fuelled risk based pricing, and taken together, credit scoring, risk based pricing and securitisation have resulted in the development of a mortgage market for sub-prime and predatory loans', he suggests, noting that increased default and foreclosure rates are symptoms and not the origins of the crisis.[96] Within the Consumer Law and Policy literature, Iain Ramsay notes a conflict between credit scoring models and truly responsible lending; 'responsible lending envisages a more individualised lending process…credit scoring, however, permits a lender to grant credit without ever meeting the borrower'.[97]

In terms of the role of finacialization in enhancing access to ownership tenure, Aalbers asserts that 'housing is a central aspect of financialization', but 'the financialization of home was never designed to enable homeownership; it was first and foremost designed to fuel the economy'.[98] This observation brings the economic and social policy dimensions of mortgage policy into focus both in terms of loan origination and funding. Acknowledging the dynamic between mortgage markets and

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[95] Manuel B Aalbers, 'The Sociology and Geography of Mortgage Markets: Reflections on the Financial Crisis' (2009) 33(2) International Journal of Urban and Regional Research 281, 284. Aalbers notes that credit scoring is 'not only indispensable if lenders want to sell their mortgage portfolios in secondary markets, but it facilitates risk based pricing'. 'Credit scoring uses available information to make predictions about future payment behaviour; it is a form of customer profiling … i.e. factoring capacity to pay and willingness..'. The globalisation of lenders is also a factor in the globalisation of mortgage markets; although, according to Aalbers it is empirically less important.

[96] Manuel B Aalbers, 'The Financialization of Home and the Mortgage Market Crisis' (2008) 12(2) Competition and Change 148, 159 and 162. Predatory loans are defined as 'an unsuitable loan designed to exploit vulnerable and unsophisticated borrowers'. Predatory loans are a subset of subprime loans and among the identified characteristics of a predatory loan are; abusive terms and conditions that trap borrowers and lead to increased indebtedness; failure to take into account the ability to repay the loan …(etc)

[97] Iain Ramsay, 'From Truth in Lending to Responsible Lending' in Geraint Howells, Andre Janssen and Reiner Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Ashgate 2005) 59.

[98] Manuel B Aalbers, 'The Financialization of Home and the Mortgage Market Crisis' (2008) 12(2) Competition and Change 148, 160.

house prices, he points out that whilst financialization has resulted in an increase in the number of homeowners, it has 'also and more importantly, (resulted) in a rapid and huge increase in the value of homes' and the 'upward pressure in house prices restricts access to homeownership and adds to the wealth of "insiders" at the expense of "outsiders…'.[99] This observation highlights the fact that short term inclusion in a mortgage market context can over a longer period lead to exclusion, and in 2009, the present author similarly identified the paradox of enhanced access as a cause of exclusion with reference to the inflationary pre-crisis EU context.[100]

Aalbers identifies financialization as increasing the probability of crisis stating 'simply put, the more financialized the mortgage market in a country, the bigger the risk of a mortgage crisis'.[101] He asserts 'the financialization of the mortgage market means that it is not only the global and the local that have become interdependent, but also the financial and the built environment'.[102] This analysis does not discount the significance of process related aspects as causative factors, i.e. bubbles and mis-aligned incentives which are addressed by other fields, but he opines that the focus on these aspects limits the understanding of how a global crisis can occur. Ultimately, although housing markets are local or regional, mortgage markets, in particular secondary mortgage markets are not, and 'whilst in the past a mortgage bubble or housing bubble would affect the economy through homeowners, the current bursting of these bubbles affects the economy not just through homeowners but also through financial markets'.[103]

In common with literature from other fields, Aalbers notes the gulf between neo liberal ideology and practice, discussing the pre-crisis regulatory context in terms of

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[99] ibid, 157. Manuel B. Aalbers, 'Wrong Assumptions in the Financial Crisis' (2009) 5(1) Critical Perspectives on International Business 94, 96. With reference to the US context, Aalbers discounts as a myth the assertion that sub-prime lending increased inclusion in respect of homeownership; both with reference to the lack of affordability (i.e. expenses out of scale with income) and most subprime loans were refinance loans or second mortgages (i.e. loans for those who already owned a mortgaged property'.

[100] Karen Lynch Shally, 'Are National Property Regimes an Impediment to a Single EU Market in Mortgage Credit' (Unpublished Thesis NUI Galway 2009).

[101] Manuel B Aalbers, 'The Financialization of Home and the Mortgage Market Crisis' (2008) 12(2) Competition and Change 148, 161.

[102] ibid, 162. Aalbers points to the process of financialization and globalization affecting those seemingly unconnected from high finance and international investment, i.e. it affects homeowners, lenders, investors in MBS, for example, in the US and then global investors and through institutional investors like pension funds, it indirectly affects workers.

[103] Manuel B Aalbers, 'The Sociology and Geography of Mortgage Markets: Reflections on the Financial Crisis' (2009) 33(2) International Journal of Urban and Regional Research 281, 287.

deregulation and then re-regulation in the neo liberal mould to further market activity.[104] He observes that States are not external but central to neo liberalism and in common with other academic fields, notably Consumer Law and Policy, he opines that neoliberalism has not been 'dismantled' in the wake of the crisis but has been furthered, citing bailouts for private companies on the one hand and austerity measures for the general public.[105] In a broad sense, this reflects the point made by Pistor in her Legal Theory of Finance regarding a hierarchy in terms of the elasticity of legal obligations in times of crisis, and that flexibility for those at the apex is made possible by enforcement at the periphery.[106]

Aalbers identifies mortgage markets as being politically constructed and reconstructed, a point echoed in the broader financial market context by Micklitz, who identifies the role of the EU as a driving force in 'transforming the requirements of international financial economics into a legal framework for a European financial market'.[107] Julia Black similarly observes that 'central to institutionalist analyses of markets is that the State plays a fundamental role in producing the institutional arrangements for markets to function' and she identifies two 'key ways' in which this is undertaken in financial markets; 'first it provides, the facilitative structures for financial products and transactions…..through contract and property law rules, governance structures for markets and the associated infrastructure of the judicial system….secondly the state produces regulative structures by legal rules that require markets, organisations and behaviours to be organised in particular ways'.[108] Aalbers also notes the instrumental role of law, pointing out that in advanced capitalist societies, 'the law is the institution par excellence to embed the ideology of private

[104] Manuel B Aalbers, 'Neoliberalism is dead…Long Live Neoliberalism' (2013) 37(3) International Journal of Urban and Regional Research 1083, 1084. 'The ideological project hides what neo liberalism actually wants and does…….therefore it is not so much de-regulation that we see, but rather re-regulation'.

[105] Manuel B Aalbers, 'Neoliberalism is dead…Long Live Neoliberalism' (2013) 37(3) International Journal of Urban and Regional Research 1083, 1084- 1085. 'Free markets are not natural: markets are institutions created by the state and maintained by state intervention. The invisible hand of free markets needed the State to create that market (Polyanyi, 1944; Immergluck, 2004)'.

[106] Katharina Pistor, 'A Legal Theory of Finance' (2013) 41(2) Journal of Comparative Economics 315, 325.

[107] Hans W Micklitz, 'Access to, and Exclusion of, European Consumers from Financial Markets after the Global Financial Crisis' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis* (Ashgate 2013) 64.

[108] Julia Black, 'Reconceiving Financial Markets - From the Economic to the Social' (2013) 13(2) Journal of Corporate Law Studies 401, 414.

property in wider societal relationships'.[109] In addition to the theoretical perspectives of Aalbers, there is also applied socio geographic analysis and, in respect of the jurisdictions under review, Richard Waldron is a notable Irish academic in this regard; however, for the purposes of the current inquiry this applied analysis is of less direct relevance.[110]

2.3.5. Public Law Regulation of Mortgages

A field of literature which is relevant but underdeveloped, and to which the current thesis can contribute, is that which conceptualises or analyses the nature of what for current purposes, is referred to as the 'public law'/'facilitative sphere' of mortgage regulation, and the dynamic between this and the 'private law'/'constitutive sphere'. In 2009, Patrick McAuslan identified a deficit in legal analysis as he reviewed what he referred to as the public law of mortgages as it existed in the UK at that time; noting that this was an aspect which was largely absent from academic analysis of mortgage law. 'The public law of mortgages is a very recent development. A decade ago it didn't exist. It still doesn't in most of the textbooks on land law or real property law'.[111] Lisa Whitehouse and Olha Cherednychenko have recently contributed to the development of this literature, albeit from different jurisdictional and theoretical perspectives.

In 2015, Whitehouse juxtaposed the first legal charge mortgagor as conceptualised in the private and public law regimes in the UK noting that in the private law regime, i.e. land law, the mortgagor is conceptualised as a landowner; whereas in the public law regime, i.e. financial services regulation, the mortgagor is conceptualised as a consumer.[112] She observes that notwithstanding the historic willingness of land law to alter its conceptualisation of the mortgagor as evidenced by the emergence and evolution of equity and the move to a consumerist model of housing provision, there

[109] Manuel B Aalbers and Brett Christophers, 'Centring Housing in Political Economy' (2014) 31(4) Housing Theory and Society 373.
[110] See for example Richard Waldron, 'The Unrevealed Casualties of the Irish Mortgage Crisis: Analysing the Broader Impacts of Mortgage Market Financialisation (2016) 69 Geoform 53; Richard Waldron and Declan Redmond, '(For)Bearing the Costs of Reckless Lending: Examining the Response to the Irish Mortgage Arrears Crisis' (2016) 16(3) International Journal of Housing Policy 267.
[111] Patrick McAuslan, 'Whose mortgage is it anyway? Producers, consumers and the law in the UK mortgage market' (Paper presented at the ISA International Housing Conference *Housing Assets, Housing People*, September 2009) 3.
[112] Lisa Whitehouse, 'The First Legal Mortgagor: A Consumer without Adequate Protection' (2015) 38(2) Journal of Consumer Policy 161, 161.

has not been an equivalent change in the status of the mortgagor in land law.[113] In respect of the distinction between the treatment of the mortgagor as consumer and landowner under the respective regimes she opines, 'the continued operation of two distinct regulatory regimes founded upon different conceptions of the mortgagor will inhibit attempts to create a robust regulatory framework which ensures that all mortgagors are treated fairly. Rather, what is needed is a unified approach in which both regimes conceive of the mortgagor as consumer'.[114] Whitehouse's stated aim '…. is simply to reverse the somewhat ironic situation prevalent within the current legal framework, which means that mortgagors receive less protection than a consumer purchasing non-essential goods. The argument, therefore, is that mortgagors deserve *at least* as much protection as would normally attach to the status of consumer'.[115] Whilst Whitehouse's analysis is specific to the UK legal framework and focuses on an inequality in the protections offered to consumers depending on the form of credit; it is representative of a nascent mortgage literature, to which the current thesis will contribute, which offers legal analysis of the private and public law spheres of residential mortgage regulation.

Olha O Cherednychenko's research on the 'Europeanisation' of national private law focuses on the EU role in the public law sphere and, in particular, on conceptualising conduct of business frameworks therein. Using EU legislation within the financial services context, including the then draft Directive on mortgage credit, Cherednychenko conceptualises regimes 'characterized by a significant involvement of administrative agencies and, as a rule, highly detailed ex ante regulatory legal regimes resulting therefrom', as European Supervision private law.[116] She notes that 'this emerging body of law forms part of European regulatory private law and is made up of contract-related conduct of business rules that are cast as public supervision standards and are enforced by public authorities through administrative law means'.[117] The development of European supervision private law is viewed as putting pressure '…on the leading role of private law and civil courts in setting standards of behaviour in private relationships' and its development is traced 'to a

[113] ibid, 162 and 164.
[114] ibid, 163.
[115] ibid, 162.
[116] Olha O Cherednychenko, 'Public Supervision Over Private Relationships: Towards European Supervision Private Law?' (2014) 22(1) European Review of Private Law 37, 54.
[117] ibid, 37.

growing reliance of the EU and/or national legislators on public supervision and enforcement in the realm of European regulatory private law with a view to achieving specific public goals, such as market integration and consumer protection'.[118] She observes that the 'EU pushed Member States to ensure the existence of administrative agencies designed for securing the smooth functioning of the markets and, what is more, consumer protection in such markets. Because of a close connection between standard setting and enforcement, many contract-related rules have become part of a specific public supervision and enforcement framework'.[119] She suggests that 'these developments can be observed most obviously in the field of financial services' and cites the Markets in Financial Instruments Directive (MIFID) as exemplifying this trend, noting that with reference to the investment advisers duty to know his client in Article 19(4); it highlights the potential for private law duties of care and…loyalty to be transformed 'into contract-related regulatory duties of financial institutions within a financial supervisory framework'.[120]

Cherednychenko contrasts 'the instrumentalist conception of European regulatory private law' with the 'ethical-societal conception of national private laws' noting that 'whereas national private laws have been primarily concerned with justice between market participants rather than the pursuance of specific public goals, the EU has viewed private law, in particular contract law, as an instrument for achieving the collective objectives of European integration'.[121] She acknowledges that although conceptually different, the objectives pursued by specific EU measures in the field of financial services, in particular client/consumer protection, may not necessarily or always contradict the traditional private law idea of respecting the minimum requirements of justice between the two private parties.[122] However, the capacity for conflict is clear where full harmonisation of legal aspects is important for the establishment of the internal market to remove barriers to cross border activity, since

[118] ibid, 41 and 66. Noting the complexity which can arise with the use of the terms public and private enforcement she identifies the former as meaning enforcement by public authorities through administrative law means for the purposes of the article.
[119] ibid, 39.
[120] ibid, 39-40.
[121] ibid, 38.
[122] ibid, 38.

'…such an approach to law-making in the field of private law involves the risk of overemphasizing market integration over client/consumer protection'.[123]

Cherednychenko suggests that '…the emergence of European supervision private law remains largely neglected in traditional private law circles', and that 'although the recent financial crisis has provoked a wide debate on the architecture and substance of financial supervision regimes', this does not encompass the relationship between the contract-related rules within these regimes and traditional private law.[124] She suggests that what is required is not a legal technical analysis but rather a contract governance approach, noting that the institutional framework for contract-related rule-making needs to encompass the externalities which may arise from financial contracting between private parties. 'The role of civil courts in the governance of contract law, in general, and in securing the public interest in the adequate functioning of financial markets, in particular, deserves special attention in this context. Rethinking the judicial role is not just a question of making sense of what civil courts actually do in such a highly regulated area as financial services but also of supplying a framework for evaluating that role and the relationship of the judiciary to financial supervisory authorities'.[125] One of the questions raised is 'whether a formal separation between supervision private law and traditional private law should be maintained, or, alternatively, regulatory contract-related rules that now form part of supervisory regimes should be integrated into private law systems' noting that 'the idea of integration should be assessed taking into account the possibilities for the interplay between public and private enforcement in the territory of private law and the role of supervisory authorities in the development of contract-related rules'.[126]

2.3.6. Consumer Law and Policy Perspectives

Within the consumer law and policy literature, there is a discrete body of consumer credit scholarship which has been reinvigorated by the financial crisis and is highly relevant to the current analysis as it explores the regulatory paradigm applicable to retail credit products. The analysis is directed at consumer credit which at EU and

[123] ibid, 52.
[124] ibid, 40 and 62.
[125] ibid, 64 - 65.
[126] ibid, 65.

national level, is to an extent, distinguished from mortgage credit in law and policy through differential regulatory obligations and frameworks. However, there is a core which is common to both types of credit with respect to the regulatory paradigm and the issues arising therein. Notably the literature does not universally exclude mortgage finance products from the remit of the discussion; although, in many of the articles the focus is on other retail credit products, e.g. credit cards, payday loans etc.[127.] The shortfall in the consumer credit literature, from the perspective of the current thesis, is that whilst it addresses the issues surrounding regulation of retail consumer credit, the analysis does not extend to address the additional social and economic policy implications associated with mortgage credit, as compared with other forms of consumer credit, i.e. the dynamic between mortgage markets and house prices and the loss of home as a consequences of default. Nonetheless, the commonality in terms of regulatory paradigm and the policy issues arising in the provision of credit to consumers, such as suitability and affordability, render it a fertile literature for examination.

Notwithstanding the existence of texts on Consumer Law which contain analysis of frameworks which regulate consumer credit, one of the most directly relevant publications, for current purposes, stems from a 2012 symposium organised by Griffith Law School.[128] The literature emerging from this symposium addresses policy issues which would be relevant to a mortgage credit context, i.e. information based requirements, responsible lending, over indebtedness and access via financial inclusion. Significantly, the literature also analyses the neo liberal regulatory paradigm in its scope, substance and application to the consumer credit context. Of particular relevance in terms of analysis of the regulatory paradigm in both a theoretical and comparative context are articles by Iain Ramsay, Toni Williams, Therese Wilson and Hans-W. Miklitz.

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[127] In the articles reviewed there were articles in which mortgage credit is stated to be excluded, those in which it is specifically included and those in which there is no explicit reference to mortgage credit.

[128] See for example Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart 2012). This observation extends also to texts on land law which address relevant frameworks e.g. in the UK see Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law: Text, Cases and Materials* (2nd edn, Oxford University Press 2012); Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, Oxford University Press 2009) and, in Ireland, the issue is comprehensively addressed by Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011).

In common with the socio-geographic literature, the consumer credit literature asserts the continuation of a neo liberal paradigm of regulation in the post-crisis context. Therese Wilson describes the financial crisis as having occurred in a 'neo liberal economic consumerist' context which has 'persisted in Western liberal democracies since the crises and influenced the regulatory responses to it'.[129] Contextualising the distinction between a consumer protection orientation and an economic consumerist orientation in the contemporary market, Wilson points out that the 'dominant neo liberal, economic consumerist legal order would be concerned with facilitating easy access to credit and consumer choice, such as through mortgage securitization models, whereas a legal order concerned with consumer protection would seek to remove harmful credit products from the market, including predatory mortgage loans made possible through the separation of risk from the mortgage transaction under the securitisation model'.[130]

Toni Williams assess the significance of consumer protection as a component of contemporary global financial policy in the pre and post-crisis context. In respect of the former she observes that the assumption that dealings between financial firms and retail consumers in the financial services context were 'essentially private and parochial' led to a perspective 'that placed the regulation of consumer financial markets outside remit of global financial policy making'; a view which is 'anachronistic' in the aftermath of the GFC.[131] Williams notes that although the dominant focus of the global debate on post-crisis regulatory reform was on prudential regulatory techniques 'there emerged a distinct strand of policy discussion about financial consumer protection.[132] Notably this was framed in terms of the contribution which consumer protection regulation could make to the safety and

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[129] Therese Wilson, 'Credit and Over-indebtedness: Current Context, Regulatory Responses and Future Possibilities' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis* (Ashgate 2013) 3.
[130] ibid, 4.
[131] Toni Williams, 'Continuity, not Rupture: The Persistence of Neoliberalism in the Internationalization of Consumer Finance Regulation' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis,* (Ashgate 2013) 15. 'Private' in the sense that they advance the 'self-defined economic goals of individual consumers, producers and retail market intermediaries, rather than engage the broader public or collective interests' and 'parochial' in that the consumer interest 'is thought to be limited and local in scope and purpose and, correspondingly, financial firms, however transnational their operations and cosmopolitan their brands, nonetheless are assumed to conduct their business as if each national market they service were discrete, narrow and self-contained'.
[132] ibid, 16.

soundness of the global financial system and Williams labels this the G20 Financial Stability Model of Consumer Protection. In assessing the significance of the consumer protection component within the G20 objectives, Williams notes that references to consumer protection in G20 summits from 2008 to 2011 were aspirational, and that the OECD as tasked by the G20, produced high level principles for financial consumer protection which expressed a preference for 'market enabling regulation in the form of information based consumer rights and remedies'.[133] Williams opines that the G20 financial stability model of consumer protection is likely to fail consumers given that it is a continuation of a familiar neo liberal theme and this leads her to assert 'continuity rather than rupture' with the pre-existing paradigm.[134] With reference to this perspective Therese Wilson identifies the G20 financial stability model as embracing 'neo liberalisms financial consumer who is responsible for and capable of protecting him/herself and is engaging with neo liberalisms resilient, competitive and disciplined market'.[135] She highlights the gap between the rhetoric and the reality in the market; noting the complex and opaque nature of consumer finance products, the failure of economic models of regulation to incorporate behavioural biases and the dominance of transnational firms in the 'competitive' market.[136]

Toni Williams also analyses neo liberalism in its objectives, institutional framework and manifestations in the consumer credit context. Citing David Harvey, she identifies neo liberalism as consisting 'of political – economic practices based on the theory that human well-being can best be advanced by liberating individual entrepreneurial freedom and skills within an institutional framework characterised by strong private property rights, free markets and free trade. This institutional framework is constituted by the freedoms and restraints created by the private law norms of contract, property, tort and the competition law regimes that structure the

[133] ibid, 33.

[134] Williams notes that at the Seoul summit in November 2010, the G20 identified consumer protection as part of the financial sector reforms requiring more work and policy development and mandated the OECD and FSB 'to explore and report back by the next summit on options to advance consumer finance protection. Tellingly, the G20 spelt out its view of the appropriate way of advancing …..protection….informed choice that includes disclosure and transparency and education; protection from fraud/abuse and errors; and recourse and advocacy'.

[135] Therese Wilson, 'Credit and Over-indebtedness: Current Context, Regulatory Responses and Future Possibilities' in Therese Wilson (ed.), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis* (Ashgate 2013) 5.

[136] ibid, 5 – 6.

ability of firms to grow and to dominate markets for their products. In addition to creating and sustaining these institutions, which are the foundation of contract power in a market society, neo liberal states have also opened up new markets for suppliers of consumer financial products through strategies of privatising and marketizing public services'. [137] This echoes analysis within new comparative economics and sociological literature regarding the role of the State and the instrumental use of law in the constitution of markets.

Issues of access are primarily addressed in socio economic literature in terms of discrimination and predatory lending and, in the housing research context, with a particular emphasis on low income access. In the consumer credit literature, Hans W. Micklitz provides a fascinating analysis of access with reference to financial inclusion and exclusion of European consumers in the contemporary financial market context.[138] Citing Robert Shiller, 'democratizing finance means effectively solving the problem of gratuitous economic inequality', Micklitz notes that this had been the credo of the financial services sector in the pre-crisis context and, in EU parlance, 'social and financial inclusion…is the automatic result of the release of market powers'[139] Micklitz observes that consumer credit legislation was not well prepared for the new challenges arising from the contemporary financial market pointing out that from a legal contractual perspective, developments in financial economics did not change responsibilities in the underlying dynamics of bilateral contracts and contingency risk remained with the consumer alone.[140] 'It is notable that, at the level of day to day practice, the rhetoric of democratization, easy access to credit for all and "total inclusion" did not, at that time find a legal contractual expression that allowed consumers …..at the very least ask for adjustment in case the idyll of the

[137] Toni Williams, 'Continuity, not Rupture: The Persistence of Neoliberalism in the Internationalization of Consumer Finance Regulation' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis,* (Ashgate 2013) 18.
[138] Hans W Micklitz, 'Access to, and Exclusion of, European Consumers from Financial Markets after the Global Financial Crisis' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis* (Ashgate 2013) 48 and 54. Micklitz specifically includes mortgages within the scope of his analysis and clarifies that he does not conceive of the consumer as a 'mere victim of the global crisis' pointing out 'those consumers benefited from cheap and easily accessible credit, particularly in the EU since the introduction of the Euro'.
[139] ibid, 47. Financialization is cited as a term intended to cover the 'economic and societal transformation process that has been triggered by the reshaping of the financial market and financial system, noting that there is no commonly agreed definition of the term and that the origins of the word are obscure.
[140] ibid, 59.

financial market were to fail – that is, in the event that the expectations of rising house prices on which the whole credit construction in the US was built, would collapse'.[141] This point is closely aligned with Katharina Pistors suggestion that ex poste alteration could serve to prevent the escalation of financial crisis to the benefit of those on the periphery who are currently penalised, i.e. mortgage consumers.

Miklitz notes that 'the market state paradigm pushes the EU towards consumerism and challenges the welfare state variant of producerism'.[142] He observes that the move from producerism to consumerism in investment services, in policy terms from social regulation to market regulation, went comparatively unnoticed or uncommented upon, i.e. from Directive 93/22 to MIFID. In contrast the equivalent in the Consumer Credit Directive, i.e. from Directive 87/102/EEC to Directive 2008/48/EU, led to significant debate from consumer groups and academics.[143] In analysing the existence of a countermovement in the EU legal order against the ideology of easy access to consumer credit, Miklitz points out that the 'European legal order provides ground rules in a strange combination of broad constitutional principles concretized in strong policy recommendations on financial inclusion/exclusion and over indebtedness, on the one hand, and a few hard rules in secondary community law on the other. Therefore the degree to which the consumer might benefit from producerism, from social welfare, ultimately depends very much on the standards set in the Member States'.[144] In addition, he identifies the lack of a European civil society, noting that the European consumer agency BEUC[145] is stuck at policy level as it has no legal standing in EU or national law and that there is no European equivalent to the US class action.[146] Micklitz asserts that each crisis is an opportunity and that in order to exploit the opportunity to rethink financial market design first and foremost 'means taking as given the divide between the consumerist European market state and the producerist national welfare states with all their differences' and, that 'getting to grips with socially and financially excluded

[141] Ibid, 59 - 60.
[142] ibid, 62. He notes that what makes the role of the EU so complex is its competence under the EU treaty to open up the market (i.e. initiate the shift to consumerism) but it has little or no competence to initiate social regulation, at least not to ensure the reintegration of the socially excluded.
[143] ibid, 66-68.
[144] ibid, 68.
[145] Bureau Européen des Unions de Consommateurs.
[146] ibid, 72.

consumers in the future will depend more than ever on Member States willingness and capacities'.[147] He queries why the EU could not play a political role in financial services comparable to that which it plays in the areas of human rights and environmental protection, i.e. promoting and defending higher standards against international pressure. With reference to this suggestion he proposes a financial architecture for Europe, which sets a benchmark beyond the internal market and builds on the regulatory parallel between product safety and financial products regulation, in terms of dangerous consumer products and toxic financial products.[148] Keeping with the analogy, Luke Nottage suggests that in common with product regulation, harmful consumer credit services are more appropriately addressed through public regulation rather than by reliance on markets or on private law regulation through the courts.[149]

Therese Wilson examines responsible lending as a response to issues of consumer over indebtedness and uses the regimes in Australia, South Africa, the US and Europe to highlight the distinctions which exist. Wilson notes that regimes have differed in terms of their emphasis on 'responsible lending' and 'responsible borrowing', and that the relative emphasis on these components within the framework is indicative of whether the primary regulatory objective is 'consumer protection generally, or market protection from potentially harmful mortgage lending'.[150] Notwithstanding variations in other aspects, the requirement to assess the borrower's capacity to repay is identified as being at the heart of all responsible lending regimes. Wilson notes that whilst some regimes impose penalties for lenders failure to make those assessments, other do not, relying instead on borrowers to commence proceedings to complain about lenders conduct.[151] She observes that regulation which imposes a requirement of responsible borrowing, 'clearly embraces

[147] ibid, 73.
[148] ibid, 74. Micklitz identifies three pillars upon which such an approach could be premised; an obligation for those who bring financial products to the market to take systemic risks into consideration, a shift from prudential to market surveillance and a prior approval procedure for particularly dangerous products.
[149] Luke Nottage, 'Innovating for "Safe Consumer Credit": Drawing on Product Safety Regulation to Protect Consumer of Credit' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis* (Ashgate 2013).
[150] Therese Wilson, 'The Responsible Lending Response' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis* (Ashgate 2013) 109, 120.
[151] ibid, 109.

the neo liberal 'responsibilization' of the consumer, which emphasises the need for consumers to protect themselves against the potential harms of the market, arming them with opportunities for financial literacy and education, as well as information disclosure by lenders'.[152] She notes the emphasis placed by the OECD and the FSB in their post-crisis high level principles on 'the need for consumers to behave responsibly' in order to 'prevent financial instability'.[153] Wilson argues that responsible lending regimes should be focused on consumer and not market protection, and should be developed proactively rather than reactively as is the current trend; 'seeking to avoid not only social and economic harms that have already arisen as a result of free market failure, but also harms that might arise in the future'.[154] Wilson identifies the danger inherent in the G20 financial stability model of consumer protection promoted in OECD and FSB publications.[155] She notes that where threats to financial stability are not perceived, consumer protection may be overlooked; also noting that consumer protection may be seen as less important than prudential regulation in terms of the systemic objective with potential negative implications for the consumer objectives. To exemplify the point she cites a UK proposal in which the prudential regulator could veto decisions made by the consumer protection regulator as highlighting the potential subordination of consumer protection to the prudential mandate.[156]

With reference to the respective role of culture and politics in consumer credit regimes, Iain Ramsay asserts that 'efforts to understand differences in regulation within Europe should focus on political economy rather than on cultural arguments'.[157] Of particular relevance is the interaction of interest groups and state agencies at both national and regional level and he notes the role of the financial

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[152] ibid. The term 'responsibilization' is attributed to Iain Ramsay, 'Consumer law, Regulatory Capitalism and the "New Learning" in Regulation' (2006) 28 Sydney Law Review 9, 13.
[153] ibid, 110. See 'Consumer Finance Protection with a Particular Focus on Credit' (FSB 2011); 'G20 High Level Principles on Financial Consumer Protection' (OECD 2011).
[154] ibid.
[155] 'Consumer Finance Protection with a Particular Focus on Credit' (FSB 2011) 3. 'G20 High Level Principles on Financial Consumer Protection' (OECD 2011) 4.
[156] Therese Wilson, 'The Responsible Lending Response' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis* (Ashgate 2013) 111.
[157] Iain Ramsay, 'Culture or Politics? Models of Consumer Credit Regulation in France and the UK' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis* (Ashgate 2013) 106.

services industry in shaping pre-crisis EU regulation.[158] The dominance of the finance industry on the expert committees within the Internal Market Directorate General was seen to create an impetus towards neo liberal EU credit policy, i.e. a policy of 'consumerism' and 'access' in the pre-crisis context.[159]

In respect of the jurisdictions which are subject to analysis in the current work, there is also analysis of aspects of the national consumer protection framework by legal academics in those jurisdictions. In the Irish context, Mary Donnelly is notable in this regard having produced the seminal text on the legal frameworks applicable to credit in the Irish context, and having written extensively on consumer related aspects of financial services.[160] The issue of the legal protections available for consumers of credit and other financial services in Ireland has also been the subject of a detailed report by the Free Legal Advice Centre (FLAC). The report critiques the current framework and highlights weaknesses which could be addressed to improve the position of consumers[161] Of particular relevance in the current context are the issues it raises regarding the efficacy of the Financial Ombudsman Services (FSO) in the exercise of its jurisdiction.

2.3.7. EU Policy Analysis

A significant evidence based contribution to the debate on post-crisis EU mortgage policy was provided by the Centre for European Policy Studies (CEPS) in its 2011 report, 'A New Mortgage Credit Regime for Europe: Setting the Right Priorities'.[162] The significance of the report in the current context is that it profiles pre-crisis lending in Ireland and Spain, and in doing so, it juxtaposes the issue of access with that of affordability and highlights the underwriting practices which resulted in

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[158] ibid. Ramsay cites the change in the substance of the responsible lending provisions within the Consumer Credit Directive from its introduction to its adoption in 2008, as evidence of the capacity of financial interest to influence regulation.

[159] ibid, 103-104.

[160] Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011). See also Mary Donnelly, 'The Consumer Protection Code: Regulatory Innovation from the Irish Financial Regulator' in Deborah Parry et al (eds), *Yearbook of Consumer Law 2009* (Routledge 2008); Mary Donnelly and Fidelma White, 'The Effect of Information Based Consumer Protection: Lessons from a Study of the Irish Online Market', in Christian Twigg-Flesner et al (eds), *Yearbook of Consumer Law 2008* (Ashgate 2008).

[161] Paul Joyce and Stuart Stamp, Redressing the Imbalance: A study of legal protections available for consumers of credit and other financial services in Ireland (Free Legal Advice Centre (FLAC) March 2014).

[162] Hans Joachim Dübel and Marc Rothemund, 'A New Mortgage Credit Regime for Europe: Setting the Right Priorities' (Centre for European Policy Studies June 2011).

consumer indebtedness. The report notes that 'Spain, Ireland and others have seen considerable high-risk lending, in particular high loan-to value ratios, high loan-to-income ratios especially for first-time buyers, and maturity extensions, as well as risk-layering'.[163] The report then quantifies these aspects in the respective national context. 'In Ireland, typical first-time buyer LTVs prior to the house price collapse were 95%, based on highly inflated house prices….the Spanish mortgage association reports that a quarter of loans that originated in 2006 had original LTVs over 80%. More problematic is that a quarter of new lending at the time had also debt-to-income ratios over 45%'.[164] It notes that the duration of Irish amortising mortgages had increased from 20 to 30 years by 2007, and that interest-only mortgages 'rose from virtual insignificance in 2001' to 15% of new business in 2007.[165] The report also identifies the rise of low-documentation (or 'self-certification') loans in Ireland, 'beyond the initial niche of the market which was focused on the self-employed objectively lacking documentation'.[166] Extended loan durations were also identified in Spain in the decade prior to 2006, as typical loan maturity increased from 17 to 28 years and maximum maturities of 35 years became available.[167]

The report asserts the 'cyclical relaxation of underwriting standards, in particular regarding LTV and amortisation, close to the house price peak.... The Central Bank of Ireland reports that the availability of 95% LTV mortgages peaked together with long amortisation periods and high debt-to-income ratios in 2007'.[168] It notes that 'in that year an estimated 10% of new originations were made for 'mortgage equity withdrawal' purposes, i.e. with the purpose to increase the LTV on hitherto low-LTV loans. Long maturities in Spain in the originations of 2006, according to Fitch Ratings (2007), were concentrated in loans with high debt-service-to-income ratios and high LTVs'.[169] The report asserts that 'such pro-cyclical behaviour of lenders with the goal of catering to borrowers even as housing becomes harder to afford is universal in mortgage finance'.[170] The report identifies Adjustable Rate Mortgage (ARM) lending as quantitatively the 'most relevant risk feature…beyond the classic

[163] ibid, 17-18.
[164] ibid.
[165] ibid, 19.
[166] ibid.
[167] ibid.
[168] ibid.
[169] ibid.
[170] ibid.

risk layering'.[171] 'Higher house prices in a negative feedback effect further stimulate the growth of ARMs as declining affordability leaves lenders and borrowers no other product choice'.[172] This point is substantiated with reference to Ireland where an increase in the share of ARMs paralleled house price inflation 'in Ireland, the ARM share increased within six years from 60% (1999) to 80% (2005), as house prices ballooned'.[173] The report highlights the implications for borrowers with respect to the transfer of interest rate risk, 'the "savings" in initial payment are not cost-free, however; they come against future payment shock risk: in Spain, Euribor interest rates almost doubled between 2005 and 2007, and with them the interest burden of practically all existing mortgage borrowers. This happened although Spanish lenders were obliged to cap interest rates contractually; however, the typical cap is fixed at double-digit interest rate levels rendering it economically pointless'. [174] The report concludes that 'the empirical lessons for the European responsible lending debate seem in general quite similar to the ones for the US. The four fundamental drivers of default risk – excessive house price levels, excessive consumer leverage, excessive expansion of the credit curve and product risk layering – can also be identified as present in the European markets most seriously affected by mortgage lending crisis'.[175]

The CEPS report identifies a number of reforms to address the structural and institutional factors which contributed to the crisis. In respect of product reform, they suggest that 'changing the structural bias towards ARMs, e.g. by differentiating capital requirements or stress-testing during underwriting, appears more important than addressing temporary house price bubble endgame covenants, such as low amortisation or high LTVs, even though these practices deserve attention, too'.[176] As identified by the Harvard Symposium in the following section, the various public interest objectives in the residential mortgage context can come into conflict and this is noted in respect of the foregoing proposal; 'however, the interest rate pass-through properties of ARMs on household debt service and consumption are also currently

[171] ibid, 19 - 20. The report notes the 'high empirical relevance of ARM lending outside the core of France, Germany, Belgium and the Netherlands'……'European borrowers are exposed to far greater interest rate risk than their US counterparts'.
[172] ibid, 21.
[173] ibid.
[174] ibid.
[175] ibid, 24.
[176] ibid, 35.

assisting central bank emergency action to re-inflate the economy. This establishes a conflict between stability and pump-priming that needs to be addressed'.[177] The report also proposed consideration of a reversion to a specialised housing finance system, akin to that which existed prior market liberalisation. 'A liberalised mortgage finance system – as designed in the 1980s - relying mostly on commercial banks with their focus on ARM lending, their implicit government guarantees and interest subsidy relations with central banks, is bound to fail within a short period of time again. Europe has almost completely dismantled its specialist housing finance system offering Fixed Rate Mortgages (FRM) in the past two decades. It could take the opportunity of the crisis to consider bringing it back as a stable long-term option to isolate housing finance risk, make such risk transparent and strengthen the specialist knowledge and focus needed in the sector'.[178] The report also notes the role of housing policy asserting that 'both Europe and the US finally need a turnaround of public housing policy to a new equilibrium. This should lie somewhere between the vast social housing expenses of the 1970s – a by-product of stagflation, which severely curtailed housing finance – and the view gaining ground since the 1980s that market-based lending can provide housing solutions to all stakeholders and minimalistic public intervention in the sector is sufficient. Europe needs to start to understand that – very much analogous to the US - the current fiscal crisis is not just the result of "lax lending standards" in banking. Rather it is a reflection of the partial withdrawal of the public sector from social transfers and housing policy'.[179]

2.3.8. Housing Law and Policy Perspectives

The reference to housing in the CEPS report reflects the contemporary significance of the residential mortgage as a mechanism for accessing ownership tenure. It is unsurprising then, that there is literature from housing researchers relevant to the mortgage context. The European Network for Housing Research (ENHR), is the specialist forum for housing researchers in Europe and all of the authors cited in the context of European housing literature are members of the ENHR.[180] There are two

[177] ibid, 35 – 36.
[178] ibid, 35.
[179] ibid, 36.
[180] The European Network for Housing Research (ENHR) was established in 1988 'to provide an organizational platform for institutions and individuals in (and outside) Europe, who are actively engaged in housing research'. It currently has 1000 individual and, close to 100 institutional members. See https://www.enhr.net

working group of potential relevance to mortgage markets; the first is the 'legal aspects of housing' group and the second is the 'housing finance' workshop. The latter workshop is primarily an economic forum, and so, to the extent that there is analysis of mortgage markets, it is primarily through an economic lens. In the legal aspects workshop, notwithstanding the dominance of legal academics and practitioners', mortgage markets are not a notable theme or a focus of direct analysis as compared with aspects of housing research such as homelessness, housing rights and legal aspects pertaining to rental tenure, etc.

In terms of housing literature which focuses on mortgage markets, Kathleen Scanlon has written, both independently and as a co-collaborator, on a number of articles on mortgage markets in the post-crisis context. These publications address policy responses to market volatility and the global financial crisis both in the national and comparative European context.[181] Mortgage markets are addressed by other authors in a variety of ways. There are for example, publications which provide direct analysis in the form of literature on mortgage product availability in the European context.[182] Less directly, there is analysis of the economic consequences of mortgage debt, the impact of the financial crisis on housing systems and the national and comparative policy response thereto.[183] There is also literature which contains analysis relevant to mortgage markets via its examination of ownership tenure. A Delft University publication 'Home ownership; getting in, getting from, getting out' has three editions which straddle the pre and post-crisis context. The publications analyse housing policy and the desirability and accessibility of ownership tenure in both a European and national context. 'Getting in referred to issues of access to home

[181] See for example Kathleen Scanlon and Christine M E Whitehead, 'The UK Mortgage Market: Responding to Volatility' (2011) 26(3) Journal of Housing and the Built Environment 277. Kathleen Scanlon and Marja Elsinga, 'Policy Changes Affecting Housing and Mortgage Markets: How Governments in the UK and the Netherlands Responded to the GFC' (2014) 29(2) Journal of Housing and the Built Environment 335.

[182] Michael Lea, 'International Comparison of Mortgage Product Offerings' (Research Institute for Housing America September 2010). Kathleen Scanlon, Jens Lunde and Christine ME Whitehead, 'Responding to the housing and financial crises: mortgage lending, mortgage products and government policies' (2011) 11(1) International Journal of Housing Policy 23.

[183] Geoffrey Meen, 'The economic consequences of mortgage debt' (2011) 26(3) Journal of Housing and the Built Environment 263; Judith Yates, 'Protecting Housing and Mortgage Markets in times of Crisis; A View from Australia' (2014) 29(2) Journal of Housing and the Built Environment 361; Hugo Priemus and Christine M E Whitehead 'Interactions between the Financial Crisis and National Housing Markets' (2014) 29(2) Journal of Housing and the Built Environment 193; Harry Van Der Heijden, Kees Dol, and Michael Oxley, 'Western European Housing Systems and the Impact of the International Financial Crisis' (2011) 26(3) Journal of Housing and the Built Environment 295.

ownership which in European countries, and indeed elsewhere, is dominated by the high cost relative to average incomes. The chapters under this heading thus considered the financial costs facing households, the role and activities of financial institutions that lent money to the households for purposes of house purchase and the involvement of governments in facilitating access. Getting from referred to the benefits that households may derive from their position once they have become home owners, these, including psychological well-being, social status and financial wealth, set owners apart from renters. Finally, Getting out referred to the movement of households out of home ownership where this has been precipitated by financial difficulties, perhaps driven by unemployment or loan interest rate increases'.[184] In respect of the national markets which are the subject of this thesis, Michelle Norris and Dermot Coates in particular, have analysed the boom and bust in Irish housing markets and the sub prime residential mortgage market.[185]

2.3.8.1. Joint Centre for Housing Studies Harvard University

The foregoing publications analyse the pre-crisis developments and the post-crisis policy response from a housing perspective, which is perhaps less useful for the current work as compared with other literature streams. However, a particularly interesting contribution to the housing research materials was provided by the Joint Centre for Housing Studies of Harvard University (JCHS). The JCHS held a symposium in February 2010, entitled 'Moving Forward; The Future of Consumer Credit and Mortgage Finance'. The intention was to 'illuminate' the policy debate regarding 'the future of consumer credit and mortgage finance in light of the financial crisis with the goal of exploring how public policy can facilitate access to credit for low-income households that is not unduly risky or costly'.[186] Of particular

[184] Peter Boelhouwer, John Doling and Marja Elsinga (eds), *Home Ownership: Getting In, Getting From, Getting Out* (Delft University Press 2005); John Doling and Marja Elsinga (eds), *Home Ownership: Getting In, Getting From, Getting Out Part II* (IOS Press 2006); John Doling, Marja Elsinga and Richard Ronald (eds), *Home Ownership: Getting In, Getting From, Getting Out* Part III (IOS Press 2010).

[185] Michelle Norris and Dermot Coates, 'How Housing killed the Celtic Tiger: Anatomy and Consequences of Ireland's Housing Boom and Bust' (2014) 29(2) Journal of Housing and the Built Environment 299; Dermot Coates 'The Irish Sub Prime Residential Mortgage Sector: International Lessons for an Emerging Market' (2008) 23(2) Journal of Housing and the Built Environment 131; Michael Barke, 'Second Homes in the Spanish Housing Market: One Market or Two?' (2008) 23(4) Journal of Housing and the Built Environment 277.

[186] 'Moving Forward: The Future of Consumer Credit and Mortgage Finance - Symposium Proceedings MF 10-16' (Joint Centre for Housing Studies Harvard University December 2010) 1. The

relevance for the present thesis was application of what Morgan and Yeung would classify as a public interest approach to the mortgage market context; the only relevant example which I have come across throughout the research process. The analysis identified what it considered to be the public interest in mortgage and credit market operations, the market failures leading to the crisis and the appropriate regulatory response.

The 'public interest' was conceptualised as falling into four distinct areas; ensuring the safety and soundness of the financial system, realizing the economic gains from efficient capital markets, accounting for the positive and negative externalities of private decisions and addressing concerns about whether the distribution of financial opportunities and outcomes are meeting social needs and are equitable.[187] A key theme of the symposium was the inherent conflict between competing public interests; a tension highlighted by a consideration of the various policy objectives. 'Interests in both social needs and economic efficiency lend support to the goals of expanding *access* to credit and promoting *affordable* credit. The public interest in the safety and soundness of the financial system leads to the goal of limiting the *degree of risk* borne by the financial system and concerns about externalities, economic efficiency, and equity suggest the need to ensure the *suitability* of credit products used by individual consumers. Finally the public interest in realizing economic gains from efficient capital markets would support the need to preserve *consumer choice* and support *innovation* in financial products and systems'.[188] Echoing the juxtaposition of economic consumerism and consumer protection in the consumer credit literature, Belsky notes the tension between protecting consumers whilst also preserving consumer choice and not overly restricting access to credit. It is also noted that policy makers need to make decisions about how to balance these interests in the context of reform of the financial system. Recognising the convergence between financial stability and consumer protection, participants observed that reducing the riskiness of lending and promoting the suitability of consumer products were 'mutually reinforcing goals'.[189] However, it was also noted that policy

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symposium was structured around 15 papers commissioned from leading academics and practitioners.

[187] ibid, 3.

[188] ibid, 10.

[189] ibid, 11.

decisions should be taken with reference to their impact not just 'on a single intended goal but on other criteria'.[190]

Resonating with the point made by Black regarding the instrumental role of consumers as a driving force in optimal market outcomes, consumer choice is cited as a key market failure, which in addition to its implications for the individual consumer, 'undermines the ability of the market to efficiently allocate capital'.[191] However, the failure is contextualised with reference to the increased complexity and range of pre-crisis mortgage products and the insights from behavioural economics regarding cognitive bias in consumer decision making; thus highlighting the challenge for disclosure based paradigms of consumer protection.[192] 'One thing that the crisis has demonstrated is that it is challenging to have effective disclosures' and, although 'properly structured disclosures' were assessed as 'potentially valuable prongs of consumer protection efforts', the paper notes 'a clear sense that there were limits to the ability of disclosures to fully protect consumers'.[193] Other consumer protection techniques considered were financial education, banning products, suitability requirements, as well as structural regulatory reform. It is suggested that a homogenous approach to the use of consumer protection techniques is inappropriate; 'one size does not fit all' concerns apply not just to how to regulate specific products or practices, but also how to best meet the needs of specific consumer groups'.[194] This point is echoed by Cheredynychenko in her assertion that 'one of the key challenges, …is to find a right balance between eradicating dangerous financial products from the financial market and preserving a healthy level of consumer choice and competition ….. A one-size-fits all regulation may simply not perform well in markets characterized by consumer heterogeneity'.[195] There was a diversity of opinion expressed regarding the extent of the financial education role as a mechanism of post-crisis consumer protection. Although some participants expressed the view that 'improving financial education should be an important priority moving forward given that a lack of financial knowledge was a contributing factor to the

[190] ibid.
[191] ibid, 14.
[192] One such bias is hyperbolic discounting which refers to the tendency for people to increasingly choose a smaller-sooner reward over a larger-later reward.
[193] ibid, 20.
[194] ibid, 19.
[195] Olha O Cherednychenko, 'Freedom of Contract in the Post-Crisis Era: Quo Vadis?' (2014) 10(3) European Review of Contract Law 390, 419.

crisis….others strongly expressed the view that there was only a limited role for education in protecting consumers'.[196] It was observed that 'the idea of improved financial education also fit with a notion of financial citizenship where individuals' rights to access credit are balanced by their responsibilities in managing their finances'.[197] It was suggested that there is an aspect of "blaming the victim" to impute that consumers could have been better prepared to make appropriate choices.[198] This resonates with Wilson's characterisation of responsible borrowing as imputing some culpability on the part of the consumer.[199] Product bans were identified 'as an option in cases where other remedies were unlikely to offer sufficient protection', whilst the imposition of a product suitability requirement on lenders was seen as potentially responding to two issues. The first was the inability of consumers to make appropriate choices about financial products, and the second was lenders exploitation of information asymmetry to steer consumers towards more profitable products.[200]

2.4. Conclusion

The objective of this literature review was to survey existing literature on residential mortgage regulation to provide a theoretical framework for the current analysis and, to identify its contribution to the existing body of scholarship. A significant finding was that relevant literature is dispersed across a spectrum of academic disciplines and that the various materials address discrete aspects of the research. Theoretical perspectives on financial markets from the fields of law, sociology and economics can be applied to the residential mortgage context to conceptualise the legal frameworks which regulate the interaction of borrower and lender. Whilst Consumer Law and Policy does not encompass the totality of the economic and social policy considerations inherent in the residential mortgage, it addresses the regulatory paradigm and consumer protection issues associated with the provision of credit to

[196] 'Moving Forward: The Future of Consumer Credit and Mortgage Finance - Symposium Proceedings MF 10-16' (Joint Centre for Housing Studies Harvard University December 2010) 21-22.
[197] ibid, 21.
[198] ibid.
[199] Therese Wilson, 'The Responsible Lending Response' in Therese Wilson (ed), *International Responses to Issues of Credit and Over-indebtedness in the Wake of the Crisis* (Ashgate 2013) 109 - 110.
[200] 'Moving Forward: The Future of Consumer Credit and Mortgage Finance - Symposium Proceedings MF 10-16' (Joint Centre for Housing Studies Harvard University December 2010) 23.

consumers. In respect of materials which address mortgage markets directly, socio geographic analysis offers insight into the extent to which the economic objectives inherent in the commodification of the home and borrower are potentially in conflict with consumer protection objectives. The merging of this literature in the current analysis is a significant contribution to the existing body of literature. In addition, through its conceptualisation and profile of the constitutive and facilitative spheres of residential mortgage regulation in Ireland and Spain, this thesis will contribute to the emerging literature on the nature and role of public law regimes as represented by Whitehouse and Cherednychenko.

Chapter 3

Contemporary Residential Mortgage in Economic and Legal Context

3.1. Introduction

Chapter two provided a review of theoretical perspectives relevant to the regulation of residential mortgages. The purpose of chapter three is to provide an economic and legal frame of reference to underpin analysis of regulatory reform within the residential mortgage context. It necessitates 'unpacking' the term 'mortgage regulation', so that it can be understood as a legal composite which has both private and public law components and, primary and secondary market applicability. It also requires placing the bilateral contract between borrower and lender within an economic frame of reference so that the orientation of regulatory reform can be understand with reference to the engagement of the residential mortgage market with the contemporary financial market and the macro economy.

3.2. Residential Mortgages – Supply and Demand

In the residential mortgage context, demand is driven primarily by the desire to access private ownership. There may be a range of factors influencing tenure choice in a housing market context, not least of which are the cost and availability of alternate tenure; but irrespective of the stimulus, the fundamental point is that from the borrowers perspective the purpose of the loan is central to demand and the issue thereafter becomes one of access, in terms of the eligibility of the consumer with reference to underwriting criteria. This point is reflected in Nield's observation, 'in contrast to other financial products, the mortgage...is not always seen as the product being bought and sold but as a means to an end. The focus is then on the asset purchased'.[201] Whilst the mortgage loan represents access to housing for the

[201] Sarah Nield, 'Responsible Lending and Borrowing: Whereto Low-Cost Home Ownership?' (2010) 30(4) Legal Studies 610, 617.

borrower, the purpose of the loan is of comparatively tangential relevance to the lender as the primary focus is on the economic impact of the loan on the lending institution. From the lenders perspective the mortgage loan is a source of revenue and, in the contemporary financial market context, potentially a source of funding and risk diversification. The factors which are determinative of the supply of mortgage loans are similarly economic in orientation, e.g. the impact of prudential regulation on the economic desirability of various forms of lending, the existence of relevant statutory restrictions or other regulatory requirements which impact the profitability of, or the capacity to originate residential mortgage loans.[202] Of central importance is the availability of funding; 'The supply of mortgage credit products and the price at which they are offered relies heavily on individual institutions funding strategies'.[203] Traditionally, mortgage origination was funded primarily via retail deposits with the wholesale or interbank market offering non-retail based funding alternatives.[204] However, in the period from the mid 1990's, financial market liberalisation led to the emergence in the EU of capital market based alternatives based on the securitisation or sale of mortgage loans.[205] Highlighting the dynamic between securitisation and mortgage lending, it has been observed that although deposits, equity or unsecured debt are general forms of funding which are not clearly linked to a particular line of business, securitised debt in the EU banking sector is manifestly attributable to residential mortgages.[206]

3.3. Primary and Secondary Mortgage Markets

The term 'mortgage market' is habitually used to refer to the engagement of borrower and lender in the retail financial services context. However, in the contemporary financial market, the 'mortgage market' is comprised of two inter related components; a primary and a secondary market. In the primary market,

[202] For example capital risk weighting for mortgages as compared with other forms of lending, the existence of Loan to Value (LTV) ratios and caps or restrictions on charges and interest are considerations in the supply side context.
[203] 'Report of the Mortgage Funding Expert Group' (DG Internal Market and Services 22 December 2006) 1.
[204] ibid, 3. 'The Costs and Benefits of Integration of EU Mortgage Markets' (London Economics for DG Internal Market and Services August 2005) 123. The wholesale or inter-bank market provides loans from banks and corporations via debt instruments.
[205] 'Report of the Mortgage Funding Expert Group' (DG Internal Market and Services 22 December 2006) 3.
[206] Sophie Ahlswede, 'Bank Funding of Residential Mortgages in the EU' (EU Monitor-Financial Market Special No 86, Deutsche Bank Research 12 August 2011) 2.

activity centres on the origination and servicing of mortgage loans and accordingly, the economic and legal engagement is between retail market participants, i.e. lender (intermediary or servicer if applicable) and borrower. In the secondary market, the sale of rights to mortgage loans is undertaken thereby providing liquidity to the lender to originate further loans.[207] Broadly speaking the economic and legal engagement is between the investor or purchaser, and the issuer or vendor of securities or loans, depending on whether securitisation type transactions or the sale of a portfolio of mortgage loans is in question.[208] As a mechanism of financing access to housing, the primary mortgage market represents a fusion of economic and social policy interests. Aalbers has asserted that financialisation of the borrower and home, which is implicit in capital market based funding instruments, was 'first and foremost designed to fuel the economy'.[209] This assertion is consistent with the neo-classical school of economic thought which perceives 'increased financial activity – greater market liquidity, more active trading, and financial innovation – as a broadly positive development…… the more liquid are financial markets and the more extensive is financial innovation, the more efficient the economy will be'.[210] Irrespective of the stimulus to the development of capital market based funding, to the extent that it can increase the availability and range of mortgage products, it has the capacity to enhance access to private housing markets. The significance of this access had increased due to the move from direct to market based housing provision in the pre-crisis European context.[211] The secondary mortgage market like its primary market counterpart thus represents an interface of economic and social policy interests with reference to the residential mortgage context.

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[207] Peter Sparkes, *European Land Law* (Hart Publishing 2007) 409. 'Report of the Mortgage Funding Expert Group' (DG Internal Market and Services 22 December 2006) 3. The latter report acknowledges that there are other interpretations of the terms 'primary' and 'secondary' mortgage market; however the utilisation in the current work is consistent with that of the MFEG report.

[208] Temporary Warehousing Facilities are a further source of funding, however warehoused loans are ultimately securitised or sold in bulk.

[209] Manuel B Aalbers, 'The Financialization of Home and the Mortgage Market Crisis' (2008) 12(2) Competition and Change 148, 160.

[210] William Scally 'Fixing Finance 3: The Irish Experience' (Institute of International and European Affairs 2010) 3.

[211] 'Housing Rights: The Duty to Ensure Housing for All' (CommDH IssuePaper 2008/1, Council of Europe 2008) 3. The Council of Europe noted that European governments had increasingly withdrawn from the provision of housing, in favour of supporting access to private housing markets. Peter Hoeller and David Rae, 'Housing Markets and Adjustments in Monetary Union', (Economics Department Working Paper No 550, OECD 2007) 28. In 2007, on the basis of its national economic surveys which incorporated an assessment of housing markets, the OECD recommended an improvement in the social housing policy in Ireland, Finland, the Netherlands and Spain.

3.3.1. Legal Aspects of Securitisation

'Securitisation is effectively a process though which loans, receivables, and other assets are pooled. The related cash flows and economic values are employed to support payments on related securities … issued in the public and private markets by or on behalf of issuers who utilise securitisation to finance their business activities…..The basic concept of securitisation may be applied to virtually any asset which has a reasonably ascertainable value, or that generates a reasonably predictable future stream of revenue'.[212]

Covered Bonds (CB) and Mortgage Backed Securities (MBS) are two securitisation based funding instrument utilised in the EU residential mortgage context. The instruments are comparable to the extent that both provide funding via the issuance of securities backed by a cover pool of mortgage loans.[213] However, a significant legal point of distinction is that in respect of Covered Bonds, there is retention of the cover pool of mortgage loans on the balance sheet of the originator, i.e. on balance sheet retention. In contrast, the fundamental legal requirement and defining characteristic of an MBS transaction is legal segregation of the asset pool which supports the securities from the balance sheet of the entity which originates the loans, i.e. off balance sheet segregation.[214] Correspondingly, investor recourse in the context of MBS is confined solely to the asset pool and does not extend to the claims paying ability of the originator; whereas the Covered Bond holder has recourse both to the asset pool and the issuer.[215] Notwithstanding the legal segregation in the MBS context, the originator frequently retains a servicing role with respect to the mortgage loans. This is of both legal and commercial benefit as it maintains relations with the

[212] Iain Barbour and Katie Hostalier, 'The Concept of Securitisation' in Frank Fabozzi and Moorad Choudhry (eds), *The Handbook of European Structured Financial Products* (Wiley 2004) 10.
[213] Neither instrument is restricted to mortgage loans as collateral. The nomenclature MBS distinguishes securities backed by mortgage loans from securities backed by other collateral, i.e. Asset Backed Securities (ABS). Where the cover pool consists of residential mortgage loans the nomenclature RMBS is used, i.e. Residential Mortgage Backed Securities. Covered Bonds may be collateralised by residential or commercial mortgages or public sector loans; however, for current purposes all references to Covered Bonds refers to the former.
[214] Sergio Nasarre Aznar, Securitisation and Mortgage Bonds: Legal Aspects and Harmonisation in Europe (Gostick Hall Publications 2004) 8.
[215] Alexander Batchvarov, Jenna Collins and William Davies, 'Mechanics of Securitisation' in Frank Fabozzi and Moorad Choudhry (eds), *The Handbook of European Structured Financial Products* (Wiley 2004) 22.

debtor, thereby preserving the cross selling potential. It also eliminates some of the legal formalities, i.e. notification of debtor, which would be otherwise required.[216]

In the EU context, legal segregation of the asset pool for MBS transactions is undertaken either through a specific statutory framework or within the general legal framework depending on the jurisdiction.[217] The *trust* as an inherent feature of Anglo Saxon legal tradition offers an inbuilt mechanism for asset segregation, whilst nonetheless facilitating the continued participation of the originator as servicer of the mortgage loans.[218] This compatibility is unsurprising since the concept was conceived in the U.S. and designed to utilise the trust. The absence of the trust as an inherent feature of civil law jurisdictions means that the segregation requirement which is central to securitisation, is intrinsically problematic, and legislative intervention is necessary to facilitate the process.[219] Irrespective of which legal framework is utilised, the segregation almost universally requires the transfer of the asset pool, and this may, in respect of the real component of the mortgage loan, entail compliance with the formalities specified under national property law.[220] In contrast, Covered Bonds are subject to a specific statutory framework in each national market and the retention of the mortgage loans by the originator eliminates the transfer requirement and any associated formalities.[221] The alignment of securitisation with Common Law, evident in the dominance of the UK in the pre-crisis EU MBS

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[216] ibid.

[217] 'Legal Obstacles to Cross-Border Securitisations in the EU' (European Financial Markets Lawyers Group 7 May 2007) 19.

[218] Sergio Nasarre-Aznar, *Securitisation and Mortgage Bonds: Legal aspects and harmonisation in Europe* (Gostick Hall Publications 2004) 9; 'Legal Obstacles to Cross-Border Securitisations in the EU' (European Financial Markets Lawyers Group 7 May 2007) 19. In Ireland, a special taxation regime applicable to SPV's has been introduced but otherwise no legislation pertaining to securitisation has been enacted.

[219] 'Legal Obstacles to Cross-Border Securitisations in the EU' (European Financial Markets Lawyers Group 7 May 2007) 13. Sergio Nasarre Aznar, *Securitisation and Mortgage Bonds: Legal Aspects and Harmonisation in Europe* (Gostick Hall Publications 2004) 95. 'Report of the Mortgage Funding Expert Group' (DG Internal Market and Services 22 December 2006) 27. The first Civil Law jurisdiction to introduce a securitisation law was France in 1988 and thereafter laws were introduced in Belgium (1990), Spain (1992), Italy and Portugal (1999), Greece (2003), Germany (True Sale Initiative, 2004), Luxembourg (2004), Poland (2004), Malta (2006).

[220] 'Legal Obstacles to Cross-Border Securitisations in the EU' (European Financial Markets Lawyers Group 7th May 2007) 19.

[221] See Stefan Schafer, 'Integration of EU Mortgage Markets: It's the Funding, Commissioner!' (EU Monitor-Financial Market Special No 38, Deutsche Bank Research 19 October 2006) 8. An exception to the assertion regarding statutory frameworks are so called 'structured covered bonds' which utilise the general legal framework to issue 'covered bonds' on a contractual basis in the same manner as MBS. This first occurred with HBOS in the UK market in 2003; see 'European Covered Bond Factbook' (3rd edn, European Covered Bond Council August 2008) 36.

market, reflects the compatibility of the legal culture with the process.[222] Residential mortgage loans were the first asset class to be securitised in Europe, the UK was the first market and in 2006, it accounted for 57% of the total EU market.[223] The volume of outstanding Covered Bonds backed by mortgage loans in Europe at the end of 2007, was €1.14 trillion, of which 71% of was comprised of the German, Danish and Spanish markets.[224] The UK which was one of the most highly developed mortgage markets in the EU did not have a Covered Bond sector until 2003.[225] The Irish statutory framework was introduced in the Asset Covered Securities Act 2001.

3.3.2. EU Role of Securitisation Based Funding

In the 1990's, the emergence of capital market based funding mechanisms in the EU increased the economic significance of the residential mortgage to lenders, as in addition to their role in generating revenue, residential mortgage loans became a source of funding and, depending on the mechanism used, risk diversification.[226] By 2005, although 70% of mortgage origination was still funded via deposits, there had been a significant increase in the role of securitisation based instruments with Covered Bonds and Residential Mortgage Backed Securities (RMBS) accounting for 17.5%[227] and 10% of mortgage funding respectively.[228] The change in the structure of mortgage funding can be contextualised with reference to macroeconomic and prudential factors against the backdrop of an increasingly market based model of housing provision. It is clear that the low interest rate environment prevalent in the EU from 1996 onwards had an adverse impact on the supply of deposits relative to

[222] 'Report of the Mortgage Funding Expert Group' (DG Internal Market and Services 22 December 2006) 27; Phil Adams, 'European Residential Mortgage Backed Securities' in Frank Fabozzi and Moorad Choudhry (eds), *The Handbook of European Structured Financial Products* (Wiley 2004) 413.
[223] 'Hypostat 2006: A Review of Europe's Mortgage and Housing Markets' (European Mortgage Federation November 2007) 141. In 2006, the European RMBS market was composed of nine of the twenty seven Member States; the UK accounted for €139 billion (57%). In the jurisdictions relevant to the current analysis, the figures were Spain €36.4 billion and Ireland €10.2 billion.
[224] ibid, 77. This figure includes both commercial and residential mortgage loans.
[225] 'European Covered Bond Factbook' (3rd edn, European Covered Bond Council August 2008) 58. The first issuances in the UK were 'Structured Covered Bonds'. A statutory Covered Bond framework did not come into existence until 2008.
[226] Stefan Schafer, 'Integration of EU Mortgage Markets: It's the Funding, Commissioner!' (EU Monitor-Financial Market Special No 38, Deutsche Bank Research 19 October 2006) 7-9.
[227] The percentage cited refers to Covered Bonds backed by both commercial and residential mortgages as no figures are available for residential Covered Bonds in isolation.
[228] Commission, 'Accompanying document to the White Paper on the Integration of EU Mortgage Credit Markets: Impact Assessment – Annex 1 Mortgage Market Characteristics (Commission Staff Working Document) SEC (2007)1683, 8. The balance was attributed to unsecured lending.

the rate of mortgage origination.[229] In addition, the use of securitisation based instruments offered benefits in terms of the ability to structure the securities according to the maturity of the underlying loan, thereby eliminating the maturity mismatch which arises with short terms deposits. [230] The legal segregation of the asset pool in the context of RMBS was seen to provide a further benefit in terms of risk diversification and, alongside the greater flexibility as compared with covered bonds in terms of eligible collateral, there was increasing utilisation of securitisation at the expense of covered bonds in the pre-crisis context.[231] With reference to the financial crisis, it became apparent that the capacity for risk diversification, whilst ostensibly beneficial, can also be a stimulus for deterioration in underwriting standards due to the non-retention of default risk by the originator. [232]

The role of MBS in the financial crisis resulted in a loss confidence and disruption to the market and it is clear that current securitisation issuance is significantly less than it was in the pre-crisis period. In 2014, securitisation issuance in Europe amounted to €216 billion as compared with €594 billion in 2007.[233] Nonetheless, the proportion of EU mortgage funding attributed to securitisation in 2010, was 23%, although cumulative figures for the EU as a whole obscures the diversity in the significance of the instrument across Member States. Figures from 2011 cite RMBS as playing a

[229] Stefan Schafer, 'Integration of EU Mortgage Markets: It's the Funding, Commissioner!' (EU Monitor-Financial Market Special No 38, Deutsche Bank Research 19 October 2006) 7; 'Report of the Mortgage Funding Expert Group' (DG Internal Market and Services 22 December 2006) 3. The European Central Bank identified an 83% increase in mortgage lending as compared with a 33% increase in Euro zone deposits, against a backdrop of declining interest rates and sustained house price appreciation in the period from Q1 1998 to Q3 2006.

[230] Stefan Schafer, 'Integration of EU Mortgage Markets: It's the Funding, Commissioner!' (EU Monitor-Financial Market Special No 38, Deutsche Bank Research 19 October 2006) 7. Where the maturities on the asset and liabilities side of the balance sheet are not fully matched then derivatives can be used to close off the interest rate risk.

[231] 'The Costs and Benefits of Integration of EU Mortgage Markets' (London Economics for DG Internal Market and Services August 2005) 126. In the mid 1990's, Covered Bonds accounted for over 25% of secondary market funding.

[232] 'Financial Supervision and Crisis Management in the EU- IP/A/ECON/IC/2007-069' (Study for the Committee on Economic and Monetary Affairs PE 400.992, European Parliament December 2007) 5. The report noted that 'financial regulation and crisis management have not kept pace' with the structural changes in financial markets; the bank based originate and hold model has been superseded by a market based originate, rate and relocate variant, contingent on the use of capital market based funding instruments. Notably the report also identified the extent to which the subprime crisis had highlighted the potential for a micro level risk management approach to open the door to systemic risk; the threat to liquidity emanating from the homogenous response of market participants to extreme events. This was central to the post crisis emphasis on macro prudential risk and supervision.

[233] Commission 'An EU Framework for Simple, Transparent and Standardised Securitisation' (Consultation Document) 18 February 2015, 10.

major funding role in only 7 of the then 27 EU Member States.[234] In Ireland and Spain, RMBS accounted for 52% of residential mortgage funding at the end of 2010. It is worth noting however, with reference to the respective jurisdictions, that whereas Ireland has had one of the highest growth rates in RMBS outstanding between 2008 and 2010, Spain has one of the highest outstanding amounts of total European RMBS.[235] Further reflecting issues of confidence and the reputational damage to MBS, there has been a significant post-crisis increase in retained issuance, i.e. where securities are retained by the originator rather than being sold to investors.[236] Whereas in 2007, retained issuance for all securitisations (not only MBS) was 23%, in the period from 2008 to 2010, the figures were 94%, 96% and 81% respectively.[237] However, it is clear that securitisation is once again the focus of EU policy objectives. Pre-crisis EU mortgage policy identified the integration of capital market based funding markets as an objective linked to the integration of primary mortgage markets. However, in the post-crisis context, the creation of a Single EU capital market has become an independent economic policy objective. A Green Paper issued in 2015, identified Capital Markets Union as a mechanism for increased economic growth and job creation in the EU.[238] Within the context of that objective, one of the 'priorities for early action' was 'building sustainable securitisation'.[239]

3.3.3. Relevance of Capital Market Based Funding to Regulation

In the current analysis, the relevance of capital market based funding mechanisms is that they link retail and capital market participants and, pursuant to this link, they

[234] Sophie Ahlswede, 'Bank Funding of Residential Mortgages in the EU' (EU Monitor-Financial Market Special No 86, Deutsche Bank Research 12 August 2011) 3.
[235] ibid.
[236] Bank of England and European Central Bank, 'The Case for a Better Functioning Securitisation Market in the European Union - A Discussion Paper' (Bank of England/European Central Bank May 2014). 10. The report notes that in 2006, virtually all primary issuance were placed with end investors and other banks, however by 2009, almost all deals were retained by originating banks and many were placed as collateral with central banks.
[237] Sophie Ahlswede, 'Bank Funding of Residential Mortgages in the EU' (EU Monitor-Financial Market Special No 86, Deutsche Bank Research 12 August 2011) 4.
[238] Commission, 'Building a Capital Markets Union' (Green Paper) COM (2015) 63 final, 2.
[239] ibid, 10. Prior to the Green Paper, securitisation had already been the subject of a joint discussion paper by the BoE/ECB see 'The Case for a Better Functioning Securitisation Market in the European Union - A Discussion Paper' (Bank of England/European Central Bank May 2014). It had also been the subject of a cross sectorial task force of the IOSCO see 'Criteria for Identifying Simple, Transparent and Comparable Securitisations' (Consultative document by the Board of the International Organization of Securities Commissions (IOSCO), Bank for International Settlements 11 December 2014).

constitute an economic portal between the primary and secondary markets. The regulation of residential mortgages in the primary market must thus be contextualised with reference to the economic dynamic between loan origination and funding. In particular, there must be recognition of the extent to which primary market and indeed broader economic objectives are dependent on secondary markets and the capacity for this dependence to impact the trajectory of regulatory reform.

3.4. Macroeconomic Perspective

Aside from their role as a retail component of financial markets, primary mortgage markets have particular macroeconomic impacts, i.e. impacts on the economy as a whole, by virtue of their role in providing access to housing.[240] Homeownership creates a financial asset, i.e. the property purchased, and the associated credit constitutes a financial liability, i.e. the mortgage loan. The on-going financial commitment in terms of loan repayments impacts the level of household disposable income, whilst the value of the asset less the liability constituted by the credit, i.e. market value versus outstanding loan balance, represents an important component of households' net wealth.[241] The capacity of mortgage markets to influence household consumption and net wealth and, at the aggregate level, the national economy is central to its utilisation by the ECB, in a monetary policy context.[242] A predominantly variable rate environment is beneficial in this regard as it optimises the sensitivity of interest rates to changes. With reference to the observations contained in the CEPS report in the previous chapter, whilst the utilisation of Adjustable Rate Mortgages (ARM) is ostensibly of benefit in macroeconomic terms; it is arguable, that it is not in the best interest of the consumer from an affordability perspective. This assertion reflects the assumption of interest rate risk by variable rate consumers and the resulting capacity for increased repayments over the term of the loan agreement. Notwithstanding that ARM are not a homogenous category and, that there are limitations on the capacity for lenders to unilaterally increase the

[240] Macroeconomics is a branch of economics which focuses on the performance, structure, behaviour, and decision-making of the economy as a whole. In contrast microeconomics focuses on the behaviour of individuals and firms.

[241] Structural Factors in the EU Housing Markets (European Central Bank March 2003) 4.

[242] Philippe. Moutot, 'Monetary and Financial Stability: The Role of Mortgage Markets', (Keynote address by the Deputy Director General Economics and Director Monetary Policy of the European Central Bank to the European Mortgage Federation Annual Conference, Brussels 21-22 November 2007).

interest rates dependent on the product in question, the relevance of the point is exemplified by the public and political debate on variable rate products which emerged in Ireland in 2015.[243] A further dimension is the extent to which ARM products can contribute to over-indebtedness by facilitating access, notwithstanding declining affordability, i.e. 'higher house prices in a negative feedback effect further stimulate the growth of ARMs as declining affordability leaves lenders and borrowers no other product choice'.[244] Whilst the issue of funding is relevant to access in terms of its capacity to enhance or restrict the capacity of lenders to originate mortgage loans, within the macroeconomic context, the issue of access must be contextualised with reference to the dynamic between mortgage markets and house prices.

3.4.1. Mortgage Markets and House Prices

The financial crisis has served to emphasise the potency of the cyclical dynamic between the availability of mortgage credit and house price dynamics and the potential implications for consumers, the macroeconomy and the financial system. This is manifest in the post-crisis emphasis on responsible lending and borrowing, which had not been a feature of EU mortgage policy discourse in the period up to December 2007.[245] The house price cycle stems from the relative inelasticity of housing supply which increases the significance of demand side drivers in short-term

[243] Issues arose due to the variance between the rates applicable to variable rate mortgage products in Ireland as compared to other EU Member States, e.g. the standard variable mortgage rates were 3.6% on average in Ireland, in contrast to an average rate of 2% across the euro zone. In addition, there were distinctions in the interest rates offered to variable rate customers, i.e. lower rates for new customers in contrast to rate increases for existing customers. Commercial factors which were relevant to these issues were the prevalence of pre-crisis loss making tracker mortgages on the balance sheets of lenders and the scale of non performing mortgage loans. The Central Bank launched a 3 month consultation in November 2015, with a view to revising the Consumer Protection Code 2012 (CPC 2012) so as to enhance information and transparency in respect of variable rate products. The changes pursuant to this consultation, which are outside the temporal scope of the current analysis, were announced in July 2016.

[244] Hans Joachim Dübel and Marc Rothemund, 'A New Mortgage Credit Regime for Europe: Setting the Right Priorities' (Centre for European Policy Studies June 2011) 19, 20, 35 and 36. The report notes that '..ARM lending create massive moral hazard by both borrowers and lenders by destroying the willingness to pay for interest rate risk protection via fixed rates and generate mismatch risk with the basically fixed income stream from housing'.

[245] The first reference to 'responsible lending' was contained in the White Paper issued in December 2007. This can be interpreted as a direct response to the then unfolding US sub-prime crisis as the issue of responsible lending had not been an aspect of the analysis within the Mortgage Credit Initiative in the previous 4 year period.

house price dynamics. [246] Notwithstanding that the level of demand is fundamentally determined by a range of variables including demographics, disposable income and the average level of interest rates; the availability of debt financing is pivotal.[247] As a result, highly developed mortgage markets have the capacity to increase the slope of the demand curve thereby resulting in greater house price volatility.[248] The dynamic between enhanced mortgage market access, house prices and household debt and leverage is manifest in EU statistics from the decade preceding the crisis. From the mid-1990s, EU housing markets were characterised by house price inflation which was unprecedented both in its magnitude and duration.[249] In Ireland, there was a 242.7% increase in *real*[250]house prices between 1992 and 2005 and in Spain the increase was 114.2% from 1996 to 2004.[251] This was paralleled by an expansion in national mortgage markets and an increase in mortgage debt to GDP. In the period from 1997 to 2006, outstanding residential loans rose from € 17.2 million to €123.3 million and, from €104.3 million to €571.7 million in Ireland and Spain

[246] *Structural Factors in the EU Housing Markets* (European Central Bank March 2003) 6. The ECB point out that since land is a scarce resource, in the long term, real house price increases are strongly correlated with the rising cost of land for construction use; however, the sluggish response of supply to demand side shocks increases the importance of these factors in short term house price dynamics. Peter Hoeller and David Rae, 'Housing Markets and Adjustments in Monetary Union', (Economics Department Working Paper No 550, OECD 2007) 19 and 23. The authors point out that the long-run elasticity of supply to price changes depends primarily on the 'natural or policy-induced scarcity of urban land'. Nathalie Girouard, Mike Kennedy, Paul van den Noord and Christophe Andre, 'Recent House Price Developments; The Role of Fundamentals' (Economics Department Working Paper No 475, OECD 2006) 22 and 29. The application of land and housing related planning policy and the efficiency of the associated administrative procedures are cited as determinative of the responsiveness of the supply of residential development land to house price dynamics.

[247] Nathalie Girouard, Mike Kennedy, Paul van den Noord and Christophe Andre, 'Recent House Price Developments; The Role of Fundamentals' (Economics Department Working Paper No 475, OECD 2006) 29 and 68.

[248] Peter Hoeller and David Rae, 'Housing Markets and Adjustments in Monetary Union', (Economics Department Working Paper No 550, OECD 2007) 15.

[249] Nathalie Girouard, Mike Kennedy, Paul van den Noord and Christophe Andre, 'Recent House Price Developments; The Role of Fundamentals' (Economics Department Working Paper No 475, OECD 2006) 6. The authors also identify the correlation across countries and the extent to which it was disconnected from the business cycle as other notable features.

[250] Ratio of actual house prices to the Consumer Price Index (CPI).

[251] ibid, 8. Of the 18 OECD states analysed, Ireland recorded the most significant increase in percentage terms. Notably in Spain, there had also been a significant increase, i.e. 134.8%, in the period from 1986 to 1991.

respectively.[252] Over the same period the residential mortgage debt to GDP ratio rose from 24% to 70.1% in Ireland and from 20.6% to 58.6% in Spain.[253]

Tsatsaronis and Zhu have identified house purchase decisions as exhibiting more sensitivity to the nominal amount of monthly payments than the size of the loan in relation to household income.[254] This suggests that considerations of affordability on the demand side can narrowly focus on the quantum of repayments rather than on the extent of household debt and leverage. In the pre-crisis EU context, and with reference to this rationale, it is clear that mortgage market liberalisation, (i.e. extended loan maturities, increased LTV ratios, interest only and variable maturity mortgages) and macroeconomic conditions (i.e. a decline in interest rates which paralleled house price inflation) may have contributed to a perception of affordability if taken from this narrow viewpoint. [255] With reference to this point, it is notable that notwithstanding the increase in overall household indebtedness across the EU, the proportion of disposable income allocated to housing related expenses remained constant; the European Mortgage Federation (EMF) asserts that between 1991 and 2005, the average debt servicing burden of the household sector in the Eurozone remained at 12% of disposable income.[256] However, as noted by the OECD in 2006, although an increase in debt levels paralleled by an increase in asset prices is ostensibly a benign tend, it leaves households vulnerable to negative macroeconomic developments and income shocks.[257]

The residential mortgage may thus be set within a contemporary financial market and macroeconomic context in terms of the link between origination and funding markets and between mortgage markets and house price dynamics. In a sense, this economic

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[252] 'Hypostat 2006: A Review of Europe's Housing and Mortgage Markets' (European Mortgage Federation November 2007) 121.

[253] ibid, 121-122. The mortgage debt per capita figure increased from €4,700 to €29,290 in Ireland and from €2,640 to €13, 070 in Spain.

[254] Kostas Tsatsaronis and Haibin Zhu, 'What Drives Housing Price Dynamics: Cross-Country Evidence' March (2004) *BIS Quarterly Review* 65, 74.

[255] 'Hypostat 2005: A Review of Europe's Mortgage and Housing Markets' (European Mortgage Federation November 2006) 16, 27 and 28. Nathalie Girouard, Mike Kennedy, Paul van den Noord and Christophe Andre, 'Recent House Price Developments; The Role of Fundamentals' (Economics Department Working Paper No 475, OECD 2006) 28.

[256] 'Hypostat 2005: A Review of Europe's Mortgage and Housing Markets' (European Mortgage Federation November 2006) 17.

[257] Nathalie Girouard, Mike Kennedy, Paul van den Noord and Christophe Andre, 'Recent House Price Developments; The Role of Fundamentals' (Economics Department Working Paper No 475, OECD 2006) 8 - 9.

contextualisation encapsulates the pre and post-crisis casting of the issue of consumer access to mortgage credit. As will be detailed in Chapter Four, with reference to the dynamic between the primary and secondary markets, a central focus of pre-crisis EU mortgage policy was on the role of capital market based funding as a supply side determinant which could enhance access to mortgage credit. However, with reference to the responsible lending orientation prevalent in post-crisis frameworks, it is clear that the macroeconomic linkages and the consequences of enhanced access are a focus of post-crisis policy. In as much as it was necessary to place the commercial transaction between borrower and lender within an economic frame of reference, it is necessary to place the bilateral contract which underpins this transaction within a legal frame of reference.

3.5. Regulation of Residential Mortgages

A mortgage is 'a real right in land created by the owner (mortgagor) entitling the mortgagee to payment of a certain sum of money out of the land with priority to other creditors on the forced sale of the property. Typically, it is used as a security right'.[258] From a strict legal perspective then, the term 'mortgage' refers to a limited real property right. Within the EU context, Aznar points out that although each Member States has its own mortgage or hypothec as a component of its national property system, a common link is the capacity to secure a debt by granting a preferential right.[259] In a financial services context, the term 'mortgage' is used as shorthand to refer to the retail financial services product, i.e. mortgage loan, which encompasses but is not confined to the security right referred to above. A pre-requisite to any discussion on the impact of the financial crisis on 'residential mortgage regulation' is the need to identify the various components of what is, in a sense, a composite term; since it is evident from the foregoing, that depending on the context in question, the term may be used to signify regulation of the security right, the mortgage loan contract or alternatively a broader framework of mortgage market regulation which includes prudential aspects. Even the use of the term 'mortgage market' is not without its difficulties because as noted in the previous section, the

[258] Christoph U Schmid, Christian Hertel and Hartmut Wicke, 'Real Property Law & Procedure in the European Union: General Report' (European University Institute 31 May 2005) 85.
[259] Sergio Nasarre Aznar, 'The Eurohypothec: A Common Mortgage for Europe' (2005) January–February The Conveyancer and the Property Lawyer 32, 37. Peter Sparkes, *European Land Law* (Hart Publishing 2007) 397.

term may refer to the primary market in which mortgage loans are originated or the secondary market in which the rights to loans are subsequently sold, or the combined primary and secondary market. It is thus necessary to identify and conceptualise the sources of mortgage regulation relevant to the current analysis.

3.5.1. Scope of the term 'Residential Mortgage'

Notwithstanding that there is a degree of variation in the terminology used at national level, from an EU policy perspective, mortgage loans are loans which are secured by a mortgage or equivalent real charge and whose purposes is the acquisition of, or improvements to, immoveable property. Housing loans[260] are loans which have the same objective but which are unsecured or subject to a personal surety. [261] Mortgage equity release products, in common with mortgage loans, are secured by a mortgage or equivalent charge over immoveable property; however they differ from both mortgage and housing loans in objective as ostensibly their purpose is to fund consumption.[262] These three categories of product constitute what at EU level is deemed 'mortgage credit', a term used for the purposes of distinguishing these products from other forms of consumer credit. If we use the term 'residential mortgage loan' to encompass the entire scope of 'mortgage credit' products, and acknowledge the tangential relevance of non-real estate secured loans as a niche which is not applicable to the jurisdictions under review, then residential mortgage

[260] Notably the term housing loan may have a different meaning ascribed to it in national frameworks, e.g. Consumer Credit Act 1995 in Ireland.

[261] 'The Costs and Benefits of Integration of EU Mortgage Markets' (London Economics for DG Internal Market and Services 2005) 1. Commission, 'Mortgage Credit in the EU' (Green Paper) COM (2005) 327 final, 2; 'Accompanying Document to the White Paper on the Integration of EU Mortgage Credit Markets - Impact Assessment' (Commission Staff Working Document) SEC (2007) 1683, 4. The Commission sponsored London Economics study used the term mortgage credit to describe 'the primary loan products used to fund house purchases and improvements'. The subsequent Commission *Green Paper* includes the emerging mortgage equity release products within the ambit of the initiative, irrespective of the purpose for which the loan was secured. The extension is affirmed in the *White Paper* which defines the scope of the analysis as encompassing, 'credit agreements secured by a mortgage or by another comparable surety commonly used on immoveable property, as well as certain credit agreements, the purpose of which is acquiring property rights'.

[262] Udo Reifner, Sebastien Clerc Renaud, Elena F Pérez Carrillo, Achim Tiffe, Michael Knobloch, 'Study on Equity Release Schemes in the EU:Part I - General Report' (Project No MARKT/2007/23/H, European Commission January 2009) 1. The report identifies two models of equity release schemes in the EU. The loan model which encompasses reverse mortgages or life time loans is premised on repayment of the loan from the eventual sale of the property. The sale model, also known as home reversion involves an immediate sale of the property with a right to remain in occupation. Notwithstanding these specific products, equity release can also be achieved through a second mortgage or any other transaction which permits the borrower to increase their mortgage borrowing against their housing wealth.

loans have a dual legal component; consisting of both *rights in rem* and *rights in personam*.[263] The former refer to the security right constituted by the mortgage or equivalent real right and the latter to the personal contractual obligations between the parties.

3.5.2. Relevance of Contract and Property Law

The parameters of the private law relationship between the parties to the loan contract and the respective rights and obligations of both are 'regulated' in the first instance by the national property and contract law frameworks of which the *rights in rem* and *rights in personam* are a component. These frameworks have distinct roles. The former regulates aspects such as the constitution, registration, and enforcement of the security right,[264] whilst the latter determines the outer parameters of permissible contract terms and practices. Notably, these frameworks are relevant not just to the bilateral borrower/lender context of primary market origination, but also to secondary market funding aspects, as the economic link between primary and secondary markets has a legal parallel. The nature of capital market based funding, whether it is securitisation (i.e. MBS/Covered Bonds) or Whole Loan Sales, is that it is predicated on the sale of the legal rights to mortgage loans. The funding transaction is thus underpinned by the rights and obligations of lender/borrower, i.e. the latter are the legal bedrock of the former. In the case of MBS or the sale of a portfolio of mortgage loans, there is a transfer of the loan and its collateral to a SPV or third party purchaser, who then accrues the rights of enforcement against the borrower which would previously have been held by the lender. In respect of Covered Bonds, notwithstanding the retention of the loans by the originator, investors acquire legal rights over the cover pool of loans. This creates what could be conceived of as a regulatory portal between primary and secondary markets in the sense that changes to the legal frameworks in primary markets may have

[263] Agnieszka Drewicz Tulodziecka (ed), 'Basic Guidelines for a Europhypothec' (Mortgage Bulletin 21/2005, Mortgage Credit Foundation May 2005) 54. The Eurohypothec research group identify the use of personal sureties in France and Belgium and personal bills in Bosnia and Poland; in the former Member States this is attributed to a defect in the Napoleonic registration system. The European Mortgage Federation similarly asserts that non real estate secured loans for housing purposes are country specific.

[264] In respect of rights of possession and enforcement, the relevant property law provisions are applicable only to the extent that they are not subject to contractual variation, i.e. mandatory versus variable mortgagor rights and mortgagee obligations.

implications for secondary markets, or vice versa, depending on the aspect in question.

The nature of the legal dynamic between primary and secondary markets is highlighted by a consideration of underwriting and enforcement. If mandatory requirements in underwriting criteria were imposed in the context of loan origination, this clearly impacts the characteristics of the asset pool which is used to collateralise securities, e.g. statutory loan to value ratios etc. Conversely, a regulatory impact on primary market origination can emerge from legal frameworks in the secondary market. This could occur, for example, where minimum requirements on loan characteristics are imposed in legal frameworks for securitisation; thereby impacting underwriting criteria to the extent that there is utilisation of such funding by originators.[265] The point is highlighted by the pre-crisis distinction between underwriting criteria for asset pool loans in the respective contexts of Covered Bonds and Mortgage Backed Securities. The existence of a prudential incentive for compliance with EU legislation meant that eligible collateral in the Covered Bond context were characterised, for example, by specified LTV ratios.[266] Notably, in the absence of such requirements, the retention of loans by the originator would, of itself, have provided an incentive for greater risk assessment and more conservative underwriting criteria, an incentive which is absent in the MBS context. The transfer of default risk, which is an inherent feature of MBS, increases the significance of the capacity to impose minimum thresholds on underwriting criteria and, by extension, certainty regarding the quality of the underlying collateral. This point is reflected in post-crisis EU proposals for a plain vanilla MBS i.e. securities where loans are underwritten to conservative criteria to offer a low risk alternative to other securitisation variants.[267]

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[265] Clearly there is the capacity for normative standards to be imposed by market participants; however, the focus in the current context is on formal legal frameworks.

[266] The Capital Requirements Directive which provided the prudential regulatory framework offered privileged treatment for bonds which complied with Art 22(4) UCITS Directive and a set of eligibility criteria in respect of the cover assets.

[267] 'High Quality Securitisation for Europe: The Market at a Crossroads' (Association for Financial Markets in Europe (AFME) July 2014) 6. Mario Draghi, President of the European Central Bank observed in March 2014 'We think that a revitalisation of a certain type of [asset-backed security], a so-called plain vanilla [asset-backed security], capable of packaging together loans, bank loans, capable of being rated, priced and traded, would be a very important instrument for revitalising credit flows and for our own monetary policy'.

In terms of enforcement or other aspects regulated by national property law, the dynamic is somewhat different. In contrast to the context of loan origination, a change to legal frameworks on the funding side does not have the capacity to directly impact the conditions of enforcement, which are regulated by national mortgage and procedural law. However, economic policy objectives with respect to funding markets may be a stimulus for reform of legal frameworks in the primary market context. This is manifest in pre-crisis proposals to reduce the duration of enforcement process across Member States with the objective of enhancing cross border origination and funding activity.[268]

3.5.3. Dual Spheres of Residential Mortgage Regulation

Black has observed that the State provides institutional structures for financial markets in two key ways; 'first, it provides the facilitative structures for financial products and financial transactions through contract and property law, governance structures for markets and the associated infrastructure of the judicial system….secondly, the state provides regulative structures by legal rules that require markets organisations and behaviours to be organised in particular ways'.[269] Pistor has identified the enforceability of contractual obligations as the bedrock upon which contemporary financial market is constructed. Applying these perspectives to the residential mortgage context and with reference to the focus on legal frameworks which regulate the interaction of borrowers and lenders, the current analysis will conceptualise residential mortgage regulation as comprising of dual spheres; a constitutive and a facilitative sphere.

3.5.3.1. Constitutive 'Private Law' Sphere

In the current work, the constitutive sphere of residential mortgage regulation is comprised of the private law framework of contract and property law. This acknowledges the extent to which the willingness of demand and supply side participants to enter into the mortgage loan transaction is premised on the enforceability of their respective contractual rights and obligations. As already observed, this private law sphere is relevant to both the primary and secondary market context, as the enforceability of contractual obligations and ancillary property

[268] See Chapter Four (i.e. 4.6.2.1.).
[269] Julia Black, 'Reconceiving Financial Markets - From the Economic to the Social' (2013) 13(2) Journal of Corporate Law Studies 401, 414.

law rights are the basis upon which capital market based mechanisms such as securitisation and portfolio sales are premised; notwithstanding that these rights are subsumed into a further contractual layer. However the focus in the current analysis is crisis related reform within the primary market sphere, and the relevance of secondary market aspects is thus restricted to an awareness of its capacity to influence the content and orientation of regulatory reform in the primary market.

3.5.3.2. Facilitative 'Public Law' Sphere

In addition to the regulation emanating from the 'constitutive sphere', in the contemporary context, the legal and economic engagement of borrower and lender in the primary market has been subject to what might be broadly termed public law regulation. This regulation has been in the form of consumer law and conduct of business obligations contained in financial services regulation. Rinkes has conceptualised consumer law as an instrument through which to redress the economic imbalance between consumers and professionals in the market with a view to 'protecting the reasonable expectations of honest men regarding their health, safety and economic interest'.[270] Maloney notes that in the context of financial system regulation, conduct of business regulation of market intermediaries is a mechanism of promoting market efficiency, transparency and integrity.[271] As will be observed in subsequent chapters, both these forms of public law intervention are applicable to the residential mortgage context. Within the context of the current analysis, the foregoing are conceptualised as components within a 'facilitative sphere' of residential mortgage regulation; a term which acknowledges the instrumental role of the sphere in promoting various policy objectives through the functioning of the market.

3.6 Conclusion

This chapter places the bilateral contract between borrower and lender into a broader legal and economic frame of reference. It juxtaposes issues of access with reference

[270] Jac G J Rinkes, 'European Consumer Law: Making Sense' in Christian Twigg Flesner et al (eds), *Yearbook of Consumer Law 2008* (Ashgate 2008) 15 and 17. Rinkes notes of consumer protection; '…an area of law under construction, a dynamic area which is continually influenced by social and economic circustances'.

[271] Niamh Moloney, 'The Legacy Effects of the Financial Crisis on Regulatory Design in the EU' in Eilís Ferran, Niamh Moloney, Jennifer G Hill and John C Coffee Jr, *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge University Press 2012) 111 and 119.

to the role of capital market based funding in enhancing the capacity for loan origination and the implications of enhanced access for consumer indebtedness with reference to the dynamic between mortgage and housing markets. It also conceptualises residential mortgage regulation as consisting of a constitutive and facilitative sphere; the former consisting of national frameworks of contract and property law, and the latter of frameworks of consumer law and financial services regulation. Chapter four will use this conceptualisation to identify pre-crisis frameworks of residential mortgage regulation in Ireland and Spain.

Chapter 4

Pre-Crisis Profile of Ireland, Spain & the EU 2008

4.1. Introduction

This chapter provides a profile of the pre-crisis frameworks of residential mortgage regulation in Ireland and Spain. It contextualises the profile by identifying the form of State governance and the national legal systems of the respective jurisdictions. It proceeds to identify the content of the legislative frameworks within the constitutive and facilitative spheres of residential mortgage regulation, and the scope of institutional competence therein. The chapter highlights the tangential role of the EU in the regulation of national mortgage markets in the pre-crisis context. The lack of a significant EU regulatory role is attributed to the desire to advance the Single Market objective within a neo liberal regulatory setting.

4.2. Profile of the State – Ireland v Spain

A starting point for comparative analysis of residential mortgage regulation in Ireland and Spain is identification of the form of State governance and the national legal system. The objective of this profile is to contextualise the regulation of mortgage markets with reference to the sources of national law and the capacity for regulatory intervention by the various branches of the State.

4.2.1. Form of State Governance

The existence of a monarchy in Spain is perhaps the most notable distinction between the forms of State governance in the jurisdictions under review. Ireland is a parliamentary democracy, Spain is a parliamentary monarchy and both are possessed of a written constitution which identifies the powers and functions of the various

organs of State.[272] The current Irish Constitution, *Bunreacht na hÉireann* (BnE), significantly predates its Spanish counterpart, the *Constitución Española* (CE), the former having been adopted in 1937, and the latter in 1978.[273] Pursuant to the foregoing constitutions, the head of State is responsible for sanctioning and promulgating law and this is a role attributed to the President of Ireland and the Monarch of Spain respectively.[274] In Ireland, the head of government is the Taoiseach whilst in Spain it is the President, although the latter is habitually referred to in English as the Prime Minister.[275] Both Ireland and Spain have bicameral national parliaments known as the *Oireachtas* and *Cortes Generales* respectively. The two houses of the *Oireachtas* are *Dáil Éireann* (House of Representatives) and *Seanad Éireann* (Senate) and, the corresponding houses of the *Cortes Generales* are the *Congreso de los Diputados* (Congress of Deputies) and the *Senado* (Senate).[276] In both Ireland and Spain, the functions and powers of the legislative, executive and judicial branches of government are derived from the Constitution, and ultimately, the people. Although the respective constitutions vest law making power in the national parliament, there is also the capacity for a delegation of legislative competence subject to certain constitutional safeguards regarding the scope and content of the delegated legislation.

4.2.1.1. Legislative Competence

The Irish Constitution precludes a delegation of the competence of the Irish legislature in as much as it states, 'the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State'.[277] However, in the seminal case of *Cityview Press v An Chomhairle Oiliúna*, the Irish Supreme Court confirmed that a delegation of competence to a Minister or a State agency to adopt secondary legislation is permissible, provided that the relevant measures do no more than give effect to the

[272] Art 6.1 BnE; Ss 1.1 and 1.2 CE.
[273] The constitutions of 1937 and 1978 replaced prior constitutions of 1922 and 1931 respectively. Notably, there have been 28 amendments to the provisions of *Bunreacht na hÉireann* from 1939 to 2013; although none which are relevant for current purposes.
[274] Art 13 BnE; S 62.a CE.
[275] Art 28.5 BnE; S 98.2 CE.
[276] Art 15.1.2° BnE; S 66.1 CE.
[277] Art 15.2.1°.

principles and policies which are contained in the delegating statute.[278] Hunt observes that 'the absolutist terms of Article 15.2.1°..' in respect of the exclusive role of the Irish legislature has 'been dramatically modified' as a result of Ireland's membership of the EU', pointing to constitutional and judicial recognition of the power of the EU to make laws which are binding on the State.[279] Irish statute law is thus comprised of measures of national and EU origin which are given effect through primary legislation in the form of Acts of the Oireachtas and secondary legislation in the form of regulations and orders, which are collectively referred to as statutory instruments. Ireland adopts a dualist approach to international law, and accordingly, treaty obligations do not become part of domestic law until they are incorporated by an Act of the Oireachtas. In respect of obligations stemming from Ireland's membership of what is now the European Union, the European Communities Act 1972, was the domestic legislation which incorporated the EU treaties into national law. It also facilitates the adoption of legislation where necessary to give effect to EU law obligations, e.g. transposition of EU Directives.[280] Notably, regulations adopted pursuant to the 1972 Act are capable of amending primary legislation and have 'statutory effect'.[281] Hunt observes that this is 'perhaps the most clear-cut exception to the rule that amendments made to primary legislation by way of secondary legislation are impermissible', and notes that coincident with our accession to what is now the EU, there has been a 'tendency towards the creation of ….a form of hybrid of legislation which seems to tread dangerously on the line which separates primary legislation from secondary legislation'.[282]

There are noticeably more mechanisms of legislative delegation provided for in the Spanish Constitution as compared with its Irish counterpart. Subject to the caveat

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[278] 'In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself' (at 399).

[279] Brian Hunt, 'Role of the Houses of the Oireachtas in the Scrutiny of Legislation' (Report pursuant to the Inaugural Parliamentary Fellowship of the Houses of the Oireachtas, December 2010) 4. Citing Art 29.4.10° (currently 29.4.6°) and Keane J in *Murphy v Bord Telecom Éireann* [1989] ILRM 53, 59; 'The exclusive role of the making of laws assigned to the Oireachtas by Article 15 of the Constitution has been expressly modified by Article 29.4.10 so as to enable Community law to have the force of law in the State'.

[280] S 3(1).

[281] Ss 3(2) and 4(1)(b); the latter as substituted by the European Communities (Amendment) Act 1973.

[282] Brian Hunt, 'Role of the Houses of the Oireachtas in the scrutiny of Legislation' (Report pursuant to the Inaugural Parliamentary Fellowship of the Houses of the Oireachtas, December 2010) 81.

that the content of the legislation does not fall within the scope of a *Ley Organica*, the Constitution provides for a delegation of legislative competence to the government.[283] The delegation is undertaken by means of a *Ley de Bases* where the purpose is the introduction of new legislation, and a *Ley Ordinaria*, where the delegation is for the consolidation of existing legislation.[284] Both these variants of delegated legislation have the force of an act of parliament and are titled *Decretos Legislativos*. In addition to the exercise of delegated authority from the legislature, the Constitution provides a restricted mandate to the government 'in cases of extraordinary and urgent need', to enact temporary legislation, i.e. *Decretos-Leyes*, which are subject to retrospective approval by parliament.[285] In respect of secondary legislation, Section 97 of the *Constitución Española* empowers the executive to adopt *reglamentos* which are statutory regulations. There is a hierarchy in respect of this secondary legislation and at the apex are *Decretos* (Decrees) of the Council of Ministers, followed by *Ordenes* (Orders) of a Minister or of a delegated commission, and then *Instrucciones* (Instructions) and *Circulares* (Circulars) from 'inferior authorities and members of the administration', including executive agencies such as the Banco de España.[286]

4.2.2. National Legal Systems

Ireland has a common law legal system and the primary sources of Irish law in order of precedence are the Constitution, statue and common law, i.e. case law. Pursuant to the European Communities Act 1972, the EU treaties are part of Irish law as well as any directly effective measures adopted under those treaties. In contrast to Ireland, Spain has a civil law system and accordingly, its core principles are codified in the *Código Civil* (CC), i.e. Spanish Civil Code. Pursuant to the *Código Civil* the primary sources of law in the Spanish legal system are 'la ley', i.e. legal rule, customs[287] and

[283] S 82 CE. Pursuant to S 81, 'Organic acts are those relating to the implementation of fundamental rights and public freedoms, those approving the Statutes of Autonomy and the general electoral system and other laws provided for in the Constitution'.
[284] Ss 82.4 and 82.5 CE. The *Ley de Bases* 'shall define precisely the purpose and scope of the legislative delegation, as well as the principles and criteria to be followed in its exercise'.
[285] Limitations per S 86.1.
[286] Elena Merino Blanco, *Spanish Law and Legal System* (2nd edn, Thomson Sweet and Maxwell 2006) 41.
[287] Art 1(3) CC provides the parameters for the role of custom which 'shall only apply in the absence of applicable statutes, provided that they are not contrary to morals or public policy, and that it is proven'.

general legal principles.[288] The concept of 'legal rule' in the code encompass the Constitution, statutes and other enactments emanating from the State and the Autonomous Communities where competence exists; in addition to European legislation and international treaty provisions.[289] Spain adopts a monoist approach to the incorporation of international law, and thus, there was no requirement for a Spanish equivalent to the European Communities Act 1972, as pursuant to the Spanish Constitution, the treaty provisions were automatically incorporated into the Spanish legal system once they had been signed and ratified. [290]

In both Ireland and Spain, the national constitution is at the apex of the legal hierarchy. The respective constitutions preclude the validity of any law which is repugnant to its provisions and provide for judicial review and the striking down of any such legislation.[291] A particular distinction between Ireland and Spain, indeed between Common and Civil law systems generally, is the role of judicial precedent. In common with other common law jurisdictions such as England, the doctrine of stare decisis requires the Irish courts to apply clear precedents set by courts of equivalent or higher jurisdiction. The Supreme Court is an exception to this principle as it has declared itself not bound by its own previous decisions.[292] In the Spanish legal system *la jurisprudencia*[293](i.e. case law) is not regarded as a source of law and its role is stated in the following terms in the Spanish Civil Code, 'case law shall complement the legal system by means of the doctrine repeatedly upheld by the Supreme Court in its interpretation and application of statutes, customs and general legal principles'.[294] The judiciary 'shall have the inexcusable duty to resolve in any event on the issues brought before them, abiding by system of sources set forth

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[288] Antoni Vaquer, 'Introduction' in Sjef van Erp and Antoni Vaquer (eds), *Introduction to Spanish Patrimonial Law* (Comares 2006) 14.
[289] ibid.
[290] Ss 93 and 94 CE. Elena Merino Blanco, *Spanish Law and Legal System* (2nd edn, Thomson Sweet and Maxwell 2006) 34 – 37. Merino Blanco notes that Spain's accession to the then EEC in 1986, was authorised by Ley Organica 10/1985 of 2 August and that the Spanish Supreme Court has asserted the 'direct efficacy and supremacy of European Community Law due to the partial assignment of sovereignty to the Community Institutions'.
[291] Arts 15 4.1° and 15.4.2° (BnE); S 161 (CE). Per Art. 34.3.2° (BnE) the High Court and the Supreme Court have jurisdiction to assess the constitutional compatibility of legislation; whereas in Spain, per S 161 (CE) this is solely the jurisdiction of the Constitutional Court.
[292] *Attorney General v Ryan's Car Hire Ltd* [1965] IR 642.
[293] The term *jurisprudencia* refers only to case law emanating from the *Tribunal Supremo (*TS), i.e. the Spanish Supreme Court.
[294] Art 1(6) CC.

herein'.[295] Spanish courts are thus not *formally* bound by the decisions of superior courts, or even the jurisprudence of the Supreme Court. However, article 477(3) of *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (LEC)*, i.e. Spanish Civil Procedure Law, provides for an appeal on the grounds of infringement of the *jurisprudencia* of the *Tribunal Supremo.*[296] This has given rise to academic commentary regarding the true extent of the differences between the systems in terms of the role of case law.[297]

The respective national constitutions identify the structure and competence of the national courts. The Irish Constitution provides for a courts structure 'comprising a court of final appeal (the Supreme Court), a Court of Appeal, and courts of first instance which include a High Court with full jurisdiction in all criminal and civil matters, and courts of limited jurisdiction, the Circuit Court and the District Court organised on a regional basis'.[298] Whether dealing with civil or criminal matters the current hierarchy of Irish Courts is as follows; the Supreme Court, which serves as the final Court of Appeal, the Court of Appeal[299], the High Court, the Circuit Court and the District Court.[300] Pursuant to the Constitution of 1978, the Spanish territory was reorganised into autonomous regions.[301] Currently there are 17 C*omunidades Autónomas*, i.e. Autonomous Communities, and there is shared competence of functions between central and regional executives and legislatures.[302] However, the judicial function is unitary and thus courts throughout the Spanish territory are courts

[295] Art 1(7) CC.
[296] Antoni Vaquer 'Introduction' in Sjef van Erp and Antoni Vaquer (eds), *Introduction to Spanish Patrimonial Law* (Comares 2006) 15. This is also possible in respect of the case law of the *Tribunales Superiors de Justicia* where Autonomous Community law is at issue.
[297] See Elena Merino Blanco, *Spanish Law and Legal System* (2nd edn, Thomson Sweet and Maxwell 2006) 47.
[298] Courts (Establishment and Constitution) Act 1961 pursuant to Art. 34 BnE.
[299] Pursuant to the Court of Appeal Act 2014, a general Court of Appeal was established to sit between the High Court and the Supreme Court.
[300] When hearing a criminal case, the High Court is referred to as the Central Criminal Court. In addition to the above referenced courts, there is a Court of Criminal Appeal which consists of one Supreme Court and two High Court judges and, pursuant to s 35 of the Offences Against the State Act 1939, a Special Criminal Court for use 'whenever the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order'.
[301] Antoni Vaquer 'Introduction' in Sjef van Erp and Antoni Vaquer (eds), *Introduction to Spanish Patrimonial Law* (Comares 2006) 8.
[302] Ss 137-158 CE addresses the territorial organisation of the Spanish State. In addition to the 17 autonomous communities there are also two autonomous cities; Ceuta and Melilla.

of the State.[303] The hierarchy of Spanish courts varies according to whether the issue is a civil or criminal matter and, whether it is regulated at national or autonomous community level. The hierarchy in civil law matters regulated at national level, which is the context of most relevance in the current analysis, is as follows; *Tribunal Supremo* (TS) (i.e. Supreme Court), *Audiencias Provinciales*(AP) (i.e. Provincial Courts) and *Juzgados de Primera Instancia e Instrucción* (JPI) (i.e. Courts of First Instance).[304]

4.3. National Constitutional Provisions

The constitution is at the apex of the legal hierarchy in both Ireland and Spain. It is therefore relevant to establish the nature and scope of constitutional provisions applicable to the residential mortgage context. Notwithstanding that the Irish and Spanish constitutions significantly pre-date the emergence of the contemporary housing finance landscape, there are a number of relevant provisions. From a demand side perspective, a residential mortgage is a mechanism for providing access to housing and it might be presumed that housing rights are among the relevant constitutional provisions. However, the absence of any express constitutional right to housing in either Ireland or Spain means that the relevance of the respective constitutions for the residential mortgage context stems from other legal, human rights and social policy dimensions. The articles in question address constitutional property rights, the inviolability of the dwelling and directive principles of social policy and, as in other aspects; there is a strong correlation in the content and scope of the respective provisions, and in the nature of the constitutional rights conferred.

4.3.1. Constitutional Property Rights

In legal terms, a mortgage is a 'real right in land created by the owner (mortgagor) entitling the mortgagee to payment of a certain sum out of the land with priority to other creditors on the forced sale of the property'. [305] As a property right, any constitutional provisions which recognise and protect property rights are applicable and relevant.

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[303] Ss 117.5 CE.

[304] Pursuant to S 123.1 CE, the Spanish Supreme Court is the highest judicial authority except where the case falls within the competence of the Constitutional Court.

[305] Christoph Schmid, Christian Hertel and Hartmut Wicke, 'Real Property Law & Procedure in the European Union: General Report' (European University Institute 31 May 2005) 85.

Bunreacht na hEireann contains two Articles which refer to property rights; Article 40.3 Personal Rights and Article 43 Private Property.[306]

Article 40.3.1°

> *The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*

Article 40.3.2°

> *The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.*

Article 43

> *1. 1° The State acknowledges that man, in virtue of his rational being, has the natural right, (antecedent to positive law), to the private ownership of external goods.*
> *1.2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.*
> *2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.*
> *2.2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.*

The contemporary judicial view is that the provisions 'mutually inform' each other and both have to be taken into account by the courts when assessing the

[306] *Report of the Constitution Review Group* (Government Publications 1996). The report recommended the replacement of existing provisions with a single article which would expressly protect the right to property, subject to limitations imposed on the grounds of social justice or public policy including consumer protection. However, to date there has been no reform of the provisions.

constitutional protection of property rights.[307] In contrast to the fragmentation of the Irish provisions, a singular provision of the *Constitución Española*, addresses the constitutional right to private property.

Section 33

> *1 The right to private property and inheritance is recognized.*
>
> *2 The social function of these rights shall determine the limits of their content in accordance with the law.*
>
> *3 No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law.*

Fundamentally, both constitutions recognise a right to private property which would include the right to own and transfer property, thereby securing the right to homeownership and the use of a mortgage in respect thereof. Notwithstanding differences in terminology, there are broadly similar limitations imposed which prevent these rights from being absolute. In Ireland the limitations are with reference to 'social justice' and the requirement of the 'common good', whilst in Spain the concept of social function is utilised.[308] Notwithstanding the capacity of the State to limit the scope of the right with reference to these concepts, neither constitution permits such limitations to render the right nugatory, i.e. abolition of the right of private ownership or the general right to transfer property.[309] The provisions bring Irish and Spanish constitutional law in this area in line with Article 1 of the First Protocol of the European Convention on Human Rights (ECHR) and, Article 17 of the EU Charter of Fundamental Rights.

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[307] Gerard W Hogan and Gerry F Whyte, *JM Kelly: The Irish Constitution* (4th edn, Lexis Nexis Butterworths 2003) 1978.

[308] ibid, 1970. The authors observe that whilst the courts readily deferred to the judgement of the legislature until the mid-1960's, their jurisdiction to inquire whether a restriction imposed, is in fact justified by the 'exigencies of the common good and, whether it accords with the principles of social justice', is now well established. Jose Fulgencio Angosto Saez, 'The Constitutional Concept of Ownership' in Sjef van Erp and Antoni Vaquer (eds), *Introduction to Spanish Patrimonial Law* (Comares 2006) 264. The author notes that Spanish constitutional case law establishes, that as with the property right there is an individual and collective dimension to the function of property, i.e. satisfaction of owners interests and common good citing TC 26.3.1987 (RTC 37) confirmed by TC 17.3.1994 (RTC 89).

[309] Jose Fulgencio Angosto Saez, 'The Constitutional Concept of Ownership' in Sjef van Erp and Antoni Vaquer (eds), *Introduction to Spanish Patrimonial Law* (Comares 2006) 263.

4.3.2. Inviolability of the Dwelling

The second category of constitutional provision relevant to the mortgage context are those which, in essence, confer on the dwelling an 'inviolable' status, similar to that granted under Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and, Article 7 of the EU Charter of Fundamental Rights (CFR). In Ireland, the relevant provision is Article 40.5 Personal Rights which provides that the '*dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law'*.[310] The relevant Spanish provision, Section 18.2 provides '*The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of flagrante delicto'*. The national provisions broadly guarantee that entry into the home may take place only with the consent of the individual, or in accordance with the law. The particular relevance of this provision from a residential mortgage perspective is with reference to the context of enforcement of the mortgage security by the creditor. Fundamentally, the constitutional requirement is that enforcement of the security right should be regulated by law. However, with reference to case law from the European Court of Human Rights (ECtHR), it is clear that notwithstanding the existence of a legal framework for enforcement, a breach of constitutional rights may occur if the framework is not proportionate or contains insufficient procedural safeguards. A particular concern may arise in respect of the latter aspect where there is a statutory power of sale out of court.[311]

4.3.3. Directive Principles of Social Policy

The third category of constitutional provisions with manifest relevance to the residential mortgage context is those which are intended to guide the development of economic and social policy. In Spain, the relevant provisions are contained in sections 47 and 51 which are respectively titled housing rights and consumer protection.

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[310] *DPP V Corrigan* [1986] IR 290, 296, Blayney J 'Dwelling in this section means a house or part of a house'.

[311] For a complete analysis of the relevance of the ECHR in the context of repossession see Sarah Nield, 'Article 8 Respect for the Home: A Human Property Right?' (2013) 24(2) Kings Law Journal 147–171; Sarah Nield and Nicholas Hopkins, 'Human Rights and Mortgage Repossession: Beyond Property Law using Article 8' (2013) 33(3) Legal Studies 431 – 454. With reference to the context of a statutory right to possession without judicial oversight see Sarah Nield, 'Charges, Possession and Human Rights: A Reappraisal of s. 87(1) of the Law of Property Act 1952 in E Cooke (ed), *Modern Studies in Property Law Vol 3* (Hart Publishing 2005).

Section 47

> *All Spaniards have the right to enjoy decent and adequate housing. The public authorities shall promote the necessary conditions and establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation…..*

Section 51

> *1 The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests.*
> *2 The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them on those matters affecting their members, under the terms established by law.*

The Irish Constitution does not contain comparable provisions in terms of housing or consumer protection but within its directive principles, Article 45 suggests that the framing of legislation in the context of mortgage credit must be examined in the context of collective welfare;

2. The State shall, in particular, direct its policy towards securing:

iv. That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole'.

Hogan and Whyte identify early legislative recognition of this constitutional provision by its inclusion in section 6(1) of the Central Bank Act 1942, which established the Central Bank of Ireland. The statute identified the stated objective as a duty of the Central Bank alongside the other powers duties and functions conferred on it by law.[312]

[312] Gerard W Hogan and Gerry F Whyte, *JM Kelly: The Irish Constitution (*4th edn, Lexis Nexis Butterworths 2003) 2086.

4.3.4. Impact of the Constitutional Rights

It is important to differentiate between the theoretical import of the constitutional provisions in terms of the relevance of their content, and the practical import for the mortgage consumer in terms of the nature of rights conferred. A clear distinction can be made between the first two categories, i.e. private property and inviolability of the dwelling, and the latter, i.e. directive principles of social and economic policy, in this regard. The constitutional provisions in respect of private property and the inviolability of the dwelling are fundamental rights in both Constitutions and are binding.[313] The provisions thus confer rights on individuals which can be pleaded before the national courts, and any regulation of these rights, must be consistent with the essential content of the constitutional provisions. The implication, as previously asserted, is that the right to private ownership and the right to transfer property, which underpin the residential mortgage transaction, cannot be abrogated and that enforcement of the security right must be regulated by law which is proportionate and contains procedural safeguards.

The directive principles of social and economic policy contain aspects of particular contemporary relevance such as consumer protection and collective welfare in credit related policy. However, the utility of these provisions for the individual mortgage consumer is minimised by their legal status. In respect of the Spanish provisions, the use of the word 'right' in Section 47 on housing would appear to infer a binding obligation. However, this inference is expressly precluded by Section 53(3) which confirms that the 'principles' are merely intended to guide the development of legislation and policy and do not confer directly enforceable rights.[314] Article 45 of *Bunreacht na hÉireann*, similarly identifies the function of its Directive Principles of Social Policy as a guide to the development of legislation and confirms their inability to confer individual rights.[315] The import is that notwithstanding the relevance of the issues addressed by the directive principles, any conferral of individual rights would be predicated on legislation which gives effect to the content of the principles.

[313] S 53.1 (CE); Art. 40.3. 1° re Personal Rights and 43.1.1° re Private Property (BnE).
[314] S 53.3 (CE), '…they may only be invoked before the ordinary courts in accordance with the legal provisions implementing them'.
[315] '…the application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution'.

4.4. Constitutive Sphere – National Property Law

Pursuant to the conceptualisation employed in chapter three, there are dual spheres of residential mortgage regulation relevant to the current analysis. Reflecting the extent to which the enforceability of the contract and related security are the bedrock upon which the willingness to transact is premised, the framework of national mortgage law has been identified as a component of the constitutive sphere. We have already observed that both the Irish and Spanish Constitutions provide a constitutional basis for residential mortgage transactions. However, the precise nature and scope of the property rights within the context of such transactions is a matter for determination by the legislature with reference to concepts of social welfare and function. Accordingly, it is national frameworks of mortgage law which establish the balance of property rights between the borrower and lender with reference to their role as mortgagor and mortgagee and, impose limitations on contractual autonomy with reference to that perspective. It is thus necessary to establish the scope of the rights conferred and the limitations imposed in the jurisdictions under review in the pre-crisis context, so as to establish a threshold from which to evaluate the nature and extent of post-crisis reform.

4.4.1. Contemporary Mortgage Law in Ireland

The origins of the common law mortgage lie in the emergence of capitalism and the need for methods of circumventing the feudal prohibition on usury.[316] Originally, the common law mortgage entailed a conveyance of the fee simple to the lender, subject to the condition that the estate would be re-conveyed to the borrower, provided that the debt was repaid by the legal date of redemption.[317] The harshness of the outcome at common law where a borrower did not repay by the given date, i.e. forfeiture of land and ongoing liability for the debt, led to the intervention of the Court of Chancery through the development of the equity of redemption. The contemporary mortgage in Ireland is thus a product of common law and equitable principles as modified by statute.[318] Although the Conveyancing Acts (1881-1911) provided the statutory framework applicable to the residential mortgage context for more than a

[316] See Andrew Lyall, *Land Law in Ireland* (2nd edn, Round Hall Sweet and Maxwell) 769 – 771; Padraic Kenna, Housing Law, Rights and Policy (Clarus Press 2011) 441.
[317] Andrew Lyall, *Land Law in Ireland* (2nd edn, Round Hall Sweet and Maxwell) 770.
[318] Law Reform Commission, Reform and Modernisation of Land Law and Conveyancing Law (LRC CP 34 – 2004) 139.

century; in the pre-crisis context a process of reform was ongoing, precipitated by the view that existing mortgage law created unnecessary complications and militated against the true function of a mortgage which was to provide security for a loan.[319] Reform of existing law was given effect through the Land and Conveyancing Law Reform Act 2009 (LCLRA 2009) which 'substantially overhauled' mortgage law in a number of respects, not least it's streamlining of the procedure for the creation of a legal mortgage.[320] Although from a temporal perspective, changes to the statutory framework did not come to legislative fruition until the immediate post-crisis context; the LCLRA 2009, for current purposes is included in the pre-crisis profile. This reflects the fact that fundamentally the reforms contained therein had been identified in 2005.[321] They do not therefore constitute a direct legislative response to the indebtedness issues affecting pre-crisis borrowers, which were beginning to emerge in the period from 2009 onwards.[322]

For current purposes, the most significant aspect of the reforms pursuant to the LCLRA 2009 is its creation of a differential regime of statutory rights and obligations for certain types of mortgage loan. Under the previous framework, the statutory rights of the mortgagor were subjugated to the principle of freedom to contract and were thus applicable, only to the extent that they were not varied by contract. This substantially negated the benefit of any protections for the mortgagor contained therein. The LCLRA 2009 can be viewed as having increased the statutory protections conferred on mortgage consumers by precluding contractual variation of statutory provisions for 'housing loan' mortgages entered into from 1 December 2009. This creates a differential statutory regime for mortgages within the scope of

[319] ibid, 29 and 141. 'A mortgage is essentially a secured loan transaction. The only, albeit very substantial, interest which the mortgagee should have is security for its loan. It is of the very nature of security that the lender does not expect to have to invoke it – it expects to enforce its security as a last resort only, i.e. where the borrower has defaulted in a serious way and all other attempts at a resolution of the problem have failed'.

[320] Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 403.

[321] Subsequent to the 2004 consultation paper proposals for reform were published in Law Reform Commission, *Report on Reform and Modernisation of Land Law and Conveyancing Law (*LRC 74-2005). The proposals include the requirement for a court order for sale and a prohibition on consolidation of mortgages, but do not include the 7 days consent period in the context of orders for sale or a differential regime for 'housing loans'. Mary Donnelly, *The Law Of Credit and Security* (Round Hall 2011*)* 433. Donnelly notes that 'this distinction was introduced at a late stage in the Bill's passage through the *Oireachtas*'.

[322] In February 2009, the first Code of Conduct on Mortgage Arrears (CCMA) was introduced. In the same year the Central Bank of Ireland began to compile and publish residential mortgage arrears statistics; the first data covering the arrears status as of end September 2009.

this term. The definition of 'housing loan' is imported from the Consumer Credit Act 1995 (CCA 1995), thereby providing consistency in the addressee of the statutory frameworks of mortgage and consumer law. Pursuant to the definition contained in the CCA 1995 it is clear, that the scope of the term 'housing loan' encompasses residential mortgages which are the subject matter of the current analysis. In its broadest casting the term applies to an 'agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is, or is to be, constructed where the person to whom the credit is provided is a consumer'.[323] Donnelly has observed that notwithstanding the apparent capacity arising from the scope of the statutory definition, the 'consumer' requirement is likely to result in mortgages for the purchase of a residential investment property, falling outside the scope of the provisions.[324]

The most fundamental right of a mortgagor is the right to redeem the mortgage and recover ownership of the property. This is a right which is derived from equity and attempts to restrict or impede the equitable right to redemption are prohibited.[325] The LCLRA 2009 may be viewed as having enhanced the statutory right to redemption of housing loan mortgages by prohibiting the prior statutory right of the mortgagee to consolidation of mortgages.[326] This ensures that a mortgagor can redeem a 'housing loan' mortgage without having to redeem any other mortgage with the mortgagee, whether in respect of the same or another property.[327] The mortgagor is, as previously, entitled to inspect or make copies of title documents in possession of the

[323] S 2(1) CCA 1995 as substituted by s 33 and sch 3 pt 12 item 1(ba) of the Central Bank and Financial Services Authority of Ireland Act 2004.
[324] Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 433. In support of this assertion Donnelly cites *AIB v Higgins & Ors* [2010] IEHC 219 and the observation of Kelly J that 'a person is not a consumer simply on the basis that he/she is acting outside his/her primary business'.
[325] ibid, 436 - 438. Donnelly cites Hardiman J in *Dellway Investments & Ors v NAMA*, [2011] IESC 14 in describing the right to redeem as 'a most valuable asset which prevents a mortgagor from simply selling the house or land for what it can get in the short term, leaving the mortgagor to discharge the rest'. She further notes that the maxim that clogs and fetters cannot be placed on the equity of redemption prevents restrictions which impede the right to redeem to the extent that it becomes illusory per *Samuel v Jarah Timber and Wood Paving Corp* [1904] AC 323, *Fairclough v Swan Brewery* [1912] AC 565.
[326] S 17 of the Conveyancing Act 1881 provided for a right of consolidation if this was contained in the contract.
[327] S 92 altering s 17 of the Conveyancing Act 1881.

mortgagee and to request a transfer of the mortgage in lieu of redemption.[328] Prior to the LCLRA 2009, the mortgagors' right to possession was either an express or implied contractual term, however, it is now a statutory right.[329] The 2009 Act also places on a statutory basis the right of a mortgagor to seek an order for the sale of the land whenever an action is brought by him in relation to the land. The explanatory memorandum to the act contextualises this provision by identifying the types of actions envisaged and the motivation for such actions, i.e. redemption, sale, the raising and payment in any manner of the mortgage debt or any combination of these in the alternative with deleveraging cited as a possible motivation for the foregoing.[330] The right of the mortgagor to sell or transfer their interest in the mortgaged property could have been restricted by contract prior to the LCLRA 2009, and this restriction remains permissible, save in the context of a housing loan mortgage.[331] The ability of the mortgagor to lease the property has also universally increased pursuant to the LCLRA 2009, as the exclusion of that statutory right is precluded for all mortgage loans.[332] As already noted, the contemporary mortgage is a product of common law *and* equitable principles. Although the LCLRA 2009 amends existing common law and statutory provisions, consistent with the recommendation of the Law Reform Commission, it does 'not interfere with the general equitable jurisdiction of the courts to control unfairness in the way mortgages

[328] Ss 91 and 93. The sections re-enact the substance of ss 12, 15 and 16 of the Conveyancing Act 1881. The transfer in lieu of redemption is inapplicable where the mortgagee is in possession.

[329] S 97(1) LCLRA 2009. Mary Donnelly, *The Law of Credit and Security (*Round Hall 2011) 414 and 711. Donnelly notes that in the context of mortgages of unregistered land prior to the LCLRA 2009, the mortgagee had an inherent right to possession which was varied by contract to allow the mortgagor a right to possession, subject to default which re-established the mortgagors inherent right. There was no inherent right in the context of registered land as a registered charge does not constitute an estate, and thus the right of possession was derived from contract. Where the mortgagors right to possession was not an express contractual term, the courts were prepared to hold an implied right where mortgage was payable by instalments per *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 1 WLR 1474 or where the contract provided in the context of default that the mortgagee could enter into possession per *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883.

[330] S 94. 'Land and Conveyancing Law Reform Act 2009: Explanatory memorandum', 36.

[331] S 94(4).

[332] Under s 112(1) LCLRA 2009, the lease must be with the written consent of the mortgagee but such consent must not be 'unreasonably withheld'. S 113(1) provides that the lease must reserve the best rent which can reasonably be obtained taking into account all relevant circumstances and be otherwise granted on the best terms which can reasonably be obtained and accord with good commercial practice. S 112(2) provides that a lease which does not comply with these requirements is void.

operate'.[333] Donnelly notes, with reference to the capacity to offer relief against unconscionable bargains, that the equitable jurisdiction is particularly active where the mortgagor is 'vulnerable', in which context the courts have been willing to 'overturn excessive interest rates ….and to set aside oppressive bargains'.[334] It is also clear that as an extension of the right to redeem the mortgage and the equitable jurisdiction re unconscionability, the mortgagee is precluded from gaining *unfair and oppressive* collateral advantage from the mortgage.[335]

In addition to conferring non variable statutory rights on the mortgagor, the LCLRA 2009 also imposes limitations on the exercise of mortgagees' powers and rights in the context of housing loan mortgages.[336] Significantly, although the powers and rights of the mortgagee vest as soon as the mortgage is created, they only become exercisable for the purpose of realising the security or protecting the mortgaged property; thus reflecting the objective of the reforms, i.e. to align mortgage law with the contemporary mortgage usage.[337] The fundamental right of the mortgagee is to enforce the security and as a result, particular emphasis is placed on the scope of the mortgagees' right to possession and sale of the property. The LCLRA 2009 has modified the exercise of these rights in the context of housing loan mortgages and has introduced a statutory requirement to obtain a court order to take possession or sell the mortgaged property.[338] Subsequent to the enactment of the LCLRA 2009, the Circuit Court has jurisdiction to deal with orders for possession or sale in the context

[333] Law Reform Commission, Reform and Modernisation of Land Law and Conveyancing Law (LRC 74-2005) 247.

[334] See Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 442 for case law on this point.

[335] ibid, 438. The issue of collateral advantage has also been addressed in the consumer law framework and Donnelly identifies the increased protection offered by the CCA 1995, through its prohibition on collateral advantage without any requirement to demonstrate that it is oppressive, unconscionable or impeding the right to redeem.

[336] S 96(3). In relation to other mortgages the provisions take effect subject to the mortgage unless the provision provides otherwise.

[337] S 96(c). Previously the rights and powers became exercisable once the legal date for redemption (usually 6 months after the creation of the mortgage) has passed in the context of non-instalment mortgages, and in the case of instalment mortgages, once a default in payment had occurred.

[338] S 97. Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 446. Theoretically possession or sale could occur in the absence of a court order if the mortgagor consents in writing not more than 7 days prior to such action; however Donnelly notes the practical difficulties with the consent requirement and suggests that in practice, lenders will always seek a court order in a housing loan context.

of housing loan mortgages.[339] The issue of judicial oversight in the context of possession or sale is relevant as it creates scope for judicial assessment of compliance, not just with mortgage law, but also potentially with obligations imposed by consumer law and financial services regulation. In a post-crisis context, this is the manner in which there has been permeation of the private law enforcement framework by the arrears protocols contained in the statutory Code of Conduct on Mortgage Arrears and, pursuant to EU case law, there would appear to be a duty imposed on national courts to 'examine *ex officio* the unfairness of a term' in a business to consumer contract with reference to the Unfair Contract Terms Directive(UCTD).[340] However, in a sense, the requirement imposed in the LCLRA 2009 is perhaps of more theoretical than practical significance, as lenders habitually sought courts orders in the context of residential property, so as to maximise the sale value via vacant possession.[341] The LCLRA 2009 stipulates that the mortgagee in possession, subject to the terms of the court order, is required to sell the property within a reasonable time period or where this is not appropriate, to lease the property and use the income derived to reduce the mortgage debt.[342] The mortgagee is also under a statutory obligation to obtain the best price which can reasonably be obtained when selling the property.[343]

4.4.2. Contemporary Mortgage Law in Spain

In contrast to the common law mortgage, the *hipoteca*, i.e. Spanish mortgage is founded on and developed through a framework of statute law, thus all rights and obligations have a statutory basis. The *Código Civil*[344] contains the core principles

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[339] Art 101(6). The Land and Conveyancing Law Reform Act 2013 (LCLRA 2013) 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.

[340] See Hans W Micklitz and Norbert Rich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' 92014) 51(3) Common Market Law Review 771, 780-784 for analysis of the scope of the obligation.

[341] 'Report of the Expert Group on Repossessions' (Department of Justice and Equality December 2013) 12.

[342] S 99(1). Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 719 - 720. Donnelly cites the lack of any statutory parameters in terms of the 'reasonable time period' and notes Neil Maddox's observation that in the context of breach resulting in loss to the mortgagor, an action may lie in damages.

[343] Explanatory memorandum points out that this extends to all mortgagees, the duty imposed on building societies by s 26 of the Building Societies Act 1989.

[344] 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.

applicable to mortgage contracts and these principles are developed in the *Ley Hipotecaria* 1946[345] (LH), i.e. Mortgage Law, and the *Reglamentos Hipotecaria* 1947[346] (RH), i.e. Mortgage Regulations.[347] As in Ireland, there is both a consensual and non-consensual mortgage in Spain, although there is no Spanish equivalent to the Irish equitable mortgage.[348] There is a high correlation between the rights and obligations attributed to mortgagors and mortgagees under the respective national frameworks. In a residential mortgage context, the Spanish mortgagor has a right to possession of the property arising from prohibitions on the appropriation or disposal of the property by the creditor.[349] However, this right to possession is subject to the right of the creditor to enforce the security upon maturity of the principal obligation. In Spain as in Ireland, the creditor is entitled to assign the mortgage loan to a third party.[350] The mortgagor is also free to dispose of the property, in which context the *hipoteca*, as a real rather than personal right, will 'follow the property', thereby continuing to guarantee performance of the secured obligation.[351] The Spanish mortgage, like its Irish counterpart is thus a recourse mortgage, albeit that there is the capacity in both jurisdictions to enter into a mortgage where liability is restricted to the secured asset.[352] Notably, pursuant to the EU legislation, Member States are prohibiting from preventing such agreements with effect from 21st March 2016.[353]

The Spanish mortgagee, like the Irish equivalent, has a statutory right to protect their claim where the actions of the debtor may result in a depreciation of the value of the

[345] Decreto de 8 de febrero de 1946 por el que se aprueba la nueva redacción oficial de la Ley Hipotecaria.
[346] Decreto de 14 de febrero de 1947 por el que se aprueba el Reglamento Hipotecario.
[347] The *Ley Hipotecaria* is divided into 13 sections which address various aspects of the constitution of the mortgage and the associated registration system. This structure is replicated in the *Reglamentos Hipotecaria* which provides additional provisions to facilitate implementation of the *Ley Hipotecaria*. Title V addresses the mortgage itself; arts 104 – 197 (LH) and arts 215-271 (RH).
[348] Arts 138 and 158 LH.
[349] Arts 1858 and 1859 CC.
[350] Art 1878 CC. This disposal may be 'in whole or in part, in compliance with the formalities required by the law'.
[351] Arts 1857 (3), 1876 CC; arts 104, 105 LH. Art 1911 CC states 'The debtor is liable for the performance of his obligations with all present and future property'. In a mortgage enforcement context, if the value of the property was less than the outstanding debt, the creditor has recourse to the debtor'.
[352] Per art 140 LH it is possible to have a *hipoteca de responsabilidad limitada* in which case the liability of the debtor does not extend beyond the property subject to the *hipoteca*. In *ICS Building Society v Grant* [2010] IEHC 17 at 2, Charleton J affirmed the capacity for a contract which restricted liability to the secured asset in the Irish context.
[353] Art 28(4) Mortgage Credit Directive.

property. In Ireland this is via an emergency possession order, whilst in Spain it is via an *acción devastación*.[354] In the context of default, the creditor is entitled to seek enforcement of the security via an *acción hipotecaria*; which was established by the *Ley Hipotecaria* 1946, and is currently regulated by the *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil* (LEC).[355] There are a number of procedural variants in the enforcement process. Most frequently, enforcement is via the summary judicial procedure prescribed in the LEC, although it is also possible via the ordinary procedure contained therein. One notable distinction between Spain and the post 2009 Irish framework is the capacity for enforcement to be undertaken on an extra-judicial basis, if this is provided for in the document creating the hypothec.[356] As previously observed, a court order would be required for possession or sale in Ireland where a housing loan mortgage is the subject of the enforcement. However, broadly speaking Spanish law did not, prior to 2013, distinguish between residential and other mortgages in this or in other aspects of the mortgage law framework. In contrast to the LCLRA 2009, the Spanish framework did not impose a statutory obligation on the creditor to minimise the liability of the debtor by making efforts to obtain the best possible price in the context of repossession and disposal of the property. Again, this is an obligation which would be subsequently imposed by EU law; albeit that it was addressed in prior national reforms which altered the threshold for which the property could be sold.[357]

4.5. Facilitative Sphere

The constitutive 'private law' sphere has been identified as a pre-requisite to the existence of a market for residential mortgage loans. However, as noted in the previous chapter, there is another sphere of regulation in which intervention is premised on the furtherance of contemporary policy objectives related to the functioning of the market. Within this sphere, the engagement of the contractual

[354] Art 117 LH which stipulates that an injunction should be sought pursuant to art 720 et seq of the LEC.

[355] Art 129 LH; arts 681-98 LEC.

[356] Art 129 LH provides that this procedure will be conducted by a notary in conformance with the formalities of the *Reglamentos Hipotecaria*.

[357] Art 28(5) MCD requires Member States to ensure procedures and measures are in place to enable the 'best efforts' price to be obtained. Law 1/2013 reduced the deposit required by bidders and increased the threshold for which the property could be awarded to the creditor in a principal private residence context per arts 7(6) and 7(10) Law 1/2013 amending arts 647(1)(iii) and 670(1) LEC respectively.

parties is subject to regulation with reference to their role as consumer and lender in the financial services marketplace. To identify the extent of convergence between Ireland and Spain, in terms of the nature and orientation of intervention in the pre-crisis context and the trajectory of reform thereafter, it is necessary to identify the institutional and legislative aspects of relevant consumer law and financial services regulation. This necessitates identification of the relevant public law bodies with competence for supervision and enforcement and the legislative frameworks pursuant to which they operate.

4.5.1. Institutional Framework (Supervision & Enforcement) – Ireland

In Ireland, the institutional framework for regulation and supervision of mortgage lenders and intermediaries underwent a significant evolution from the late 1980's to the early 2000's. Traditionally, the institutional framework was fragmented, dependent on whether the credit institution was a bank or a building society, and whether the regulatory competence related to prudential or consumer protection aspects.[358] A process of centralisation of prudential competence in the Central Bank began in the late 1980's, and by 1998, it was 'statutorily responsible for the direct supervision of most financial institutions in Ireland (with the main exception of insurance undertakings)'.[359] Notwithstanding the centralisation of prudential competence in the Central Bank, prior to 2003, the consumer protection function in the financial services sector was the responsibility of the Office of the Director of Consumer Affairs (ODCA) under the auspices of the Department of Enterprise, Trade and Employment.[360] Scally notes, that in that period, there was a widely held view that the Central Bank was not interested or concerned about how financial

[358] See 'Report of the Implementation Advisory Group on the Establishment of a Single Regulatory Authority for the Financial Services Sector' (Stationery Office 1999) Chapter 3; William Scally, 'Fixing Finance 3: The Irish Experience' (Institute of International and European Affairs 2010) 2; Mary Donnelly, *The Law of Credit & Security* (Round Hall 2011) 89 - 90 (4.03-4.04) for a complete account of the changing institutional landscape and the factors influencing these developments.

[359] 'Annual Report 1998' (Central Bank of Ireland 1999) 32. 'Report of the Implementation Advisory Group on the Establishment of a Single Regulatory Authority for the Financial Services Sector' (Stationery Office 1999), Chapter 2 at 2.4 and overview. The report cites the transfer of responsibility for authorisation and supervision of building societies from the Registrar of Friendly Societies to the Central Bank, pursuant to the Building Societies Act 1989, as the start of the consolidation of prudential regulatory competence.

[360] Mary Donnelly, *The Law of Credit & Security* (Round Hall 2011) 90. 'Report of the Implementation Advisory Group on the Establishment of a Single Regulatory Authority for the Financial Services Sector' (Stationery Office 1999) Chapter 2 at 2.25 – 2.27.

institutions treated consumer services, and that the vesting of competence for control of consumer charges in the ODCA was perceived as a manifestation of that disinterest.[361] The institutional structure which evolved during this period has been cited as a response to economic, political and social developments at both national and EU level. However, a series of banking scandals in the late 1990's highlighted deficiencies of the existing framework, and in particular of consumer protection aspects.[362] Reform was undertaken which led to a reallocation of consumer protection competence with effect from 2003.

4.5.1.1. Central Bank & Financial Services Authority of Ireland (CBFSAI)

The role which had previously been undertaken by the Central Bank was undertaken by the Central Bank and Financial Services Authority of Ireland(CBFSAI) from 2003 onwards; albeit with reform, both to the institutional structure and the supervisory competence of the body.[363] The CBFSAI was a regulatory structure with three decision making bodies, although for current purposes, only one of these bodies, the Irish Financial Services Regulatory Authority ('Financial Regulator') is of relevance.[364] In legal terms, the Financial Regulator 'was a statutory body within the legal personality of the CBFSAI' and was 'autonomous but not independent' taking

[361] William Scally, 'Fixing Finance 3: The Irish Experience' (Institute of International and European Affairs 2010) 2. S 149 of the CCA 1995 imposed an obligation on credit institution to notify the DCA of all new charges or increases in existing charges imposed by them for the provision of services to customers.

[362] The Joint Committee on Finance and the Public Service undertook a review 'to ascertain the precise regulatory/supervisory role of the State and other institutions in relation to the commercial banking sector' and concluded that existing legislation and regulations were inadequate and attributed the failure of the Central Bank to prevent such malpractice, in part 'to the fact that the Central Bank sees its role in an overall macro sense - concerned about overall financial stability in Ireland rather than individual consumer protection'. An advisory group, chaired by Michael McDowell, was subsequently established to make recommendations for reform see 'Report of the Implementation Advisory Group on the Establishment of a Single Regulatory Authority for the Financial Services Sector' (Stationery Office 1999). Substantially these reforms were implemented, although a significant exception to this was the location of the IFSRA within the CBFSAI, rather than as an independent body.

[363] Pursuant to the Central Bank and Financial Services Authority of Ireland Acts 2003 and 2004.

[364] The other two bodies were the Governor of the Central Bank and Financial Services Authority of Ireland, and the Central Bank and Financial Services Authority of Ireland. Donnelly notes that the latter was habitually referred to as the 'Central Bank'.

'its decisions and actions legally in the name of the CBFSAI'.[365] It was responsible for prudential and consumer protection functions for those mortgage lenders which fell within its remit; the distinct functions being carried out by individual prudential and consumer directorates within the authority.[366] Initially, the remit of the 'Financial Regulator' was limited like its predecessor to credit institutions. However in 2008, the scope of competence was extended and it was conferred with competence for authorization and conduct of business regulation of mortgage lenders who were non-credit institutions.[367] The extension of competence is relevant as specialised lenders serving the sub- prime market were typically non-credit institutions, and these lenders began to enter the Irish market in 2004.[368]

The Financial Regulator inherited a pre-existing mandate to impose conduct of business requirements in the form of statutory codes of conduct. Section 117 of the Central Bank Act 1989 (CBA 1989) provided that '…The Bank may, after consultation with the Minister, from time to time draw up, amend or revoke, …… one or more than one code of practice concerning dealings with any class or classes of persons and every such code shall be observed by the licence holders, or other persons so supervised, to whom they relate'.[369] The section requires the Bank in exercising this power to have regard to '—(a) the interest of customers and the general public, and (b) the promotion of fair competition in financial markets in the State'.[370] The Financial Regulator would subsequently introduce a Consumer Protection Code (CPC) and a Code of Conduct on Mortgage Arrears (CCMA)

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[365] Patrick Honohan, 'The Irish Banking Crisis: Regulatory and Financial Stability Policy 2003-2008' (A Report to the Minister for Finance by the Governor of the Central Bank, 31 May 2010) 35 at 3.5 - 3.6.
[366] Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 90 - 91.
[367] In common with other areas of this research, there is fluidity to the definitional boundaries of the terms credit and non-credit institutions which poses a challenge in attempts to provide both technical accuracy and conceptual consistency in the comparative analysis of national regulatory frameworks. For current purposes, the usage of the terms is consistent with EU law whereby a credit institution is 'an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account' and non-credit institutions are non-deposit taking. A notable exception to this distinction in Spain are Establecimientos Financieros de Crédito (EFCs), i.e. Financial Credit Entities, which are classified as 'credit institutions' under Spanish law, notwithstanding that they are not permitted to take deposits or repayable funds from the public.
[368] See Dermot Coates, 'The Irish Sub Prime Residential Mortgage Sector: International Lessons for an Emerging Market' (2008) 23(2) Journal of Housing and the Built Environment 131, 138. The first entrant was Start Mortgages followed by GE Money, Nua Homeloans and Stepstone Mortgage Funding.
[369] S 117(1) CBA 1989.
[370] S 117(2) CBA 1989.

pursuant to this mandate. The Financial Regulator was empowered by the Central Bank and Financial Services Authority of Ireland Act 2003 (CBFSAI Act 2003), to '… take such action as it considers appropriate to increase awareness among members of the public of available financial services and the cost to consumers, risks and benefits associated with the provision of those services'.[371] Notwithstanding the conferral of these information and education based duties, the section excluded civil liability on the part of the Financial Regulator for a failure to fulfil these functions. The reforms in the pre-crisis context also increased the enforcement capacity of the new body through enhanced powers of investigation and sanction in the context of non-compliance by regulated entities with statutory obligations.[372] Section 33C(3) states that 'In performing its functions and exercising its powers, the Regulatory Authority is required to promote the best interests of users of financial services in a way that is consistent with—(*a*) the orderly and proper functioning of financial markets, and (*b*) the orderly and prudent supervision of providers of those services'. It is notable that pursuant to this section, the promotion of the best interests of consumers could not be at the expense of other market related objectives.

In addition to changes to the existing framework of financial market regulation, the CBFSAI Act 2003, also reallocated institutional competence in respect of relevant components of the Consumer Law framework. The Consumer Director in the Financial Regulator was given responsibility '…for managing the performance and exercise of such of the functions and powers of the Bank under the enactments and statutory instruments specified in subsection (2)..' and 'for monitoring the provision of financial services to consumers of those services to the extent that the Consumer Director considers appropriate, having regard to the public interest and to the interests of those consumers'.[373] The list of statutes pursuant to this section included the Consumer Credit Act 1995 (CCA 1995), and accordingly, the Consumer Directorate within the Financial Regulator assumed the responsibilities which had

[371] S 33C (4) of Central Bank Act 1942 (CBA 1942) as inserted by s 26, pt 2 of CBFSAI 2003. Pursuant to s 33C(5)'…the Regulatory Authority has power to do whatever is necessary for or in connection with, or reasonably incidental to the performance of its functions'.
[372] Part IIIC CBA 1942, as inserted by s 10 CBFSAI Act 2004. See Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 92.
[373] S 33S (1) CBA 1942 as inserted by s 26, pt 2 of the CBFSAI 2003.

previously been undertaken by the ODCA to the extent that they applied to mortgage lenders and intermediaries.

4.5.1.2. National Consumer Agency (NCA)

As noted previously, the Office of the Director of Consumer Affairs (ODCA) under the auspice of the Department of Enterprise, Trade and Employment had undertaken the consumer protection function, including that in respect of financial services, from the 1980's until 2003. In 2007, the functions previously undertaken by the ODCA were transferred to a new statutory body, the National Consumer Agency (NCA), pursuant to the Consumer Protection Act 2007 (CPA 2007).[374] In contrast to the Financial Regulator, whose promotion of consumer interests was required to be consistent with its other market related statutory objectives; the primary mandate of the NCA was the promotion of consumer interests. The statutory functions of the NCA as defined in section 8 include promoting and protecting the interests and welfare of consumers', encouraging compliance with relevant statutory provisions, investigating instances of suspected offences and enforcement of relevant statutory provisions, either via summary proceedings or, in suspected cases of indictable offences by a referral to the Director of Public Prosecutions (DPP).[375]

The extent of the NCA role in respect of consumers of financial services and, in particular residential mortgages, was limited due to the role accorded to the Financial Regulator. The relevant supervision and enforcement functions under the Consumer Credit Act 1995, had been transferred to the Financial Regulator in 2003, and this allocation of institutional competence was unaffected by the establishment of the NCA. The Consumer Protection Act 2007, which established the NCA stated that 'in respect of financial services provided by a regulated financial service provider', the functions of the NCA with reference to the Consumer Protection Act 2007 and the EC (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 (UTCC Regs), are concurrently vested in the CBFSAI and may be performed by either

[374] The NCA had been in existence from May 2005; however, it was placed on a statutory footing pursuant to the Consumer Protection Act 2007 (CPA 2007). S 37(2) provided that 'functions vested in the Director (i.e. ODCA) by or under the existing enactments are transferred to the Agency (i.e. NCA) on the establishment day'.

[375] S 8(1). Referral to the DPP where the agency had reasonable grounds for believing an indictable offence under the relevant statutory provisions had been committed.

entity.[376] The statute also provided that this allocation of competence was qualified by the capacity of the parties to enter into a co-operation agreement in respect of the exercise of the shared competence.[377] Although a memorandum of understanding between the parties governed this sharing of competence from 2010 onwards, in the period from 2007 to 2010, the NCA and the Financial Regulator had an equal mandate in enforcement functions under the Consumer Protection Act 2007 and the EC (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000. However, these statutes had a less significant role in the context of residential mortgages as compared with the Consumer Credit Act 1995, in which the Financial Regulator had sole enforcement competence.

4.5.1.3. Financial Services Ombudsman (FSO)

The Financial Regulator as the supervisory authority for financial markets and participants, and the NCA as the statutory consumer agency, operate on a collective basis with respect to their supervision and enforcement functions. Enforcement of rights on an individual basis was undertaken, depending on whether these rights stem from the constitutive or facilitative sphere, via judicial action in the private law framework or via the Financial Services Ombudsman (FSO) which is the extrajudicial equivalent provided for in the public law framework.

Although non statutory Ombudsman's schemes existed in the financial services sector prior to the Central Bank and Financial Services Authority of Ireland Act 2004 (CBFSAI Act 2004), it established the first statutory Financial Services Ombudsman (FSO) with effect from 1 April 2005.[378] The purpose of the FSO is to provide an independent and accessible mechanism through which complaints by consumers about the conduct of regulated financial service providers can be mediated and,

[376] S 94 (3) amending s 5A of the Central Bank Act 1942.
[377] S 5A 3D (a) CBA 1942 as substituted by s 94 CPA 2007.
[378] Part VIIB CBA 1942 (i.e. ss 57 BA – 57 CU) as inserted by s 16, pt 2 CBFSAI Act 2004. 'Report of the Implementation Advisory Group on the Establishment of a Single Regulatory Authority for the Financial Services Sector' (Stationery Office 1999) Chapter 2, Overview. The report identified the existence of non-statutory schemes in a pre CBFSAI context. Paul Joyce and Stuart Stamp, '*Redressing the Imbalance: A Study of Legal Protections Available for Consumers of Credit and Other Financial Services in Ireland* (Free Legal Advice Centre (FLAC) March 2014) 69. The FLAC report notes that these were industry funded and administered and were limited in the scope of applicability.

where necessary, investigated and adjudicated upon.[379] The FSO remit extends to complaints by consumers in respect of the provision of, the offer to provide or the refusal or failure to provide a financial service.[380] In common with the National Consumer Agency and the Financial Regulator, the FSO is possessed of information and education functions as one of its statutory objectives is to improve public understanding of issues related to complaints against regulated financial service providers and associated consumer protection matters.[381] The FSO is accessible as compared with judicial proceedings in that the service is free to the complainant. However, a pre-requisite to availing of the services is engagement with the financial service provider in an attempt to resolve the dispute.[382] A ruling by the FSO is legally binding on both the consumer and the financial service provider, subject to the capacity of either party to appeal a determination to the High Court.[383] The FSO is required to adjudicate on disputes between consumers and regulated financial services providers in an impartial manner '….and, when dealing with a particular complaint, 'to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form'.[384] The capacity to make a complaint to the FSO services is dependent on the matter being within the jurisdiction of the FSO, a matter which the FSO itself determines, and that the conduct has occurred less than six years prior to the

[379] Ss 57BB (a) and (c) CBA 1942. Paul Joyce and Stuart Stamp, 'Redressing the Imbalance: A Study of Legal Protections Available for Consumers of Credit and Other Financial Services in Ireland (Free Legal Advice Centre (FLAC) March 2014) 72. The report observes the comparatively small incidence of resolution by mediating citing the FSO Bi-Annual Review of 2012 which states that of 2,995 complaints that proceeded to the investigation stage, only five were dealt with by way of mediation.
[380] S 57BX(1) CBA 1942.
[381] S 57BB(d) CBA 1942. In addition to an annual report, the FSO publish a bi-annual sectoral review of the complaints received and the outcome of the mediation. Pursuant to s 72 of the Central Bank (Supervision & Enforcement) Act 2013, it is now possible for the FSO to identify individual financial services providers who have three complaints substantiated against them.
[382] S 57BX(6) CBA 1942.
[383] S 57CI(9) CBA 1942.
[384] S 57BK(4) CBA 1942. Paul Joyce and Stuart Stamp, 'Redressing the Imbalance: A Study of Legal Protections Available for Consumers of Credit and Other Financial Services in Ireland (Free Legal Advice Centre (FLAC) March 2014) 88. FLAC have suggested that 'the wording is arguably too wide, is potentially contradictory and arguably divisive. For example, to specifically absolve the Financial Services Ombudsman of the responsibility to have regard to technicality or legal form in circumstances where the complaint in question may involve the interpretation and application of both legislative provisions and codes seems to be stretching informality beyond what is reasonable. In turn, how the substantial merits of many complaints can be adequately considered without having regard to technical and legal matters is highly questionable'.

complaint being made.[385] For the purposes of this temporal exclusion, 'conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred'.[386] A report by FLAC has noted the contentious nature of the temporal limitations as 'it means that *regardless of when the complainant became aware of the detrimental consequences* of the conduct (or last instance of conduct), he or she will be precluded from pursuing a complaint if six years has passed'.[387]

The FSO is given significant latitude in terms of the grounds upon which a complaint may be substantiated and aside from where the conduct is contrary to law, the FSO may determine that notwithstanding that 'the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant'.[388] It can also hold that the 'conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration' or was otherwise improper.[389] Where a complaint is substantiated the FSO can direct the payment of compensation to the complainant for any loss, expense or inconvenience sustained as a result of the conduct; subject to the maximum threshold provided for in FSO Council regulations.[390] The FSO was required to co-operate with the Consumer Director within the Financial Regulator with a view to '….to promoting the best interests of consumers of financial services and to the efficient and effective handling of

[385] S 57BX(3) CBA 1942. A complaint is also precluded where the conduct is or has been the subject of legal proceedings before a court or tribunal, except where the 'Ombudsman reasonably suspects that the regulated financial service provider has begun those proceedings in order to prevent the making of the complaint, or to frustrate or delay its investigation'.
[386] S 57BX(5) CBA 1942.
[387] Paul Joyce and Stuart Stamp, 'Redressing the Imbalance: A Study of Legal Protections Available for Consumers of Credit and Other Financial Services in Ireland (Free Legal Advice Centre (FLAC) March 2014) 71. For a review of case law and recommendation pursuant to the issue see pages 80-83 of the report.
[388] S 57CI(2)(c) CBA 1942.
[389] S 57CI(2)(d) and (g) CBA 1942. The complaint may also be substantiated where the conduct complained of was based wholly or partly on a mistake of law or fact or where an explanation for the conduct complained of was not given when it should have been given.
[390] S 57CI(4)(d).Pursuant to s 57CI(6) the direction may provide for interest to be paid at a specified rate if the amount is not paid by a date specified. Pursuant to the Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005, SI 2005/190, the upper limits imposed on compensation are €26,000 where it related to an annuity and €250,000 in all other cases; irrespective of whether the loss suffered exceeds this threshold.

complaints' and was empowered to make recommendations regarding measures which could be taken to handle persistent patterns of complaint, either in respect of individual financial service providers, a class of providers or the manner in which financial service providers dealt with complaints.[391] The act required the FSO, the Financial Regulator and the Pensions Ombudsman to enter into a memorandum of understanding as soon as practicable, 'setting out the terms under which they agree to give effect to this section'.[392] Enforcement of a direction of the FSO is within the remit of the Circuit Court and an enforcement order may be sought by either the FSO or the complainant.[393] The FSO was empowered under the CBFSAI Act 2004, to apply to the High Court for an injunction to restrain conduct by a financial service provider where the conduct is subject to investigation, and is likely to prejudice or negate the effect or implementation of a decision that the FSO might make where the complaint is substantiated.[394]

4.5.2. Institutional Framework (Supervision & Enforcement) Spain

The dynamism of the pre-crisis Irish context, in terms of the changing boundaries of the institutional mandate for consumer protection in financial services can be juxtaposed with the Spanish framework which was comparatively static, both in terms of the relevant institutions and the mandates held. In Ireland, pre-crisis institutional reforms linked to banking sector scandals led substantially to a centralisation of institutional competence for consumer protection in the national supervisory authority; irrespective of whether the relevant regulations stemmed from consumer law or mandates contained in financial services regulation. However in Spain, there remained a clear distinction in the locus of institutional competence dependent on whether the provisions stem from the general framework of consumer protection legislation or from financial services regulation.

4.5.2.1. Banco de España

In the period from 1998 onwards, there had been a dual institutional framework for supervision of financial markets and services in Spain. Within this framework, the

[391] Ss 57CQ(1) and (2) CBA 1942.
[392] S 57CQ(3) CBA 1942.
[393] S 57CJ(2) CBA 1942.
[394] Ss 57CP(1) and (2) CBA 1942.

Comisión Nacional del Mercado de Valores (CNMV) [395] is the designated supervisory authority for the securities market, whilst the Banco De España (BDE) is the competent authority for prudential regulation and supervision of credit institutions, and as such, it is the relevant supervisory authority for current purposes. *Ley 13/1994, de 1 de junio, de Autonomía del Banco de España* (Lay 13/1994) provides the contemporary legislative basis for the role of the BDE and it identifies the various functions attributed thereto. [396] In contrast to the Central Bank and Financial Services Authority of Ireland Acts, Ley 13/1994 does not contain any direct reference to the protection of the interests of consumers and users of financial services. However, it does provide that 'the Bank shall be responsible for exercising the functions assigned to it by this law and any other functions which it might be assigned by other laws'. It thus creates scope for the conferral of additional functions on the BDE through other legislative acts. *Ley 26/1988, de 29 de julio, sobre Disciplina e Intervención de las Entidades de Crédito* (Ley 26/1988)[397] is the framework which regulates the Bank's supervisory functions over credit institutions, and it is through this legislation that the BDE is accorded a role in consumer protection.[398]

Article 48.2 of Ley 26/1998 provides a mandate to the Minister for Economy and Finance to impose certain formal and procedural requirements 'with the aim of protecting the legitimate interests of credit institutions loan and deposit clientele, and without prejudice to the freedom to contract which, in its substantive aspects and with such limitation as may emanate from other legal provisions, must govern the relationships between credit institutions and their clientele….'. Among the issues specified in the section, the Minister can mandate that 'the relevant contracts are formalised in writing and dictate the precise rules for assuring that those contracts

[395] The CNMV was established by Ley 24/1988, de 28 de julio, del Mercado de Valores, i.e. Stock Market Law. Notwithstanding that the CNMV is the regulatory authority for the securities market, the BDE also has a supervisory role therein.

[396] Prior to Ley 13/1994 on the Autonomy of the Bank of Spain, the institutional structure of the BDE was regulated by *Ley 30/1980, de 21 de junio, por la que se regulan los órganos rectores del Banco de España* (i.e. Law 30/1980 of 21 June on Governing Bodies of the Bank).

[397] Law 26/1988 of July 29, on Discipline and Intervention of Credit Institutions.

[398] Art 7.1 and preamble. The original mandate contained in art 48(2) was amended in the immediate pre-crisis context pursuant to Ley 41/2007, de 7 de diciembre. The objective of the amendment was to enhance the capacity of the Minister to impose requirements with the objective of 'seeking a more effective transparency which allows borrower to make their decisions based on the actual risks of the products'. Pursuant to the amendment the Minister could impose minimum requirements in terms of pre-contractual information provided to the consumer.

reflect explicitly and with the requisite detail the commitments undertaken by the parties and their rights ….for such purpose, the Minister may determine the issues or events which contracts ……must address or provide for expressly, demand that the credit institutions establish forms for those transactions, and impose some type of administrative monitoring of those forms'.[399] As amended by Ley 41/2007,[400] article 48(2)(a) provides that in the context of residential mortgages, the information must be provided, irrespective of the quantum of the loan.[401] As noted earlier in the chapter, a Ministerial order is one variant of Spanish secondary legislation and article 48.2 thus provides a legislative mandate to the Minister for Finance to further the objective of consumer protection in the context of financial services provided by credit institutions. In the pre-crisis context, this mandate was utilised to introduce a transparency regime in respect of mortgage loans via *Orden de 5 de mayo de 1994 sobre transparencia de las condiciones financieras de los préstamos hipotecarios* (Orden de 5 de mayo de 1994).[402] To the extent that the Banco De España was provided with a pre-crisis mandate to introduce measures to enhance consumer protection, it was predicated on a delegation of competence within such orders. This is exemplified by *Circular 5/1994, de 22 de julio* (Circular 5/1994) which implements aspects of Orden 5 Mayo 1994. It clear with reference to the scope of the issues which can be subject to a Ministerial Order pursuant to article 48.2, that the focus of the order, and by extension the implementing circular of the BDE, would be on measures which enhance transparency. The existing pre-crisis mandate was thus premised on a disclosure based paradigm of consumer protection. Whilst the normative capacity of the BDE was restricted to circulars which implement the Ministerial Order, its primary role in the context of regimes pursuant to article 48.2 of Ley 26/1988 is one of enforcement.[403] It is responsible for the investigation and sanctioning of breaches of the legislation through the administrative sanctions regime

[399] Art 4(2)(a).
[400] Ley 41/2007, de 7 de diciembre, por la que se modifica la Ley 2/1981, de 25 de marzo, de Regulación del Mercado Hipotecario y otras normas del sistema hipotecario y financiero, de regulación de las hipotecas inversas y el seguro de dependencia y por la que se establece determinada norma tributaria.
[401] Art 1 Ley 41/2007. Ley 41/2007 was also the mechanism through which there was reform of early repayment regimes (chpt IV, arts 7-9) and the regulation of reverse mortgages (first additional regulation 1-11).
[402] Order of 5 May 1994 on the transparency of financial conditions of mortgage loans.
[403] Art 18.

contained therein.[404] In respect of breaches of the requirements imposed, the legislation provides that 'the performance of acts or transactions in breach of the regulations issued under paragraph 2 of Article 48 of this Law' constitutes a serious offence.[405]

4.5.2.2. Instituto Nacional del Consumo (INC) - National Consumer Institute

The National Consumer Agency (NCA) was the public body in Ireland with a statutory mandate for consumer protection from 2007 to 2014, and the Spanish equivalent was the *Instituto Nacional del Consumo* (INC).[406] Arising from the dual tiers of government in the Spanish territory and the shared mandate in the area of consumer protection, the enforcement function has both central and regional dimensions. Under the auspices of the relevant State Ministry, the INC was the State level public agency directly responsible for consumer protection, and regional enforcement was carried out through the *Direccion General de Consumo* (DG's).[407] *Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias* (RDL 1/2007) contains the primary institutional and legislative framework for consumer protection in Spain.[408] It identifies the administrative sanctions which may be imposed in the enforcement of consumer legislation, and it permits enforcement agencies to order compensation for 'proven

[404] Chapter III, arts 8 – 17. It is directly responsible for sanction in the context of minor and serious offences and for the provision of a recommendation to the Minister for Finance who imposes sanction for very serious offences.
[405] Art 5(e).
[406] In 2014, the National Consumer Institute and the Spanish Agency for Food Safety and Nutrition were merged to create a new statutory body AECOSAN pursuant to *Real Decreto 19/2014, de 17 de enero, por el que se refunden los organismos autónomos Instituto Nacional del Consumo y Agencia Española de Seguridad Alimentaria y Nutrición en un nuevo organismo autónomo denominado Agencia Española de Consumo, Seguridad Alimentaria y Nutrición y se aprueba su estatuto*. There was a similar consolidation in Ireland as the National Consumer Agency (NCA) and the Competition Authority were merged to form the Competition and Consumer Protection Commission (CCPC) with effect from 31 October pursuant to the Competition and Consumer Protection Act 2014.
[407] 'Consumer Policy Institutions Spain' (Report for the EU Commission July 2010) 3. The relevant department is the Ministry for Health and Social Policy, although other Ministries such as Justice, Finance, Trade and Tourism may have shared competence or may need to be consulted when transposing EU legislation.
[408] Royal Legislative Decree 1/2007 of 16 November which approves the Revised Text of the General Law for the Protection of Consumers and Users and Other Supplementary Laws (RDL 1/2007).

damages' caused to the consumer.[409] The INC is responsible for maintaining a register of national consumer organisations operating at national level and it engages with the *Consejo de Consumidores y Usuarios* (CCU), i.e. 'Consumers Council' which functions as an advisory body.[410] Of the eleven consumer organisations sitting at the consumers council in 2010, one specialised in financial services, i.e. *Asociación de Usuarios de Bancos Cajas y Seguros* (ADICAE).[411] As in the Irish context, there are limitations to the role of the INC in the context of mortgage consumers. In Ireland this arises due to the ceding of competence from the ODCA, and later the NCA, to the Financial Regulator. In Spain, the limitations are not linked to the parameters of institutional competence but rather to the limited applicability of the general framework of consumer protection, i.e. RDL 1/2007, to the residential mortgage context.

4.5.2.3. Consumer Arbitration Board

Among the basic consumer rights identified in RDL 1/2007 is 'the protection of their rights through effective procedures…'. In Ireland, the Financial Services Ombudsman provides an extrajudicial forum for the resolution of disputes between consumers and providers of financial services. In Spain, the equivalent mechanism is the Consumer Arbitration Board. Article 57 of RDL 1/2007 states that 'the Consumer Arbitration System is the extrajudicial system……through which the claims of consumers and users are settled, with no special formalities and in a manner that is binding and enforceable on both parties…'.[412] The arbitration bodies are comprised of 'representatives from the business sectors concerned, consumer and user associations and public administrations'.[413] There are 73 public arbitration boards in Spain, operating variously at municipal, provincial, regional and national level. There are also sector specific boards, although an EU report identified a gap in

[409] Art 51 RDL 1/2007.
[410] Art 33 RDL 1/2007. The register was established pursuant to *Ley 44/2006, de 29 de diciembre, de mejora de la protección de los consumidores y usuarios*, (i.e. Law 44/2006 of 31 December 2006 on Improving the Protection of Consumers and Users). Whilst the CCU is comprised 'of the most representative nationwide consumer and user associations' as assessed with reference to criteria including geographic scope, membership and activities.
[411] Report notes that the CCU is 'technically supported by the INC which provides the Councils technical and administrative secretariat etc).
[412] The arbitration system is regulated by articles 57 and 58 of RDL 1/2007 and Real Decreto 231/2008, de 15 de febrero, por el que se regula el Sistema Arbitral de Consumo (i.e. Royal Decree 231/2008 to regulate the system of Consumer Arbitration).
[413] Art 57(3) RDL 1/2007.

respect of the financial services sector and anecdotal evidence suggests that the bodies are not used in the context of financial services disputes.[414]

4.5.3. Legislative Framework for Ireland and Spain

It is clear from the forgoing that in both Ireland and Spain, the supervisory authority for financial markets and services and the public agency for consumer protection had pre-crisis roles in the supervision and enforcement of regulation emanating from consumer law and financial services regulation. It is also evident that even in the pre-crisis period there was an impetus in Ireland towards centralising competence for enforcement in the supervisory authority; irrespective of the source of provisions in respect of which the competence was exercised. Whilst it is clear that there are some distinctions in the national institutional framework, the question which then arises is as to the comparability of the national legislative frameworks.

4.5.3.1. Consumer Law

To varying degrees consumer law imposes obligations which impact the contractual and conduct of business autonomy of supply side market participants. The relevant interventions may be distinguished on a multiplicity of basis, including the legal nature and source of the relevant provisions and the nature and extent of enforcement and sanctioning powers. In the context of the jurisdictions under review in the current analysis, it is notable that in Ireland, consumer law was in the ascendency as a mechanism of intervention in the pre-crisis context and, to the extent that there is financial services regulation, it is of a differing legal nature to its Spanish counterpart. A universal component of both national frameworks is provisions which implement EU law obligations on unfair terms in consumer contracts.

4.5.3.1.1. Unfair Terms in Consumer Contracts - Ireland and Spain

Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, i.e. the Unfair Contract Terms Directive or 'UCTD', is a component of the EU framework of consumer law.[415] Its relevance to the current analysis is

[414] http://ec.europa.eu/consumers/solving_consumer_disputes/docs/ms_fiches_spain.pdf

[415] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29. The UCTD contains an exemption in respect of the provision of certain financial services for terms which would otherwise be deemed unfair (see annex 2), however this does not include

determined by whether or not residential mortgage loans fall within the scope of regulated consumer contracts pursuant to the Directive. Notwithstanding previous academic commentary on the issue, it is now generally accepted that the Directive applies to real property contracts and thus residential mortgage loans fall within its remit.[416] In the pre-crisis period, the UCTD was the only binding EU legislation which was applicable to mortgage loan contracts.[417] The preamble to the Directive identifies the consumer protection aspect of the Directive as instrumental to the overarching Single Market objective '…Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts'.[418] These inter-related objectives were furthered by imposing restrictions on the terms which could be incorporated into consumer contracts through the invalidation of what were deemed to be 'unfair terms'. In the jurisdictions under review, the transposed obligations are contained in the EC (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 (UTCC Regs)[419] in Ireland, and RDL 1/2007 in Spain.[420] Pursuant to RDL 1/2007, the Spanish system also incorporates preventative control in relation to the incorporation of unfair terms into contracts. Article 84 of RDL 1/2007 precludes the authorization or registration by notaries or registrars of contracts or legal transactions which include terms

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mortgage loans; 'Contracts relating to securities, financial instruments and other goods and services with prices linked to quotations, stock-market indices or financial market rates which the entrepreneur does not control. Neither shall they be applicable to currency trading, travellers' cheques or international money orders'.

[416] Hans Schulte Nölke, Christian Twigg Flesner and Martin Ebers (eds), 'EC Consumer Law Compendium Comparative Analysis' (Report prepared for the European Commission under Service Contract No. 17.020100 / 04 / 389299, Universita(umhalt)t Bielefeld April 2007) 367 – 368. The report cites materials relating to the drafting of the Directive and, of particular relevance for Ireland in the absence of Irish case law, the persuasive authority of Khatun & Ors v Newham LBC [2004] EWCA Civ 55, [2004] All ER 386.

[417] There was a Pan European Code of Conduct on Pre-Contractual Information for Home Loans but this was of voluntary applicability.

[418] Recital 6.

[419] The 2000 regulations were necessitated by the failure of the primary regulations to confer standing on consumer associations as required pursuant to art 7(2) of the Directive.

[420] The Directive was originally transposed through an amendment to the predecessor of Law 1/2007, i.e. (Law 26/1984) which was undertaken via Law 7/1998.

contained in the Spanish Standard Terms Register, i.e. a register which lists terms which have been declared unfair by final court decisions.[421]

As a minimum harmonisation measure, the UCTD offered Member States the opportunity to exceed the protections contained therein. This scope was not exploited in Irish legislation, which adopted a 'cut and paste approach' to the transposition; an approach which in general terms has been criticised for its propensity to 'perpetuate any ambiguity' which may be contained in the source Directive.[422] The consumer is defined in the Irish regulations as 'a natural person acting for purposes which are outside his business', and the provisions apply to 'any term in a contract concluded between a seller of goods or supplier of services and a consumer, which has not been individually negotiated'.[423] The scope of the Irish regulations is thus entirely consistent with the Directive in applying to non-negotiated terms in business to consumer (B2C) contracts and this encompasses the residential mortgage context where the borrower is a consumer and is contracting on the basis of a standard form contract.[424] In Spain, the provisions contained in the Directive are subsumed into the consolidated framework of consumer protection. It is noteworthy that prior to the introduction of the Directive, Spain unlike Ireland, did have legislation which addressed unfair terms and this may have been a factor in the increased scope of the Spanish transposition.[425] RDL 1/2007 defines consumers as 'natural or legal persons acting in a sphere that falls outside entrepreneurial or professional activity' and

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[421] Hans Schulte Nölke, Christian Twigg Flesner and Martin Ebers (eds), 'EC Consumer Law Compendium Comparative Analysis' (Report prepared for the European Commission under Service Contract No. 17.020100 / 04 / 389299, Universita(umhalt)t Bielefeld April 2007) 358. Terms contained in the register may also be relied upon by a party in proceedings before a national court.

[422] Mary Donnelly and Fidelma White, 'The Effect of Information Based Consumer Protection: Lessons from a Study of the Irish Online Market', in Christian Twigg Flesner et al (eds), *Yearbook of Consumer Law 2008* (Ashgate 2008) 275. For details of identified inconsistencies, ambiguities and gaps in the UCTD see Hans Schulte Nölke, Christian Twigg Flesner and Martin Ebers (eds), 'EC Consumer Law Compendium Comparative Analysis' (Report prepared for the European Commission under Service Contract No. 17.020100 / 04 / 389299, Universita(umhalt)t Bielefeld April 2007) 332-335.

[423] Reg 3(1).

[424] Reg 3(1).

[425] Hans Schulte Nölke, Christian Twigg Flesner and Martin Ebers (eds) 'EC Consumer Law Compendium Comparative Analysis' (Report prepared for the European Commission under Service Contract No. 17.020100 / 04 / 389299, Universita(umhalt)t Bielefeld April 2007) 349 and 358. In Spain, there was a specific regime for insurance contracts and a regime of general applicability to consumer contracts; the latter in article 10 of Law 26/1984 (the precursor of Law 1/2007). In Ireland, fairness was addressed by contract law doctrines, i.e. duress, and undue influence, mistake and misrepresentation prior to the UCTD.

extends the scope beyond non negotiated terms to 'practices for which express consent has not been received'.[426] If a term in a mortgage loan contract were to fall foul of the national provisions in either Ireland or Spain, it would not be binding on the consumer. However, this does not affect the validity of the contract which continues to have legal effect provided that it can exist without the invalidated term.[427] The Irish regulations, like their Spanish counterpart offer standing to the national competent authority for consumer protection and consumer organisations to bring an application for an injunction to prohibit the use or continued use of an unfair term.[428] The Irish regulations specifically provide that there is no requirement on the applicant to establish actual loss or damage or recklessness or negligence by the supplier in the use of the term; requirements which would undoubtedly impact the efficacy of the provisions.[429] In assessing whether to grant the injunction, the court is required to take into account the interests of all the parties and in particular the public interest.[430]

Notwithstanding the *potential* usefulness of the provisions in protecting residential mortgage consumers, the issue of which terms are subject to examination for compliance and the criteria for assessing the unfairness of a contractual term are factors which will be determinative of its practical effect. Micklitz has noted that with reference to what constitutes an unfair term, 'the yardstick for review' represents a merging of distinct concepts taken from different legal traditions, i.e. significant imbalance and good faith taken from English and German law respectively.[431] Accordingly, a term is deemed to be unfair pursuant to the Directive where 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.[432] This is substantially replicated in the national legislation, as is the

[426] Arts 3 and 82 RDL 1/2007.
[427] Regs 7 and 6 UTCC Regs (Ireland); art 83 of RDL 1/2007 (Spain) provides for the nullification of unfair terms and further stipulates that 'the part of the contract affected by the nullity shall be drawn up in keeping with the provisions of Article 1,258 of the Civil Code and the principle of objective good faith'.
[428] Regs 8(1) and 8(6) UTCC Regs (Ireland); arts 53 and 54 (1) RDL 1/2007 (Spain).
[429] Reg 8(4).
[430] Reg 8(5).
[431] Hans W Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51(3) Common Market Law Review 771, 773.
[432] Art 3(1) UCTD; reg. 3(2) UTCC Regs (Ireland); art 82(1) RDL 1/2007 (Spain).

Directives stipulation, that the assessment should take into account 'the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent'.[433]

The Irish regulations include a list of relevant factors in assessing the issue of good faith and an indicative list of potentially unfair terms; both of which replicate the contents of the Directive.[434] Weatherhill suggests that despite the apparent lack of cohesion there are a number of discernible themes in the indicative list, notably 'unilateral decision making power claimed by a supplier, a lack of proportionality in the nature of the obligations and an absence of information provided to the consumer, where a term imports such deficiencies into the bargain, it is ripe for characterisation as "unfair" within the meaning of the Directive'.[435] The transposing legislation in Spain is more expansive than its Irish counterpart, thereby utilising the inherent discretion to exceed the scope of the Directive.[436] In contrast to the indicative 'grey list' in the Directive and replicated in the Irish regulations, the Spanish provisions contain a 'black list', i.e. terms which *are* deemed unfair.[437] The list of 38 items identified in the Spanish legislation exceeds the 17 contained in the annex, and it has been noted, that pursuant to the revisions undertaken in RDL 1/2007, 'a relevant addition to that list is a general mention in article 86 *ab initio* of the unfairness of terms which limit or eliminate consumers' and users' rights granted by mandatory or non-mandatory law'.[438]

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[433] Art 4(1) UCTD; reg 3(2) UTCC Regs (Ireland); art 82(3) RDL 1/2007 (Spain).
[434] Schedule 2 and 3 of the regs (Ireland) replicating recital 16 and the annex of the Directive.
[435] Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar 2005) 130.
[436] Article 82 RDL 1/2007.
[437] Article 82(4) lists a six fold categorization of the types of provisions which are deemed unfair and Articles 85 to 90 enumerate specific representative terms according to the following classification; terms which a) Bind the contract to the entrepreneur's will, b) Limit the rights of consumers and users, c) Establish a lack of reciprocity in the contract, d) Impose disproportionate guarantees on consumers and users or wrongfully impose the burden of proof upon them, e) Are disproportionate in relation to the execution and execution of the contract, or f) Contravene the rules on the applicable competence and law.
[438] 'Unfair Terms in Consumer Contracts: A New Approach? (Appendices A – D of Joint Issues Paper, Law Commission and the Scottish Law Commissions 25 July 2012) 9.

A contentious aspect of the Directive is its 'core terms exemption' which excludes consideration of terms relating to the 'main subject matter of the contract or to the adequacy of the price and remuneration, in so far as these terms are in plain, intelligible language'.[439] This exclusion is broadly consistent with the precept of individual autonomy which underpins the approach to contracts in both common and civil law regimes. The extent to which this exemption may be responsible for the dearth of Irish case law in the context of loan contracts is unclear; however, relevant UK case law demonstrates the malleability of the exemption in the absence of clearer legislative specification regarding its outer parameters.[440] An interesting distinction between Ireland and Spain is the fact that in the latter, the core terms exemption has not been expressly transposed. This had led to differing interpretations of its status in Spanish law. The first is that the core terms exemption is in force notwithstanding the absence of any Spanish provision based on the relevant article.[441] The second is that the omission is a 'tacit and lawful enhancement of consumer protection in Spain'.[442] The legitimacy of the omission has been considered by the Court of Justice of the European Union (ECJ) in *Caja de Ahorros.*[443] The reference to the ECJ from the Spanish Supreme Court concerned the issue of whether the omission of the 'core terms' exemption from Spanish legislation was compatible with the UCTD. The court held that the minimum harmonization nature of the Directive facilitated enhanced consumer protection in individual Member States, and this extended to the entire 'material scope' covered by the Directive, including Article 4(2).[444]

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[439] Art 4(2) UCTD; reg 4 UTCC Regs (Ireland).

[440] HOL and the Supreme Court respectively in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52,[2001] 3 WLR 1297 and *Office of Fair Trading v Abbey National PLC & Other* [2009] UKSC 6, [2010] 1 AC 696, agreed that the core terms exemption should be interpreted restrictively so as not to negate the aim of the Directive; nonetheless the outcome favoured the lender in both cases.

[441] 'Unfair Terms in Consumer Contracts: A New Approach? (Appendices A – D of Joint Issues Paper, Law Commission and the Scottish Law Commissions 25 July 2012) 9. 'Academics and practitioners consider that this omission should be construed in the light of the whole Spanish legal system (including the liberal approach of the Spanish Constitution to free commerce) and in accordance with the UCTD, and therefore hold that Article 4(2) is in force in Spain'.

[442] ibid. The report notes that this is the view of a minority of legal academics.

[443] ibid, 10. Case C - 484/08 Caja de Ahorros y Monte Piedad de Madrid v Asociacion de Usarios de Servicios Bancarios (Ausbanc) [2010] ECR 1 – 04785. The case concerned an action brought by a consumer association to prevent the continued use of 'rounding up clauses' in the standard home loan contracts of a major Spanish Bank.

[444] 'Unfair Terms in Consumer Contracts: A New Approach? (Appendices A – D of Joint Issues Paper, Law Commission and the Scottish Law Commissions 25 July 2012) 10.

4.5.3.1.1.1. Enforcement and Sanctions

The UCTD envisages two mechanisms of enforcement of its provisions. The first stems from the requirement that notwithstanding the continued existence of the contract, the unfair term is not binding on the consumer.[445] Pursuant to this requirement, and its incorporation in transposing legislation, it is clear that consumers in either jurisdiction may rely directly on the national provisions in the context of proceedings before the national courts. This prevents private law enforcement of the offending term; although the protections offered in this regard are of course dependent on the issue being raised as a defence either by the consumer or by the court on its own initiative.[446] Donnelly notes in the Irish context, that the regulations 'have not tended to be relied upon by individual consumers' in judicial proceedings.[447] The Directive also requires Member States to ensure that 'adequate and effective means' exist to prevent the continued use of unfair terms and, ancillary to that requirement, the capacity for those with standing to obtain a determination from competent administrative or judicial authorities as to whether a particular term is unfair. In both Ireland and Spain, this requirement has been implementing by conferring standing on competent authorities for enforcement and consumer organisations to apply for an injunction to prohibit the use of a term in consumer contracts.[448]

In 2007, a comparative EC consumer law report noted that although in Ireland, there was only one case pursuant to the provisions, there was '..consistent evidence of soft enforcement by the Office of Director of Consumer Affairs' manifest in amendments to contractual terms arising from dialogue with relevant interests parties.[449] This is substantiated by the ODCA Annual report 2006 which identifies the investigation of 35 complaints which included alleged unfair clauses in housing contracts. Although it was found that in most cases the contracts did not breach the regulations, where a

[445] Art 6(1) UCTD; regs 6 (1) UTCC Regs (Ireland); Article 83 of RDL 1/2007 (Spain). In addition to providing for the nullification of the unfair term, the latter stipulates that 'the part of the contract affected by the nullity shall be drawn up in keeping with the provisions of Article 1,258 of the Civil Code and the principle of objective good faith'.
[446] Reg 8(6).
[447] Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 290.
[448] Reg 8(1) as amended by reg 5 of the UTCC Regs 2000 (Ireland); art 54 RDL 1/2007 (Spain).
[449] Hans Schulte Nölke, Christian Twigg Flesner and Martin Ebers (eds) 'EC Consumer Law Compendium Comparative Analysis' (Report prepared for the European Commission under Service Contract No. 17.020100 / 04 / 389299, Universita(umhalt)t Bielefeld April 2007) 415.

breach was confirmed, the terms were amended or withdrawn by the businesses in question.[450] Donnelly notes however that 'there has been little evidence of enforcement activity regarding the regulations in the context of loan contracts', citing an absence of judicial applications by the NCA or any evidence of prioritisation of such contracts in the annual reports.[451] The Irish regulations do not prescribe any private law right of action for the consumer against the supplier for use of the unfair term, or in the hypothetical context where loss or damage arises from the use of the term. In addition, they do not prescribe any particular sanction by a public law body for the use of an unfair term. This is consistent with the Directive which does not specify the imposition of any sanctions. It is perhaps indicative of the perceived centrality of investigation as a route of enforcement, that the Irish regulations identify as a summary offence the obstruction of an authorized office in the gathering of information necessary to discharge the enforcement functions under the regulation.[452]

In Spain, as already noted, the unfair contract terms provisions are subsumed within the general consumer protection framework contained in RDL 1/2007. There are both administrative sanctions and redress provisions applicable where unfair contract terms are utilized. Article 51 establishes a framework of escalating administrative sanctions imposed for breaches of its provisions and the inclusion of an unfair term is identified as an infringement liable to sanction.[453] In addition to the administrative sanction and, in contrast to the Irish context, RDL 1/2007 permits the National Consumer Institute or its regional counterpart, to order the payment of compensation. 'The offender may be required to restore the situation altered by the infringement to its original state and, as appropriate, to compensate for proven damages caused to the consumer, these being determined by the body with competence for imposing the sanction'.[454] This regime reflects the 'basic consumer rights' identified in article 8 of RDL 1/2007. These include the protection of the 'legitimate economic and social interests; especially from unfair commercial practices and the inclusion of unfair

[450] 'Annual Report 2006' (Office of the Director of Consumer Affairs September 2007) 11.
[451] Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 290. Donnelly observes that 'the fact of the Regulations may well have encouraged lenders to remove the most egregious examples of unfair terms from consumer contracts'.
[452] Reg 10 prescribes this as a summary offence and cites a fine of £1,500 (in 1995).
[453] Art 49 (1)(i).
[454] Art 48. This redress is expressly stated to be in addition to any liability which may exist in civil law.

terms in contracts' and it identifies compensation and redress as a consumer right where damage or harm has been suffered.

4.5.3.1.2. Consumer Credit Act 1995 - Ireland

The Unfair Contract Terms Directive (UCTD) as a component of EU Consumer Law is directed towards consumer contracts generally. However, from 1995 onwards there has also been specific EU regulation of consumer credit contracts as a niche within consumer contracts. Notwithstanding that such legislation may appear relevant to the residential mortgage context, the distinction drawn at EU level between mortgage and consumer credit means that residential mortgage credit has been outside the scope of successive European Consumer Credit Directives.[455] To the extent that EU consumer credit legislation is relevant to the mortgage context, it is thus an initiative of national rather than EU origin. It has already been noted, that in contrast to Spain, Ireland did not avail of the scope to exceed the regulatory floor set by the minimum harmonisation UCTD. However, the situation was reversed in respect of the first Consumer Credit Directive, i.e. Directive 87/102/EEC. Ireland chose to extend the applicability of the transposing legislation to include 'housing loans', an extension which was not replicated in the Spanish context. The Consumer Credit Act 1995 (CCA 1995) as a component of the Irish legislative framework for consumer credit is applicable to mortgage loans which fall within the scope of 'housing loans' as defined in the statute. [456] As already noted, the statutory concept of 'housing loans' contained in the 1995 Act was subsequently imported into the LCLRA 2009, thereby providing consistency between the applicability of provisions from the private and public law spheres of residential mortgage regulation.[457]

[455] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L 133/66. This was preceded by Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1987] OJ L042/48.

[456] The Irish statutory framework is contained in the CCA 1995 and the EC (Consumer Credit Agreements) Regulations, 2010, which are the national transposing legislation for successive EU Directives on Consumer Credit. The former transposes Directive 87/102/EEC and consolidated and amended existing Irish legislation, the latter transposed the current Consumer Credit Directive, i.e. Directive 2008/48/EC. The regimes are mutually exclusive and the issue of applicability is determined both by the nature and quantum of the credit agreement.

[457] Where the public law provisions stemmed from Consumer Law frameworks.

Part IX of the CCA 1995 contains provisions relating to 'housing loans' made by a 'mortgage lender'. There have been extensions in the scope of both of these terms since the enactment of the statute in 1995. The statutory scope of the term 'housing loan' has increased with reference to the extension from mortgage loans with a principal private residence requirement to mortgage loans in respect of land 'on which a house is, or is to be, constructed where the person to whom the credit is provided is a consumer'.[458] Donnelly opines that although second homes and holiday homes are included with the scope of the definition contained in the CCA 1995, 'it is unlikely that a loan to fund the purchase of a buy-to-let investment property would come within the definition of a housing loan….a borrower in this situation is unlikely to be construed as a "consumer" within the meaning of the CCA'.[459] An increase in the scope of the term 'mortgage lender' paralleled the entry into the residential mortgage market of lenders who were non-credit institutions. The CCA 1995 originally defined a mortgage lender as '(a) a credit institution making housing loans or (b) any other person of a class prescribed after consultation with the Minister for the Environment'. In the period from 1995 to 2004, the majority of the statutory instruments pursuant to the CCA 1995 were for the purpose of designating specific non-credit institutions as mortgage lenders for the purposes of the act. Subsequent to the reforms undertaken in the CBFSAI Act 2004, the definition of 'mortgage lender' was streamlined to 'a person who carries on a business that consists of or includes making housing loans'.[460]

Weatherhill points out that 'EC measures affecting protection of economic interests have long favoured mandatory provision of information to consumers, improved transparency in the pre-contractual phase combined with protection in the post contractual phase most notably through the provision of cooling off periods. The assumption underlying this regulatory technique is that an imbalance in economic power can be sufficiently corrected by adjusting the environment in which the bargain is struck, by giving the consumer extra information in advance and extra time to consider the implications'.[461] Consistent with the information or disclosure

[458] Section 2(1) of the CCA 1995 as amended by s 33 and sch 3 pt 12 item 1 CBFSAI Act 2004.
[459] Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 341. Citing *AIB v Higgins and Others* [2010] IEHC 219.
[460] S 33 and sch. 3 pt. 12 item 1 CBFSAI Act 2004.
[461] Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar 2005) 84.

based paradigm of consumer protection, there is a focus in the CCA 1995 on ensuring transparency regarding the main contractual terms and the form and quantum of all costs and charges.[462] The objective is to ensure that the consumer gives an informed consent in entering the credit agreement, i.e. fully informed regarding the extent of the financial obligation being undertaken and the consequences of non-compliance with contractual terms. This is manifest in provisions which stipulate mandatory disclosure requirements,[463] the provision of annual statements of the outstanding loan amount,[464] inclusion on information, application and approval documentation of warning notices regarding the effect of default in the context of secured loans and the capacity for a variation in payment in the context of adjustable rate products.[465] Specific warnings are mandated in the context of endowment loans.[466] The provisions also promote transparency regarding the basis and quantum of costs and charges associated with the housing loan, including the interest on arrears and the potential costs of enforcement to the borrower.[467] The CCA 1995 also provided for the issuing of a direction to a mortgage agent, 'in relation to the matter and form of any advertisement or information document displayed or published by or on behalf of such agent in relation to a housing loan'.[468] William P. Fagan of the ODCA issued a direction in respect of the provision of residential mortgage credit with effect from 24th March 1997, and stated his intention to check the veracity of statements in advertisements for compliance with the direction.[469] Pursuant to the transfer of supervisory competence from the ODCA to the Financial Regulator under the CBFSAI 2003, a

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[462] Ss 132 and 134.
[463] S 129 mandates the inclusion of key information on the front page of a housing loan agreement.
[464] S 130(b).
[465] S 128.
[466] S 133.
[467] Ss 132 and 134.
[468] S 135. The direction could extend to a requirement to withdraw the advertisement or information document.
[469] The direction imposed two requirements in respect of advertisements for residential mortgage credit. The first required the inclusion of specific information in direct printed advertisements '(a) The maximum percentage of the value of the property which will normally be advanced to the borrower(s) and an indication of whether other criteria apply; (b) The maximum proportion of loan to income of the borrower(s) which will normally be provided and an indication of whether other criteria apply; (c) The cost per month of a typical €100,000 20-year variable rate mortgage and the additional cost per month of a 1% rise in the rate of interest of such a mortgage; (d) A health warning stating *the cost of your monthly repayments may increase – if you do not keep up your repayments you may lose your home*' . The second related to the inclusion of the statement that 'Lending terms and conditions will apply' in all Radio, Television, and Billboard advertisements.

direction was issued by Mary O'Dea, the Consumer Director of the Financial Regulator, addressing the information which had to be included in advertisements and other documentation that promoted debt consolidation housing loans.[470]

Aside from raising consumer awareness through mandatory disclosure requirements, the CCA 1995 also imposed more substantive obligations concerning permissible conduct of business practices. Whilst the LCLRA 2009 provides a statutory basis for the right to redeem, the CCA 1995 prohibits the imposition of early redemption fees other than in the context of a fixed rate mortgage and, where a redemption fee is or may become applicable, the fee and the basis for calculation of the charge must be disclosed in all information, application and approval documentation.[471] There is a blanket prohibition on charges for valuation reports where the loan is subsequently refused, and a prohibition on passing to borrowers any charges in respect of legal fees or costs in connection with investigation of title on any security undertaken on behalf of the lender.[472] Further prohibitions are imposed on the 'lucrative but anti-competitive practice of linking the sale of other services to the loan'.[473] Under the relevant sections of the CCA 1995 a 'mortgage agent'[474] is prohibited from reserving the right to arrange insurance on the property and from linking the offer of a housing loan to the provision of financial, conveyancing, auctioneering or other services relating to the land, whether or not in connection with the loan by the agent, or any subsidiary or associated body.[475] Donnelly asserts that this could be viewed as an enhancement of consumer protection in as much as these practices could be deemed to constitute collateral advantage; which is prohibited in the equitable context only where it is deemed to be unfair and oppressive.

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[470] The direction which took effect from 1st January 2007 prohibited the advertising of interest only housing loans as being suitable for debt consolidation purposes.

[471] S 121(1). S 121(2) provides that the exemption applies where the rate is fixed either for the full term of the loan or for at least one year, or where for a minimum five year period there is a cap on the interest rate variation of 2% over the initial rate. The economic rationale underpinning such a prohibition is that funding mechanisms in respect of fixed rate products may impose a cost on lenders whereas in a variable context they may not.

[472] Ss 123 and 125.

[473] Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 344.

[474] Pursuant to s 115(2) a mortgage agent means a mortgage lender or intermediary or an insurer or insurance intermediary.

[475] Ss 124(1) and 127 (1). Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 439.

4.5.3.1.2.1. Enforcement and Sanction

In the period from 1995 to 2003, the ODCA was the designated competent authority for supervision and enforcement functions in respect of the obligations imposed by the CCA 1995.[476] As noted earlier in this chapter, there was a change in the locus of institutional competence for consumers of financial services pursuant to the Central Bank and Financial Services Authority of Ireland Act 2003.[477] In the context of the CCA 1995, this led to a fragmentation of institutional competence depending on the nature of the service provided. The ODCA, and subsequently the National Consumer Agency (NCA), were responsible for supervision and enforcement of obligations related to the activities of credit intermediaries; whilst the Financial Regulator was the competent authority for obligations imposed on parties who entered into agreements with consumers other than as credit intermediaries.[478] The Financial Regulator was thus responsible for the supervision of mortgage lenders and mortgage intermediaries in respect of the general obligations contained in the act and, of particular relevance in the current context; the obligations imposed in part IX with respect to housing loan agreements.[479] The statutory functions and powers conferred on the Financial Regulator replicate those given to the ODCA under section 4 of the CCA 1995 as enacted, and which remain with the body in respect of credit intermediaries. These functions include reviewing existing and proposed practices in relation to the relevant obligations imposed by the CCA 1995 and the investigation of such practices where this was deemed necessary.[480] It was also charged with investigating complaints regarding possible breaches of obligations, and in determining whether to conduct such an investigation there was a requirement to take into consideration the existence of alternative resolution procedures.[481] In terms of enforcement, the Financial Regulator could request that a party refrains from engaging in conduct which was, or would be, in contravention of the obligations contained in the CCA 1995 and, in the event of non-compliance with this request, could seek a High Court order to compel compliance.[482]

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[476] S 4.
[477] Pt 21, sch 1 of CBFSAI 2003 and pt 12, sch 3 of CBFSAI 2004.
[478] From 1 May 2007, the functions of the ODCA would be vested in the National Consumer Agency (NCA) which was established pursuant to the Consumer Protection Act 2007.
[479] S 8H(2) Pt 1B as inserted by pt 21, sch 1 of CBFSAI 2003.
[480] S 8H(a) and (b) as inserted by pt 21, sch 1 of CBFSAI 2003.
[481] S 8H(e) as inserted by p.21, sch 1 of CBFSAI 2003.
[482] Ss 8 H (c) and (d) as inserted by pt 21, sch 1 of CBFSAI 2003.

With reference to the foregoing, it is clear that there are parallels between the mechanisms of supervision and enforcement in the CCA 1995 and the Regulations which transpose the UCTD. These centre on the supervision of compliance through monitoring and investigation activities and the standing to seek an injunction to compel cessation of identified contraventions. However, the CCA 1995 also includes an education function and the Financial Regulator 'may provide in response to complaints or otherwise, information or advice to consumers concerning agreements to which the designated provisions apply and in particular, on the obligations imposed on creditors or other persons by those provisions'.[483] It was also given normative functions via its capacity to publish codes of conduct, 'to secure transparency and fairness in relation to the terms of those agreements and the conduct of agents dealing with consumers under those contracts'.[484] The distinction in Ministerial Competence for the public bodies charged with enforcement is reflected in the obligation of the ODCA to submit its report to the Minister for Enterprise, Trade and Employment, whereas the Financial Regulator was to report to the Minister for Finance.[485] This parallels a differential allocation of Ministerial competence in Spain, albeit that in the Spanish context the distinction in Ministerial competence is in respect of different legislative framework within the facilitative sphere, i.e. Consumer Law via RDL 1/2007 and Financial Services Regulation via Ley 26/1988; whereas in Ireland, the differential allocation is in respect of the same component of the facilitative sphere, i.e. Consumer Law via the CCA 1995.[486]

A particular distinction between the EC (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000, and the CCA 1995, is the extent to which the latter specifies the nature and consequences of breaches of the obligations contained therein. Sections 12 and 13 identified summary and indictable offences arising from contravention of the obligations contained in the Act.[487] The relevant competent authority was empowered to prosecute summarily offences other than those relating

[483] S 8 H(2) as inserted by pt 21, sch 1 of CBFSAI 2003.
[484] Ss 8 H(f) and 5(f) for Financial Regulator and ODCA respectively.
[485] Ss 4(1) and 6 (ODCA) and ss 8G(1) and 8I (Financial Regulator).
[486] Ministry of Finance has competence in respect of Ley 26/1988 for which the BDE is the supervisory authority; whereas in the context of RDL 1/2007 for which the INC is the supervisory body it is the Ministry of Health and Social Policy.
[487] Ss 12(1) and (2) as substituted by s 33 and sch 3, pt 12 item 2 of CBFSAI Act 2004.

to the obligations imposed in relation to Moneylending.[488] There are prescribed temporal limitations on the capacity to initiate summary proceedings, i.e. 2 years from the date on which the offence was committed, or 6 month from the date on which evidence is available to justify the proceedings, provided that this is within 5 years of the date on which the offence is committed.[489] In the context of housing loans agreements, all the offences arising from a contravention of the provisions of part IX are summary offences, except where there is a breach of the prohibition on falsification or alteration of a mortgage intermediary's authorisation or, on the prohibition on linking of services.[490] The CCA 1995 provides that the Financial Regulator is immune from civil proceedings for 'failure to perform or exercise an obligation' imposed by the act, unless the failure is wilful.[491] A report by FLAC in March 2014 identified a lack of enforcement activity pursuant to the competence accorded to the Financial Regulator, or its successor the Central Bank, under the CCA 1995. The Central Bank cited the difficulty in enforcing regulations which they had not devised, and expressed a preference for measures which they had developed (e.g. Codes of Conduct) as these offered greater certainty in terms of what constituted compliance or non-compliance.[492]

It is clear that the inclusion of an unfair term in a consumer contract renders that term unenforceable, and this raises the question of the comparability of impact in the context of the CCA 1995. Breach of the obligations contained in Part III of the CCA 1995, i.e. relating to the form and contents of credit agreements, has the potential to render the entire agreement unenforceable.[493] Where a court is satisfied that the failure to comply was not deliberate, has not prejudiced the consumer and that it would be just and equitable to dispense with the requirement, 'the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be

[488] S 14(1). Offences under Part VIII could be prosecuted summarily by a member of *an Garda Siochana*.
[489] S 14(3).
[490] S 12(1)(i) and 12(2)(d).
[491] S 16(2) as substituted by CBFSAI 2003.
[492] Paul Joyce and Stuart Stamp, Redressing the Imbalance: A Study of Legal Protections Available for Consumers of Credit and Other Financial Services in Ireland (Free Legal Advice Centre (FLAC) March 2014) 19.
[493] S 38.

enforceable'.[494] Notably for current purposes, housing loans are distinguished from other credit agreements in this regard, as the enforceability of a housing loan agreement is unaffected by breach of the obligations contained in the CCA 1995. [495]

4.5.3.1.3. Consumer Protection Act 2007 - Ireland

The Consumer Protection Act 2007 (CPA 2007) is the legislation through which the transposition of the Unfair Commercial Practices Directive (UCPD) was undertaken in Irish law.[496] The objective of the Directive was to prevent consumers being 'misled or exposed to aggressive marketing', and to ensure that 'any claim made by traders in the EU is clear, accurate and substantiated, thus enabling consumers to make informed and meaningful choices'.[497] In broad terms, the Directive prohibits the use of unfair, misleading and aggressive commercial practices in the context of business to consumer transactions. Notwithstanding the applicability to commercial practices in the supply of financial services to consumers, the legislation is considered to be of tangential relevance in the current analysis. This assertion stems both from the principles based nature of the provisions, and the exemption provided for financial services. Broadly speaking, the UCPD is a maximum harmonisation measure which precludes the introduction of national measures which exceed the threshold of its provisions.[498] However, the Directive provides for a derogation in the fields of financial services and immoveable property, and as a result, the Directive

[494] S 38. This saving provision does not, however, apply if the contravention is in respect of s 30 which requires contracts to be in writing, signed by the parties, provided to the consumer and, to contain certain information regarding withdrawal rights and penalties for breach of obligations.
[495] Housing loans are exempt from the withdrawal and termination rights applicable to other credit agreements under s 50. Per s 50(4), the 10 day cooling off period is inapplicable to 'a housing loan, or credit availed of by means of a credit card or an overdraft facility offered by a credit institution'.
[496] Directive 2005/29/EC of the European Parliament and of the Council of 11th May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) [2005] OJ L149/22.
[497] Commission, 'First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive)' COM 2013 139 final, 2.
[498] Art 4. COM (2013) 139 final, 3 notes that this has been confirmed by the ECJ in joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium,* and *Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I – 02949.

has a minimum harmonisation effect in the context of residential mortgage regulation.[499] The justification provided for the derogation is that 'financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders'.[500] Pursuant to the derogation, Member States can impose rules which go beyond the provisions of the Directive, as long as they comply with other EU legislation. In the event of conflict between sectoral legislation and the general provisions of the Directive, the provisions of the *lex specialis* will prevail.[501] A study on the application of the Directive in the field of financial services showed that 'most Member States have maintained or adopted legislation in the areas of financial services and immovable property that goes beyond the standards laid down by the UCPD', and this is true of Ireland and Spain in respect of aspects relevant to the current analysis.[502] Notably, transposition of the UCPD in Spain occurred in the first stage of the post-crisis period, subsequent to a judgment obtained against Spain by the EU Commission for a failure to transpose within the prescribed period.[503]

Notwithstanding the foregoing assertion regarding the limited relevance of the UCPD to the current analysis, there are two aspects of the Irish transposing legislation which are of note. Pursuant to the Directive, Member States are given discretion to determine the enforcement mechanisms and penalties, provided that the latter are 'effective, proportionate and dissuasive'.[504] In common with the legislation transposing the Unfair Contract Terms Directive (UCTD) there is the use of injunctions as a mechanism of public law enforcement.[505] However the CPA 2007 also introduces 'a right of action for relief by way of damages, including exemplary

[499] Art 3(9).
[500] Recital 9 UCPD.
[501] Art 3(4). COM (2013) 139 final, 5. 'Often, such conflict occurs because the *lex specialis* contains more detailed pre-contractual information requirements, or stricter rules on the way information is presented to consumers..'.
[502] COM (2013) 139 final, 24. Civic Consulting, 'Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU Part 2 – Country Reports Final Report' (Report for the EU Commission DG Justice, 22 December 2011) at 9.2.1.4 and 9.3.1.4. in respect of Spain.
[503] Ley 29/2009, de 30 de diciembre, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios, (i.e. Law 29/2009 of 30 December to modify the legal regime of unfair competition and advertising to improve the protection of consumers and users) subsequent to Case C – 321/08 Commission of the European Communities v Kingdom of Spain [2008] ECR I – 00063.
[504] Arts 11 and 13 UCPD.
[505] S 71 CPA 2007.

damages' for consumers who are aggrieved by a prohibited act or practice under the act.[506] In the post-crisis context, this would be echoed by the introduction of a right of action in the field of financial services regulation through the Central Bank (Supervision and Enforcement) Act 2013; although notably, the latter restricts recovery to compensatory damages.[507] Another interesting aspect of the Directive and the transposing legislation is the differential thresholds imposed dependent on whether the consumer is conceptualised as being 'vulnerable'. The concept of the 'vulnerable consumer' within the Consumer Protection Code, is identified in this analysis as an innovation in the Irish framework; however the UCPD, which was adopted in 2005 and thus predates the Irish Code, provides for a differential threshold in respect of 'a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity'.[508] It is open to question as to whether this may have inspired the inclusion of the vulnerable consumer concept in the subsequent statutory code.

4.5.3.2. Financial Services Regulation – Ireland and Spain

The foregoing regulatory interventions are intended to impact the contractual and conduct of business autonomy of the lender and are classified as Consumer Law; notwithstanding that the distribution of competence for enforcement may have moved from the national consumer agency to the supervisory authority for financial markets and services. The vesting of consumer protection competence in the Financial Regulator pursuant to the CBFSAI Acts, and the various developments associated with this competence are for current purposes the most significant aspect of the institutional reforms undertaken in the immediate pre-crisis period. The Honohan report notes, that in the period from 2003 to 2007, the Financial Regulator 'paid particular attention to issues relating to consumer matters', and Scally notes that 'the activist part of the consumer protection brief developed strongly over time'.[509] This undoubtedly reflects the emphasis arising from the over charging

[506] S 74(2) CPA 2007.
[507] S 44 Central Bank (Supervision and Enforcement) Act 2013.
[508] Art 5(3).
[509] Patrick Honohan, 'The Irish Banking Crisis: Regulatory and Financial Stability Policy: 2003-2008' (A Report to the Minister for Finance from the Governor of the Central Bank, 31 May 2010) 35 and 41 at 3.20 and 3.3. William Scally, 'Fixing Finance 3: The Irish Experience' (Institute of International and European Affairs 2010) 18.

scandal in the banking sector, and also the perception that the conduct of business framework in banking was underdeveloped, as compared with its investment services counterpart.[510] As noted, the Financial Regulator was empowered, pursuant to the mandate contained in section 117 of the Central Bank Act 1989 (CBA 1989), to initiate Codes of Practice in consultation with the Minister, having 'regard to (a) the interest of customers and the general public, and (b) the promotion of fair competition in financial markets in the State'. Section 8H(f) of the CCA 1995 further conferred competence, to 'publish codes of practice setting out conduct relating to agreements …in order to secure transparency and fairness in relation to the terms of those agreements and the conduct of agents dealing with consumers under those agreements'. In 2006, further to these and other statutory powers, the Financial Regulator introduced the Consumer Protection Code 2006 (CPC 2006).[511] Within the pre-crisis Irish facilitative sphere of residential mortgage regulation, the CPC 2006 is the sole component of the financial services framework.

4.5.3.2.1. Consumer Protection Code 2006

The CPC 2006 is a statutory code which imposed conduct of business requirements in the provision of retail financial services by regulated entities operating in the State.[512] The CPC 2006 came into effect on 1 July 2007, and although the scope of applicability in the mortgage context was initially restricted to credit institutions and mortgage intermediaries, it was subsequently extended to include non-credit institutions in the form of retail credit firms and home reversion firms.[513] This

[510] The McDowell report had noted that consumer protection in the Irish regulatory structure was more developed in the area of investment services than in banking; see 'Report of the Implementation Advisory Group on the Establishment of a Single Regulatory Authority for the Financial Services Sector' (Stationery Office 1999) 2.25 – 2.26.

[511] The CPC 2006 cites the legislative basis for the Code as 'the Central Bank Acts 1942 to 1998 (including without limitation Section 33S(6) of the Central Bank Act 1942); the Investment Intermediaries Act 1995; the Consumer Credit Act 1995; the Stock Exchange Act 1995; the Insurance Acts 1909 to 2000; and relevant statutory instruments'.

[512] 'Consumer Protection Code 2012' (Central Bank of Ireland December 2011) 3. The CPC 2012 asserts that the central objective in introducing a CPC was to ensure a similar level of protection for consumers, irrespective of the type of financial services provider they chose. The Code did not apply where the regulated entity was providing services to persons outside the State.

[513] The Central Bank Act 1997, as amended by the Markets in Financial Instruments and Miscellaneous Provisions Act 2007, confer authorisation and supervision functions on the Financial Regulator in respect of retail credit firms and home reversion firms. With effect from 1 February 2008, these entities were required to apply for authorisation and were subject to the requirements of the Consumer Protection Code. The deadline for registration of existing market participants was 30 April 2008, and the Financial Regulator reserved the right to impose the CPC at any stage of the

created a universal conduct of business framework for all mortgage lenders and intermediaries, irrespective of classification. In doing so, it created greater convergence in the applicability of conduct of business frameworks emanating from the supervisory authority with those created via consumer law, as the latter did not distinguish on the basis of the service provider but rather the loan type, i.e. regulations pursuant to the UCTD were applicable to 'consumer contracts' and relevant provisions of the CCA 1995 were applicable in respect of the provisions of 'housing loans'.

The CPC 2006 contained seven chapters and whilst chapter one, two and seven on general principles, common rule and advertising were applicable to all regulated entities, the remaining chapters distinguished between the types of service provided.[514] As the title suggests, chapter one imposes principle based obligations on regulated entities.[515] These include the requirement to act honestly, fairly and professionally in the best interests of its customers and the integrity of the market; to act with due skill, care and diligence in the best interests of customers; to avoid recklessly, negligently or deliberately misleading a customer as to the real or perceived advantages or disadvantages of any product or service; to makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer; to not exert undue pressure or undue influence on a customer; to ensure that any outsourced activity complies with the requirements of the Code and to comply with both the letter and spirit of the Code.

Within the common rules for all regulated entities, there were provisions on 'knowing the consumer' and product suitability. The former provided that 'before

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application process. In May 2008, an addendum to the CPC 2006 was issued to reflect the increased scope of applicability.

[514] Chapter 3 (Banking Products and Services) applies to regulated entities when providing banking products and services, Chapter 4 (Loans) applies to credit providers and mortgage intermediaries, Chapter 5 (Insurance Products and Services) applies to insurance undertakings and insurance intermediaries and Chapter 6 (Investments) will apply to regulated entities providing investment services, or providing services in relation to deposits with a term equal to or greater than one year, other than MiFID Services.

[515] Chapter 1 General Principles is applicable to dealings with customers whereas the other chapters are applicable to dealings with consumers, the definition of which exceeds the traditional statutory parameters. See Mary Donnelly, 'The Consumer Protection Code: Regulatory Innovation from the Irish Financial Regulator' in Deborah Parry, Annette Nordhausen, Geraint Howells and Christain Twigg Flesner (eds), *Yearbook of Consumer Law 2009* (Routledge 2008).

providing a product or service to a consumer, a regulated entity must gather and record sufficient information from the consumer to enable it to provide a recommendation or a product or service appropriate to that consumer…..the level of information gathered should be appropriate to the nature and complexity of the product or service being sought by the consumer, but must be to a level that allows the regulated entity to provide a professional service'.[516] The suitability provision required the regulated entity to ensure, 'having regard to the facts disclosed by the consumer and other relevant facts about that consumer of which the regulated entity is aware', that any product or service offered to the consumer was suitable for that consumer and, in the context of a recommendation by the regulated entity, to ensure that the recommended product was the most suitable for the consumer.[517] Notably, these provisions were inapplicable where the consumer had specified the product and provider and had not received any advice.[518]

It would be reasonable to suggest that the impact of the CPC 2006 on the origination of residential mortgage loans in the pre-crisis context is negligible. This assertion reflects both temporal and content related limitations associated with the code. The CPC 2006 was applicable for a limited duration in the pre-crisis period; credit institutions were required to comply with the obligations from 1 July 2007, and non-credit institutions from 1st May 2008. In addition, the Code was principles based rather than prescriptive in the content of its obligations. Although it imposed suitability and knowing the customer requirements, the procedural or substantive requirements to fulfil this obligation were not identified. In addition, the provisions addressing mortgage loans are comparatively limited in quantity and scope and there are no provisions addressing underwriting from an affordability or sustainability perspective.[519] Nonetheless, the introduction of the CPC 2006 was seen as 'a new departure' in Irish consumer protection and, in the current context it represents the

[516] Provision 24.
[517] Provision 30.
[518] The provision was also inapplicable where it was established that the consumer was seeking a basic banking service and had been advised of any restrictions on the account and /or the availability of a lower cost alternative.
[519] Provisions 10 to 15 in chapter 4 address mortgage lending and focus on information requirements in the context of arrears, the accessibility of information for consumers regarding the appointment of mortgage intermediaries by lenders and the requirement for intermediaries to have had sight of supporting documentation. Provisions 16 to 18 specifically addressing lifetime mortgages in terms of the requirement for explanations regarding the consequences of the product, risk warnings on documentation and communicating the importance of seeking independent legal advice.

emergence of a new component in the facilitative sphere of residential mortgage regulation.[520]

4.5.3.2.2. Ley 26/1988, de 29 de julio, sobre Disciplina e Intervención de las Entidades de Crédito

In Ireland, a pre-crisis conduct of business regime for retail financial services had been developed by the Financial Regulator pursuant to mandates contained within primary legislation; notably for current purposes, the CBA 1989 and the CCA 1995. In Spain, there was also a mandate contained in primary legislation which facilitated the imposition of transparency based conduct of business obligations in the financial services context. However as noted previously, the mandate which was contained in Article 48.2 of Ley 26/1998, was granted not to the BDE but rather to the Minister for Finance.

The existence of Article 48.2 reflects a clear distinction drawn in the Spanish legal framework between the nature and locus of consumer protection provisions generally and those applicable to the financial services context specifically. The distinction is readily identifiable due to a pre-crisis consolidation of legislative and institutional provisions for consumer protection, from both domestic and EU law, into a single national framework RDL 1/2007, and the omission of financial services related provisions from this consolidated legislation.[521] The enactment of RDL 1/2007 was pursuant to a legislative mandate to consolidate the existing general framework of domestic law, *Ley 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios*[522] with discrete legislation which transposed EU Directives relating to consumer protection.[523] The distinction drawn between contracts for financial services and other consumer contracts is acknowledged in the preamble to RDL 1/2007, which notes the exclusion of legislation transposing the first EC Consumer Credit Directive from the consolidated law; 'in consideration of

[520] See Mary Donnelly, 'The Consumer Protection Code: Regulatory Innovation from the Irish Financial Regulator' in Deborah Parry, Annette Nordhausen, Geraint Howells and Christain Twigg Flesner (eds), *Yearbook of Consumer Law 2009* (Routledge 2008).
[521] In contrast, the Irish legislative landscape is fragmented, characterised by multiple standalone measures.
[522] Law 26/1984 of 19 July 1984 for the Protection of Consumers and Users.
[523] The mandate was contained in *Ley 44/2006, de 29 de diciembre, de mejora de la protección de los consumidores y usuarios*, i.e. Law 44/2006 of 29 December 2006 on Improving the Protection of Consumers and Users and required the consolidation to be completed within a 12 month period.

its specific effect on the financial environment'.[524] The assertion was that consumer credit should be regulated, by 'the general rules contained in (the consolidated consumer protection law) and through the rules regulating financial services, in particular those referring to the obligations of credit institutions in relation to customer information, advertising and the transparency of transactions. It is considered that the regulation on consumer credit is more harmoniously integrated into this group of financial provisions'.[525] This approach is reflected in the pre-crisis fragmentation of legislative provisions and institutional competence, i.e. the applicability of discrete aspects of RDL 1/2007, with the INC and its regional counterparts as the relevant authority for enforcement, and the transparency framework stemming from Ley 26/1988, in respect of which the BDE was responsible for enforcement.

Pursuant to the mandate contained in Article 48.2, there were two orders adopted which established a pre-crisis transparency regime applicable to the services provided by credit institutions. The first was *Orden de 12 de diciembre de 1989, sobre tipos de interés y comisiones, normas de actuación, información a clientes y publicidad de las Entidades de crédito*, i.e. Order of 12 December which addressed interest rates, fees, performance standards and advertising by Credit institutions and was thus of broad applicability. The second measure, *Orden de 5 de mayo de 1994 sobre transparencia de las condiciones financieras de los préstamos hipotecarios*, i.e. Order 5 May 1994 on the transparency of the financial conditions of mortgage loans, was directly relevant to the residential mortgage context.[526] As the title suggests, and in common with the CCA 1995 in Ireland, the central objective of Orden de 5 de mayo de 1994 was to enhance the consumers understanding of the nature, effect and scope of the contractual commitments and to enhance the comparability of different products through provisions addressing the format and content of information.[527] In contrast to the CCA 1995, the Order, whilst mandating transparency as to charges and fees associated with ancillary services, does not

[524] Law 7/1995 of 23 March 1995 which transposed Directive 87/102 EEC on Consumer Credit. Various Directives on the distance marketing of consumer financial services, e.g. Directive 90/619/EEC, Directives 97/7/EC, 98/27/EC were also excluded.
[525] RDL 1/2007, 1 – 2.
[526] Related Circulars of the Banco De Espana; Circular 8/1990, de 7 de septiembre and Circular 5/1994, de 22 de julio.
[527] Arts 3 and 5 address pre-contractual information and the binding offer with the template for minimum content and format in Annex I and II respectively.

restrict the capacity of credit institutions to pass charges onto the customer.[528] It identifies specific obligations imposed on notaries to verify the accuracy and consistency of the documentation provided to the customer and to bring terms of legal and financial significance to the attention of the consumer.[529] The order also provided a mandate to the Banco De España to develop additional measures for the implementation of the order, and in particular, it references the revision of the pre-contractual template, in terms of content or format, where necessary to address product innovation.[530]

4.6. Pre-Crisis Role of the EU

As is evident from the national profiles contained in this chapter, the pre-crisis EU regulatory role in respect of residential mortgages was of a limited nature. In legislative terms, this is manifest by the fact that the Unfair Contract Terms Directive (UCTD) was substantially the only pre-crisis EU legislation applicable to mortgage loan contracts. As previously noted, the role of the Unfair Commercial Practices Directive (UCPD) in conduct of business regulation in the residential mortgage context was minimised by the derogation provided for in the field of financial services and immoveable property, and the limited pre-crisis temporal applicability.[531] There was no binding EU legislation of direct relevance to mortgage origination, whilst the distinction made at EU level between consumer credit and mortgage credit, resulted in mortgage loans being excluded from the scope of successive EU consumer credit Directives.[532]

In institutional terms, notwithstanding the existence of a Committee of European Banking Supervisors (CEBS), this did not provide the basis for an EU supervisory or regulatory role in national residential mortgage markets.[533] The CEBS, which came

[528] Art 4 stipulates that where the credit institution provides the service and it is paid for by the customer, the latter is entitled to a copy of the valuation report etc.
[529] Art 7 addresses issues such as early redemption fees, interest rate calculations and the consistency between pre-contractual information and the contract itself.
[530] First additional provision.
[531] It was not applicable to the pre-crisis Spanish context as transposition did not occur until December 2009, and in Ireland, its applicability was limited to the period from 1 May 2007 onwards.
[532] A Pan European Code of Conduct on Pre Contractual Information for Home Loans did exist although this was a voluntary rather than binding measure.
[533] Commission Decision 2004/5/EC of 5 November 2003 establishing the Committee of European Banking Supervisors [2004] OJ L003/28.

into operation on 1st January 2004, was possessed of advisory and co-ordination functions within the context of the Lamfalussy framework for the adoption of legislation.[534] The committee, which was comprised of representatives of the national competent authority for supervision of credit institutions, the national central bank and the ECB was mandated, to 'advise the Commission ….in particular as regards the preparation of draft implementing measures in the field of banking activities'.[535] In addition, it was to 'contribute to the consistent application of Community directives and to the convergence of Member States' supervisory practices throughout the Community. It shall enhance supervisory cooperation, including the exchange of information on individual supervised institutions'.[536] There are similarities between the CEBS, and its successor the European Banking Authority (EBA), in respect of the forgoing objectives and the participants in the process. Notwithstanding these parallels, there were significant differences in the status and mandate of the CEBS as compared with its successor, which minimised the capacity of the former to impact the national residential mortgage context. One of these was the distinction in the legal status of the CEBS as a committee, as compared with the EBA which was an independent EU agency with supervisory powers over national competent authorities. Even if this had not been an issue, the content of the CEBS mandate was restricted to prudential aspects thus it had no role in consumer protection or associated conduct of business aspects.[537] The question which arises is why the EU role was so peripheral to the national legal and supervisory framework in the pre-crisis period? The answer lies in the desire to further the EU Single Market objective within the prevailing pre-crisis neo liberal regulatory context.

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[534] European Union Committee, 'The Post Crisis EU Financial Regulatory Framework: Do the Pieces Fit?' (HL 2014-15 103, Stationery Office 2 February 2015) 35. The report notes that the Lamfalussy approach which was adopted in 2001 'characterises legislation in the financial sphere as following a 'hierarchy of norms' approach which distinguishes between high level primary measures and technical secondary measures'.

[535] Arts 2 and 3, Commission Decision 2004/5/EC. The Chairperson of the CEBS was also an observer at meetings of the European Banking Committee (EBC) whose function was to advise the EU Commission 'on issues related to Commission policy and proposals in the field of banking. The EBC was comprised of high level representatives from Member States and chaired by a representative of the Commission. The EBC was established pursuant to Commission Decision 2004/10/EC of 3 November 2003 replacing the previous Banking Advisory Committee.

[536] Art 2, Commission Decision 2004/5/EC.

[537] 'European Banking Supervision Taking Shape – EBA and its Changing Context' (Special Report No 5, European Court of Auditors 2014) 11.

4.6.1. EU Single Market

The single market was a raison d'etre of the European Economic Community (EEC) and it remains a pillar of what is now the European Union (EU).

Article 26 TFEU (ex art 14 TEC) provides that

1. *The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.*

2. *The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.*

In the decades which followed the adoption of the Single European Act in 1986, the manufacturing and product based economy which characterised the 1980's, was replaced by a knowledge based and service oriented variant, and there was a corresponding change in the focus of Single Market initiatives.[538] In the service based economic landscape, financial markets were viewed as playing a central role, a point highlighted by the extent to which a single EU financial services market was linked to the attainment of the Lisbon economic objectives.[539] 'Empirical studies now provide clear evidence of a link between a regions financial market sophistication and its economic growth, the lesson for Europe is that a new dynamic in the European economy is predicated not least on a further liberalisation and integration of the European financial markets'.[540] The expectation that wholesale market integration pursuant to the Financial Services Action Plan (FSAP), ongoing

[538] Commission, 'A Single Market for 21st Century Europe' COM (2007) 724 final, 8. The report identifies services as accounting for 70% of GDP, 68% of employment and 96% of new jobs created in the EU. It also highlights the low level of intra EU trade in services, i.e. 20%, thereby substantiating claims of market fragmentation.

[539] Commission, 'Financial Services Policy 2005-2010' (White Paper) COM (2005) 629 final, 4; Bernhard Speyer, 'Post FSAP: Window of opportunity to complete financial market integration', (EU Monitor - Financial Market Special No 24, Deutsche Bank Research 2005) 3. Commission, 'Single Market in Financial Services Progress Report 2006' (Commission Staff Working Document) SEC (2007) 263, 3; Commission, 'Accompanying document to the White Paper on the Integration of EU Mortgage Credit Markets - Impact Assessment' (Commission Staff Working Document) SEC (2007) 1683, 4.

[540] Norbert Walter, 'Financial Market Regulation in the EU: Reflection Yes, Fatigue No' (EU Monitor-Economics 1 September, Deutsche Bank Research 2004) 3.

from 1999 to 2005, aligned with the integration of money markets implicit in the single currency, would of itself promote integration of the retail sector, remained unfulfilled.[541] The EU Commission concluded at a mid-term review of the FSAP, that further action would be necessary to achieve the single market, particularly in the retail sector, as studies confirmed ongoing fragmentation of retail financial services.[542] The Asmussen Report[543] advocated the prioritisation of areas for intervention so as to optimise the benefits derived from action, and mortgage markets were prioritised contingent on their macroeconomic and social significance.[544] A mortgage credit initiative was launched in 2003, with the objective of assessing the existing degree of market integration and identifying any measures necessary to further the process. In advancing the single market in any sector, including financial services, the capacity for regulatory intervention by the EU is premised on competence derived from the EU treaties. In the pre-crisis context, although the Lisbon Treaty had been ratified, it had not yet come into effect, and thus any EU legislation in the residential mortgage context would necessarily have to be premised on the treaty provisions as they existed prior to the Lisbon Treaty.[545]

4.6.1.1. EU Competence – Mortgage Markets

As already asserted, EU intervention in national residential mortgage markets must be legitimated with reference to the competences conferred by the EU treaties. It is

[541] Raimar Dieckmann, 'EU Retail Banking: Drivers for the Emergence of Cross-Border Business' (EU Monitor-Financial Market Special No 36, Deutsche Bank Research 2006) 3.

[542] Bernhard Speyer, 'Post-FSAP Agenda: Window of Opportunity to Complete Financial Market Integration' (EU Monitor – Financial Market Special No 24, Deutsche Bank Research 2005) 3. 'The Costs and Benefits of Integration of EU Mortgage Markets' (London Economics for DG Internal Market and Services, 2005) 1;Commission, 'Retail Financial Services in the Single Market' (Green Paper) COM (2007) 226 final, 5. This assessment was predicated on the extent to which consumers purchase financial services from non-domestic suppliers, the rate of cross border market entry by lenders and the variation in mortgage product availability and cost.

[543] Financial Services Committee, 'Report on financial market integration' (FSC 4156/04, 17 May 2004).

[544] The policy priorities for the period subsequent to the FSAP were outlined in COM (2005) 629. However, by the time the document was published retail initiatives were already ongoing in consumer credit, payment services and mortgage credit. Subsequent to the White Paper and the results of a sectoral inquiry into retail banking which indicated competitive distortions within the sector, a Green Paper addressing the retail financial services sector was published; 'Retail Financial Services in the Single Market' (Green Paper) COM (2007) 226 final.

[545] The Lisbon Treaty was signed on 13 December 2007, but it did not come into effect until 1 December 2009. Although the Treaty of Nice (2003) was subsequent to the Treaty of Amsterdam (1997), it did not undertake any substantive changes to relevant treaty provisions as the focus was on institutional and procedural aspects necessary to facilitate the enlargement of the European Community.

clear that prior to the entry into force of the Lisbon Treaty on 1 December 2009, there was the capacity for regulatory intervention in furtherance of the single market and consumer protection objectives.

Article 169 TFEU, (ex Art 153 TEC) provided as follows;

1. *In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*

2. *The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States.*

Consumer protection objectives may thus be advanced through a harmonisation of laws in furtherance of the internal market pursuant to Article 114 TFEU. Notably, the consumer protection objective may be either the object of the harmonisation measures, i.e. in the context of divergent national consumer protection laws, or the harmonisation may have a different focus but nonetheless have an incidental regulatory impact.[546] Whereas harmonisation pursuant to Article 114 TFEU ascribes the primary role to the EU, the mechanism identified in Article 169(2)(b) TFEU has been interpreted as ascribing a subordinate role to EU legislation to the extent that it 'seeks to improve the quality of national consumer policy and not at all to replace it'.[547] Notably there is an overarching treaty requirement to take into account

[546] Geraint Howells and Stephen Weatherhill, *Consumer Protection Law* (2nd edn, Ashgate 2005) 104. The authors note that economic integration in Europe may be viewed as a form of consumer policy, i.e. a 'virtuous circle' with the consumer as the ultimate beneficiary of the process i.e. a passive recipient of the advantages of cross border commercial activity.

[547] ibid, 128 and 129. Howells and Weather point out that notwithstanding the potential to introduce legislation independent of market integration law, the latter has remained the dominant source.

consumer protection requirements when defining and implementing other EU policies.[548]

EU regulatory intervention is inherently more problematic in the context of residential mortgage loans than other forms of consumer credit due to the dual nature of the legal rights inherent therein, i.e. *rights in rem* and *rights in personam.* The constitutive framework of national property law regulates the *rights in rem* aspects and notwithstanding the foregoing provisions, a bulwark against intervention which touches on national property law is contained in Article 345 TFEU (ex article 295 TEC).

> *'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'.*

A variety of academic perspectives had been expressed in the pre-crisis context as to the extent of the barrier posed by article 345 TFEU. Sparkes suggested that the limitation was not as straightforward or all-encompassing as it might appear, and noted that the complexities of the article had been predominantly explored within the context of intellectual property rights.[549] Griffiths opined that although the creation of rights in land is an area of national competence, the exercise of these rights could not be inconsistent with the objectives of the Community, and that the centrality of the single market to the EU imputed that in the event of conflict, Community interest in securing the economic freedoms implicit therein would prevail over the apparent limitation imposed by article 345.[550] Remien asserted that although the provision insulates national regimes from unwarranted EU interference by raising the threshold for intervention, it does not appear to exempt national property law from the impact

[548] Art 12 TFEU ex art 153(2) TEC.

[549] Peter Sparkes, *European Land Law* (Hart Publishing 2007) 109 and 110. Sparkes notes that there is a degree of ambiguity regarding its meaning and its practical utility is minimised by the fact that arguments based on the provision have been rejected in every reported case.

[550] Gerwyn Griffiths, 'The Bastion Falls? The European Union and the Law of Property' (2003) 8(2) Conveyancing and Property Law Journal 39. There is the capacity for mortgage credit to be conceptualised as a free movement of capital. In this context, and with reference to Griffith perspective, the free movement of capital as a fundamental freedom of the internal market could be used to counter the limitation imposed by Art. 345. See Peter Sparkes, *European Land Law* (Hart Publishing 2007) 23, 27, 109 to 112, 120 and 383; Leo Flynn, 'Coming of Age: The Free Movement of Capital Case Law 1993-2002', (2002) 39(4) Common Market Law Review 773.

of European primary law.[551] Even if article 345 TFEU did not pose an insurmountable legal barrier, it is clear that it makes regulatory intervention impacting national property law a more complex proposition. In addition, even where a clear legal mandate exists, intervention must satisfy the principles of proportionality and subsidiarity and a further consideration was whether regulatory intervention in the residential mortgage context could satisfy these principles with reference to the feasibility of the objectives of intervention, in light of the heterogeneity of national property law frameworks.[552] It is thus clear that there were both legal and practical impediments to pre-crisis regulatory intervention which targeted or otherwise impacted national property law.

In contrast to the *rights in rem* aspects, there was less difficulty in legal terms with the prospect of EU intervention in the context of the *rights in personam* aspects as with reference to the cited provisions, a legal basis exists for EU intervention premised for example on consumer protection. [553] Again, such intervention would be subject to justification on the grounds of subsidiarity and proportionality; however, there is at least a clear mandate. Notwithstanding the existence of a treaty based mandate and an integration objective there was nonetheless an absence of pre-crisis EU regulatory intervention as is evident from the profiles of national frameworks. The explanation lies in the analysis undertaken within the context of the EU Mortgage Credit Initiative which was ongoing in the five year period preceding the crisis.

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[551] Oliver Remien, 'Real Property Law and European Private Law – A Sketch of an Unsurveyed Territory' (European University Institute 2005).

[552] Notably, consideration of subsidiarity and proportionality underlie all EU regulatory intervention and would thus be a factor in any regulatory intervention in the residential mortgage context. Under Article 5(3) TEU there are three preconditions for intervention by Union institutions in accordance with the principle of subsidiarity: (a) the area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence); (b) the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity); (c) the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e. added value).

[553] Geraint Howells and Stephen Weatherhill, *Consumer Protection Law* (2nd edn, Ashgate 2005) 121 and 122. The authors notes that notwithstanding an express political commitment as manifest in a succession of soft law documents from 1975 onwards, there was no express EU legal competence in the field of consumer protection prior to the Treaty on European Union (TEU) They observe the publication of various strategy documents, e.g. Consumer Policy Strategy 2002-2006, which are significant in terms of 'setting out a coherent programme for the EU as an actor with responsibilities in the field of Consumer Protection'. Howell points out that these soft law sources were incapable of subverting the fundamental constitutional point asserted by art1 TFEU (Ex 5 TEC), that in principle the EC's legislative authority in the consumer field reaches no further than is allowed by the Treaty.

4.6.2. Mortgage Credit Initiative (2003 – 2007)

As noted previously, the EU Mortgage Credit Initiative (MCI) was launched in 2003 in response to persistent fragmentation of mortgage markets against a backdrop of EU financial market integration. The 'better regulation' principle which had become an intrinsic feature of policy determination in the post FSAP period, required policy initiatives to be based on objective economic analysis and open and transparent consultation with stakeholder groups.[554] There was a succession of reports issued pursuant to this economic analysis and consultation process which culminated in the publication of a White Paper in December 2007.[555] These publications offer a valuable insight into pre-crisis EU policy objectives, stakeholder perspectives and the orientation of the strategy for integration.

4.6.2.1. Strategy for Integration and Role of National Property Law

The primary EU policy objective was to promote the integration of mortgage markets; integration being characterised by increased cross border activity and a convergence in the cost and availability of mortgage products across Member State markets.[556] Analysis for the EU Commission undertaken by London Economics cited unwillingness on the part of both consumers and lenders to engage in 'pure' cross border activity, and thus some physical presence by the foreign lender in the

[554] Commission, 'Financial Services Policy 2005-2010' (White Paper) COM (2005) 629, 4. 'Single Market in Financial Services Progress Report 2006' (Commission Staff Working Document) SEC (2007) 263, 4. Better regulation also necessitated impact assessment of any resulting proposals was a prerequisite to implementation and ex-poste evaluation of initiatives is a subsequent requirement, whilst the use of alternatives to traditional regulation were espoused where they could more efficiently achieve the regulatory objective.

[555] See 'The Integration of the EU Mortgage Credit Markets' (Forum Group on Mortgage Credit for DG Internal Market and Services 2004); 'The Costs and Benefits of Integration of EU Mortgage Markets' (London Economics for DG Internal Market and Services August 2005); Commission, 'Mortgage Credit in the EU' (Green Paper) COM (2005) 327 final; 'Report of the Mortgage Funding Expert Group' (DG Internal Market and Services 22 December 2006); 'Mortgage Industry and Consumers Expert Group Final Report' (DG Internal Market and Services 20 December 2006); Commission, 'Integration of EU Mortgage Credit Markets' (White Paper) COM (2007) 807 final.

[556] 'The Costs and Benefits of Integration of EU Mortgage Markets' (London Economics for DG Internal Market and Services August 2005) 4, 5, 9 and 10. 'Study on the Financial Integration of European Mortgage Markets' (Mercer Oliver Wyman for European Mortgage Federation October 2003) 78. Economic analysis was commissioned on behalf of the EU Commission and the European Mortgage Federation. Both reports identify the capacity for further integration and cite the benefits as stemming primarily from increased product diversity; contingent on the extent to which the variation in price across Member States was a function of underlying cost structures, rather than margins.

domestic market was required.[557] The Commission acknowledged that in the short to medium term, integration would have to be supply driven and this increased the salience of economic and legal factors impeding cross border supply side activity.[558] With reference to this perspective an emphasis was placed on the role of capital market based funding, and securitisation in particular, as a mechanism through which to achieve the integration of primary mortgage markets. The creation of a pan European funding market was identified as having the potential to increase competition, stimulate product diversity and provide efficiencies via economies of scale that were precluded at primary market level by structural diversity.[559] As a source of liquidity for originators, it was identified as fostering competitiveness through the negation of any requirement for a branch network; potentially increasing the range of market participants and the strategic options for market entry.[560] This reflected the perceived benefits derived from the participation of non-credit institutions in national markets. Such lenders were viewed as contributing to product innovation by catering to niche markets such as the subprime sector and thereby providing a stimulus for competition induced broadening of domestic portfolios.[561] Access to securitisation was also identified as supporting the development of risk

[557] 'The Costs and Benefits of Integration of EU Mortgage Markets' (London Economics for DG Internal Market and Services August 2005) 8 'Pure' cross border activity implies direct activity without any physical presence or intermediary in the foreign market. Borrowers reluctance related to their preference to be subject to the regulatory and consumer protection regime of their own market, and lenders were concerned about the potential for 'adverse selection'; whereby, borrowers who had already been denied credit by lenders in their own market would target cross border participants. There were also concerns regarding the lack of familiarity with legal regimes and the practical consideration of how to accurately undertake credit risk assessment. Lenders preferred to pursue cross border activity via subsidiaries acquired through mergers and acquisitions, branches resulting from greenfield investment and the use of credit intermediaries.

[558] 'Integration of EU Mortgage Credit Markets' (White Paper) COM (2007) 807 final 3. This reflected a lack of consumer confidence in the legal frameworks of other Member States and an unwillingness to transact outside of national frameworks.

[559] Stefan Schafer, 'Integration of EU Mortgage Markets: It's the Funding, Commissioner!' (EU Monitor-Financial Market Special No 38, Deutsche Bank Research 2006) 8.

[560] Commission, Accompanying Document to the White Paper on the Integration of EU Mortgage Credit Markets - Impact Assessment on Specific Issues' (Commission Staff Working Document) SEC (2007)1683 Annex 3, 143. Non-credit institutions are not licensed to collect deposits and are thus dependent on alternative funding sources. In this context, securitisation can facilitate market participation by providing a source of liquidity and is particularly appropriate due to the attendant risk diversification benefits, since such institutions frequently cater to the non-conforming and high risk sectors. Meanwhile credit institutions have increased flexibility regarding market entry strategies, as they are not confined to establishing a deposit based in a new market to facilitate origination.

[561] 'Report of the Mortgage Funding Expert Group' (DG Internal Market and Services 22 December 2006) 1. Notwithstanding these benefits, the fact that non-credit institutions are not subject to all prudential rules had been a point of contention prior and subsequent to the financial crisis.

based products in the broader context, contingent on the absorption of both interest rate and credit risk by investors.[562] In addition, the ability to differentiate between funding and administration costs inherent with these instruments was identified as improving the scope to identify and remedy cost inefficiencies.[563] In terms of portfolio sales, the development of a Pan European market was regarded as offering risk management potential and the capacity to invest in specific national markets without direct primary market activity.[564]

The significance of the constitutive framework of national mortgage law to the EU integration objective is clear. The constitution, registration, transfer and enforcement of the security right are inherent aspects of both loan origination and capital market based funding, and these are regulated by the property law of the jurisdiction in which the property is located; irrespective of the domicile of the contractual parties (i.e. *lex rei sitae*). Against the backdrop of the Mortgage Credit Initiative, the European Mortgage Federation (EMF) undertook analysis of the 'efficiency of the mortgage collateral' across EU Member States. The resulting report identified the extent of divergence in the cost and process efficiency of national property law regimes; providing a basis upon which to seek greater convergence in these aspects to remove economic barriers to cross border supply and funding of mortgage credit.[565] In its White Paper on EU Mortgage Policy in December 2007, the Commission acknowledged the economic impact at both primary and secondary market level of national land registration and forced sales procedures, and the need for Member States to improve the efficiency of these aspects of national regimes. In response, it proposed the publication of scoreboards, which would be regularly updated and which would provide comparative information on cost and duration

[562] 'Report of the Mortgage Funding Expert Group' (DG Internal Market and Services 22 December 2006) 1. 'Study on the Financial Integration of European Mortgage Markets' (Mercer Oliver Wyman for European Mortgage Federation October 2003) 63.

[563] 'Study on the Financial Integration of European Mortgage Markets' (Mercer Oliver Wyman for European Mortgage Federation October 2003) 63. The report also points to the potential for capital market based funding to improve the speed of pass through, of capital market rate changes to borrower rates.

[564] Stefan Schafer, 'Integration of EU Mortgage Markets: It's the Funding, Commissioner!' (EU Monitor-Financial Market Special No 38, Deutsche Bank Research 2006) 8. Schafer identifies the potential for trading of mortgage portfolios to free up regulatory capital and provide a mechanism through which to restructure risk assets. A regional concentration of credit risk can thus be traded in favour of geographic diversification

[565] 'Study on the Efficiency of the Mortgage Collateral in the European Union' (European Mortgage Federation November 2007).

across EU Member States. [566] To address specific impediments it announced its intention, subject to appropriate impact assessment, to present a recommendation in 2008, which would invite Member States to remedy the deficiencies identified within national regimes.[567] Notably, one of the aspects referenced was the economic barriers arising from the extended cost and duration of enforcement procedures.[568] This reflects the extent, to which the value of a charge over immovable property is determined by the effectiveness of enforcement, a point manifest in the centrality of enforcement to the risk assessment procedures for loan origination and funding activity.[569]

4.6.2.2. Regulatory Orientation emerging from MCI

In chapter two, Aalbers, Crouch et al note the gulf between neo liberal ideology and practice; the ideology advocating free markets and a non-interventionist stance and concealing the deployment of regulation in furtherance of market activity. The Mortgage Credit Initiative highlights this point as there is a manifests focus on the relevance and significance of intervention from the perspective of industry stakeholders. This point is supported by the different regulatory approaches taken to the issues arising from the *rights in rem* and *rights in personam* aspects of the mortgage loan context. In respect of the former, it was clear that the heterogeneity of national property law regimes created economic impediments to cross border supply side activity and there was support from industry stakeholders for intervention in this sphere. The lack of pre-crisis intervention is fundamentally attributable not to an unwillingness of the EU to intervene, but rather, limitations on the capacity to do so with reference to the scope of the EU treaty mandate where national property rights were concerned. In respect of the personal aspects of the loan contract and related

[566] 'Integration of EU Mortgage Credit Markets' (White Paper) COM (2007) 807 final, 8. Scoreboards were used to highlight the implementation rate of FSAP measures by Member States and a higher rate of transposition was noted subsequent to this strategy.
[567] 'Integration of EU Mortgage Credit Markets' (White Paper) COM (2007) 807 final, 8. According to the EMF, a first confidential draft of the Commission Recommendation was presented to selected stakeholders, including the EMF secretariat, at an ad hoc meeting on Wednesday, 10th September 2008.
[568] Other issues included online and cross border access to land registers, uncertainty engendered by the existence of hidden charges.
[569] Agnieszka Drewicz-Tulodziecka (ed), 'Basic Guidelines for a Europhypothec' (Mortgage Bulletin 21/2005, Mortgage Credit Foundation May 2005) 20. Peter Sparkes, *European Land Law* (Hart Publishing 2007) 405.

conduct of business practices, it was clear that the EU had greater capacity for regulatory intervention via the harmonisation and consumer protection mandates contained in the treaties. However, there was significant industry resistance to formal regulatory intervention in respect of conduct of business.[570] It was asserted that this would have a negative economic impact in terms of increased compliance costs on lenders which would ultimately be borne by consumers. Industry stakeholders advocated a 'market based' approach, citing competition as the mechanism through which to protect consumer interests via decreased costs and increased product diversity. Within this market based model, it was suggested that the consumer had the power to 'discipline' market participants by changing supplier. Consumer representatives within the process favoured formal regulatory intervention to create a framework of consumer protections. Ultimately the EU was favouring a market based approach consistent with industry preferences, although the intervention of the financial crisis was to change the trajectory of EU mortgage policy from 2008 onwards.

4.7. Conclusion

This chapter profiles the constitutive and facilitative spheres of residential mortgage regulation in Ireland and Spain in the pre-crisis context. It highlights the dominance of the national institutional and legislative frameworks and the comparatively tangential EU role. It identifies the orientation of EU mortgage policy in the immediate pre-crisis period and the emphasis on a financial collateral perspective within the Mortgage Credit Initiative. This profile sets a baseline from which to identify and evaluate post-crisis reforms to these frameworks. Chapter five will outline the nature and content of changes to the national and EU frameworks in the period from 2009 to 2012.

[570] The term 'regulatory straitjacket' was used by industry representatives. The European Banking Industry Committee (EBIC) in its position paper of 29th May 2005, the European Mortgage Federation position paper of 29th November 2005 and the Verband Deutscher Pfandbriefbanken (vdp) position paper of 11th July 2006; are consistent in their assessment of the requirements for further integration and their support for non-regulatory measures as a first preference. This non regulatory approach appeared to have been supported by the EU Parliament, EESC and the EU Commission, prior to the US subprime crisis.

Chapter 5

Post Crisis Profile of Ireland, Spain & the EU

2009 - 2012

5.1. Introduction

This chapter identifies the evolution of institutional and legislative frameworks in Ireland, Spain and the EU in the first stage of the post-crisis period, i.e.2009-2012. It distinguishes between post-crisis reform of the institutional framework for the supervision of financial services in Ireland with the absence of such reform in Spain. It identifies the content and scope of changes to legislative frameworks in response to the emergence of indebtedness issues among pre-crisis mortgagors. Within this profile it contrasts the multiplicity of Spanish measures and the focus on the financial implications of enforcement with the lesser quantum and singular focus of Irish measures on assessments of sustainability. The chapter also identifies EU institutional and legislative developments during this period which provide the basis for a subsequent regulatory role in national mortgage markets.

5.2. Post Crisis Stage One Reform - Ireland

In Ireland, the period from 2009 to 2012 was one of evolution and reform, respectively, in the regulatory and supervisory frameworks applicable to the residential mortgage context. Structural reform of the institutional framework for the supervision of mortgage lenders and intermediaries was paralleled by an expansion and development of the legal framework of residential mortgage regulation via statutory codes of conduct addressing ex-ante and ex-poste contractual interaction of borrowers and lenders. These developments are set within a context of national upheaval as a solvency crisis in the Irish banking sector led to a sovereign debt crisis and the requirement for a bailout of the Irish State by the Troika, i.e.

EU/IMF/ECB.[571] Notwithstanding the broad relevance of the banking crisis and the bailout for the national economic and political context, their role in the current analysis is restricted to those aspects which directly influence the trajectory or orientation of mortgage related reform. The relevance of the banking crisis is thus limited to its role as a catalyst for the reform of the institutional framework for the regulation and supervision of financial services. The bailout is similarly limited to relevant institutional or legislative reforms arising from commitments given to the Troika pursuant to the bailout or subsequent IMF monitoring reports.

5.2.1. Facilitative Sphere - Institutional Competence

Chapter four identified the reforms which had been undertaken in the institutional framework for the regulation and supervision of financial services in Ireland, in the years preceding the crisis. Notwithstanding the recent nature of the institutional reform, or the extensive analysis which led to the establishment of the Central Bank and Financial Services Authority of Ireland (CBFSAI) in 2003, the emergence of liquidity issues and the subsequent exposure of a solvency crisis in the Irish banking sector in the period from 2008 onwards, led to a review of the efficacy of the existing institutional framework. Patrick Honohan, who had been appointed as governor of the Central Bank in September 2009, produced a report (the 'Honohan Report') which assessed the performance of the Central Bank and the Financial Regulator as 'part of a larger exercise by Government to thoroughly examine the conduct of the banking sector…..in order to arrive at a fuller understanding of the root causes of the systemic failures that led to the need for extraordinary support from the State to the domestic banking system'.[572]

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[571] See Donal Donovan and Antoin E Murphy, *The Fall of the Celtic Tiger* (Oxford University Press 2013) for the economic developments and policies which characterised the Celtic Tiger era and resulted in the requirement for a bailout by the Troika. See also Blanaid Clarke and Niamh Hardiman, 'Crisis in the Irish Banking System' (Research Paper No 02/2012 Working Papers in Law Criminology and Socio-Legal Studies University College Dublin 2012) for a review of the causes of the banking crisis with reference to issues of corporate governance, regulation and politics.

[572] See Patrick Honohan, 'The Irish Banking Crisis: Regulatory and Financial Stability Policy 2003-2008' (A Report to the Minister for Finance from the Governor of the Central Bank 31 May 2010); Klaus Regling and Max Watson, 'A Preliminary Report on The Sources of Ireland's Banking Crisis' (Government Publications 2010). These parallel reports which were commissioned by the then Minister for Finance Brian Lenihan TD, were the pre-cursor to the establishment of a statutory Commission of Investigation. The Minister acknowledged that the 'public was entitled to a full examination of what went wrong in our banking system and more than that we need an enquiry to restore international and domestic confidence in our banks'.

A point of particular interest in the current context is the extent to which the novel 'hybrid structure' of the CBFSAI was identified as a causal factor in the banking crisis. The report's conclusion on this point is as follows; 'The Act of 2003 created a complex structure for the Central Bank and the Financial Regulator which could have exposed the system to the risk of some ambiguity in the assignment of responsibilities. This risk was mitigated by the requirements for consultation and communication and by assigning clearly overriding powers in the case of a policy conflict between the different constituent decision-making bodies – though no such conflict arose in practice. The newly established Financial Regulator was by all accounts, determined to make its mark, notably in the consumer protection field. It was also determined to achieve a degree of operational autonomy which did result in friction over the cost and quality of resources provided to the Financial Regulator. Such friction may have had the knock-on effect of imperceptibly reducing the quality of operational interaction and dialogue between Financial Regulator staff and the rest of the CBFSAI, although complaints have not been raised about obstacles to the flow of information. Though few would now defend the institutional structure invented for the organisation in 2003, it would be hard to show that its complexity materially contributed to the major failures that occurred'.[573] In a report for the Institute of International and European Affairs (IIEA), William Scally identifies the CBFSAI as representative of 'a bureaucratic compromise, approved by the *Oireachtas*, which was geared towards administering "steady state" conditions in financial markets with minimum interference'. Scally opines, that with reference to the administrative and political culture in Ireland in the period from 2003-2008, it cannot be said that any alternative regulatory structure would have worked better, whilst noting that the increased complexity in legal and accountability provisions arising from the structure of the CBFSAI was manifestly unhelpful in dealing with the emerging crisis.[574] In response to the identified weaknesses in the structure of the CBFSAI, and the perceived requirements of the post-crisis financial services landscape, a new institutional framework was established pursuant to the Central Bank Reform Act 2010.

[573] Patrick Honohan, 'The Irish Banking Crisis: Regulatory and Financial Stability Policy 2003-2008' (A Report to the Minister for Finance from the Governor of the Central Bank 31 May 2010) 42 at 3.23.
[574] William Scally, 'Fixing Finance 3: The Irish Experience' (Institute of International and European Affairs 2010) 51.

5.2.1.1. Central Bank Reform Act 2010 (CBRA 2010)

The body corporate that was the Central Bank and Financial Services Authority of Ireland, was renamed the Central Bank of Ireland (CBI) under the Central Bank Reform Act 2010 (CBRA 2010).[575] In contrast to the fragmentation which characterised the CBFSAI, the new CBI was a single fully integrated structure responsible for the central banking and regulatory functions. The changes in the institutional framework were not just of a structural nature. The supervisory style was one of the operational aspects criticised in the Honohan report as 'relying excessively on a regulatory philosophy emphasising process over outcomes'.[576] In 2010, the Central Bank published a policy document outlining a new supervisory orientation, in recognition of the deficiencies of the pre-crisis approach. The new approach is 'challenging and, where necessary intrusive' with a focus on 'delivering assertive, risk-based and outcome-focused banking supervision'.[577] Donnelly cites evidence of a change in approach in the publication of detailed corporate governance codes for credit institutions and insurance undertakings[578] and legislative reform to 'enhance the legislative supervisory tools available to the Central Bank'.[579] The move from a principles based to a more prescriptive style is also evident in the post-crisis reform of the Consumer Protection Code (CPC). The appointment of Patrick Honohan, a noted economist and academic as Governor of the Central Bank in September 2009, was similarly indicative of a change in culture as traditionally the Governor of the Central Bank was a senior civil servant from the Department of Finance.

5.2.1.1.1. Consumer Protection Functions

Although there are structural differences between the CBFSAI and the CBI, there is consistency in the statutory mandate which continues to have both prudential and

[575] S 5(1) CBA 1942 substituted by s 14 and sch 1, pt 1, item 20 CBRA 2010.
[576] Patrick Honohan, 'The Irish Banking Crisis: Regulatory and Financial Stability Policy 2003-2008' (A Report to the Minister for Finance from the Governor of the Central Bank 31 May 2010) 8 at 1.9.
[577] 'Banking Supervision: Our New Approach' (Central Bank and Financial Services Authority of Ireland June 2010) 2 and 'Banking Supervision: Our Approach 2011 Update' (Central Bank of Ireland June 2011) 18.
[578] 'Corporate Governance Code for Credit Institutions and Insurance Undertakings' (Central Bank of Ireland 2010).
[579] Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 98. Donnelly notes that the CBRA introduces the concept of 'controlled functions' and thereby extends 'the scope of the regulatory powers over individuals within a regulated entity as well as over the entity itself'.

consumer protection functions. The Central Bank is required to performs its statutory functions and exercise its powers in a manner consistent with the '(a) the orderly and proper functioning of financial markets, (b) the prudential supervision of providers of financial services, and (c) the public interest and the interest of consumers'.[580] Donnelly notes that pursuant to the CBRA 2010, the Central Bank had the statutory *capacity* to establish advisory groups other than in respect of its ESCB functions; however, this was imposed as a statutory *requirement* in respect of its consumer protection function.[581] The Central Bank continues to have 'the function of monitoring the provision of financial services to consumers of those services to the extent that the Bank considers appropriate, for the purposes of protecting the public interest and the interests of consumers'.[582] The CBRA 2010 empowers the Central Bank, in the context of undertaking or publishing studies, analyses or surveys regarding the provision of relevant financial services to consumers, to 'require any person who, in the opinion of the bank has information or a record relevant to the study, to provide this information to the bank'.[583] The CBRA confers the same power on the NCA to support its education and information functions.[584] The oscillation of consumer protection functions between the supervisory authority and the statutory consumer agency, which had been a characteristic of previous reform, continues to an extent under the CBRA 2010. There is a transfer of information and education functions from the Central Bank to the National Consumer Agency (NCA) with effect from 1 January 2011.[585]

5.2.1.2. National Consumer Agency

As noted in chapter four, pursuant to the Consumer Protection Act 2007 (CPA 2007), the National Consumer Agency (NCA) had become the statutory body charged with promoting and protecting the interests and welfare of consumers. However, its role in

[580] S 5A(11) CBA 1942 as substituted by s 14 and sch 1, pt 1, item 21 of the CBRA 2010. This replaced a similar provision in respect of the IFSRA under the CBFSAI Act 2003; although notably the relevant section, i.e. S 33C(3), did not include a reference to the 'public interest'.
[581] S 18(E)(1)(a) CBA 1942 as inserted by s 14 and sch 1, pt 1, item 28 of the CBRA 2010. Pursuant to s 18(E)(4) the members of the Consumer Advisory Group cannot include members of the Central Bank Commission, officers or employees of the bank.
[582] S 5A(f) as inserted by s 14 and sch 1, pt 1, item 21 of the CBRA 2010.
[583] Mary Donnelly, *The Law of Credit and Security* (Round Hall 2011) 96.
[584] S 8A(2) CPA 2007 as inserted by s 15 and sch 2, pt 5, item 3 of the CBRA 2010.
[585] S 8(3)(ha) CPA 2007 as inserted by s 15(5) and sch 2, pt 5, item 2 of the CBRA 2010. The function had previously been conferred on the IFSRA pursuant to s 33C(4) of the CBA 1942 as amended by the CBFSAI Act 2003.

the context of consumers of financial services was limited by the role accorded to the CBI under existing Consumer Law enactments.[586] The replacement of the CBFSAI by the Central Bank altered one particular aspect of the existing allocation of functions and duties related to consumers of financial services. Section 8 (3)(ha) as inserted by the CBRA 2010, requires the NCA in performing its statutory functions to 'promote the interests of consumers of financial services by—(i) providing information in relation to financial services, including information in relation to the costs to consumers, and the risks and benefits associated with the provision of those services, and (ii) promoting the development of financial education and capability'.[587] Notably, the new section significantly bolsters the financial education component of this statutory function, as it evolves from an implicit education function via the provision of information, to one in which this is aligned with a general mandate to promote the development of financial education and capability. The Act provides that it is an offence to intentionally prevent, hinder or obstruct the NCA in the exercise of its functions.[588] Pursuant to the CBRA 2010, the NCA is empowered to undertake and publish 'studies, analyses and surveys with respect to the provision of relevant financial services to consumers' and 'to collect and compile information for that purpose'.[589] To facilitate these publications the NCA can compel the provision of information from any person who 'in the opinion of the agency has information or control of a record or other thing, that is relevant to the study, analysis or survey'.[590] Non-compliance with a request of the NCA for the provision of information or the provision of information which 'the person knows, or ought to reasonably know is false or misleading in a material respect' constitutes an offence.[591]

[586] Supervision and enforcement functions under the CCA 1995 were the exclusive competence of the CBI in respect of mortgage lenders and intermediaries from 2003 onwards and enforcement was concurrently vested in the NCA and the CBI for the CPA 2007 and the UTCC Regs pursuant to the former act.
[587] S 8(3)(ha) CPA 2007 as inserted by s 15(5) and sch 2, pt 5, item 2 of the CBRA 2010.
[588] S 8A (3)(a)-(b) as inserted by s 15(5) and sch 2, pt 5, item 3 of the CBRA 2010.
[589] S 8A(1) CPA 2007 as inserted by s 15 and sch 2, pt 5, item 3 of the CBRA 2010. Pursuant to the co-operation agreement between the NCA and the CBI, this power extends to the latter unless the provision of the requested information is precluded under Section 33AK of the CBA Act 1942 as amended.
[590] S 8A(2) CPA 2007 as inserted by s 15 and sch 2, pt 5, item 3 of the CBRA 2010.
[591] S 8A (3)(c)-(d) as inserted by s 15(5) and sch 2, pt 5, item 3 of the CBRA 2010.

As noted in the previous chapter, the NCA was established pursuant to the CPA 2007. The latter provided for a concurrent vesting in the Financial Regulator of the functions of the NCA under the CPA 2007 and the UTCC Regs, to the extent that they related to a financial service provided by a regulated financial service provider.[592] The CPA 2007 had provided that although the shared functions of the NCA and the Financial Regulator may be performed by either party, this is subject to any arrangements provided for in a co-operation agreement between the parties.[593] Subsequent to the replacement of the CBFSAI by the CBI there was an agreement 'facilitating co-operation between the Agency and the Bank in the performance of their respective functions in so far as they relate to issues of consumer protection and welfare'. The agreement was intended to avoid a duplication of activities by the authorities and to ensure that the NCA was consulted in relation to any decisions by the CBI which affects consumers.[594] The agreement provides that in respect of the functions shared by the CBI and the NCA 'the Agency shall forbear the performance of its functions unless both parties agree within a reasonable timeframe that the Bank has chosen not to exercise such functions'.[595] This implies that in the context of alleged contravention of the UTCC Regs or the CPA 2007 in respect of consumers of financial services, the NCA must cede to the CBI unless the latter chooses not to exercise its competence.[596]

5.2.2. Arrears and Negative Equity: 2009-2012

It is evident from the previous sections that the stimulus for reform of the institutional framework applicable to residential mortgage lenders came, not from the residential mortgage market per se, but rather the broader economic and financial market context. In contrast, reform to the statutory framework within the dual spheres of residential mortgage regulation were more directly linked to the

[592] S 5A(4) CBA 1942 as substituted s 14(1) and sch 1, pt 1, item 21 of the CBRA 2010.
[593] S 5A(7)(a) CBA 1942 as substituted s 14(1) and sch 1, pt 1, item 21 of the CBRA 2010.
[594] S 1(2) of the Co-operation Agreement between the NCA and the CBI.
[595] S 6(1) of the Co-operation Agreement between the NCA and the CBI.
[596] In respect of the CPA 2007 which transposes the UCPD, the relevant sections are ss 41 to 56, excluding s 50. These relate to the following; s 41 prohibition on unfair commercial practices, ss 42-49 provisions on misleading commercial practices; s 51 offences related to the contravention of consumer information regulations, ss 52-54 provisions relating to aggressive commercial practices, ss 55-56 provisions relating to prohibited commercial practices. There is also shared competence in respect of functions pursuant to ss 30, 71, 72, 73, 75, 81, 82, 84, 86, 88 and 90 of the CPA 2007. Of relevance within these are s 71 relief via prohibition orders, s 74 the consumers right of action for damages, s 81 liability of convicted traders to compensate consumers for loss or damage, s 84 capacity of the agency to institute summary proceedings for offences.

residential mortgage sector, or more specifically, the impact which crisis related economic developments had on mortgage consumers and the regulatory deficits exposed by these developments.

In 2006, the OECD had cautioned of the dangers of increased leverage in an inflationary context, pointing out that although an increase in mortgage debt levels paralleled by an increase in households' net wealth is ostensibly a benign trend, the increased leverage leaves households vulnerable to asset price declines and negative developments in interest rates and incomes.[597] In Ireland, the salience of this warning was particularly evident from 2009 onwards as the bursting of the housing bubble and the deterioration in macroeconomic conditions exposed issues of affordability and negative equity among mortgage consumers. It has been suggested that in terms of negative equity the '…situation in Ireland is much more severe than that being experienced in other housing market downturns…we estimate that over 214,000 mortgages from the period 2005 to 2012 are in negative equity, approximately 37 per cent of households with a mortgage'.[598] The CBFSAI began to publish statistical data on arrears from September 2009 onwards. Pursuant to this data, at the end of September 2009, there were 26,300 mortgage accounts on Principal Dwelling Houses (PDH) in arrears of more than 90 days. This equated to 3.3 per cent of the total stock of PDH accounts and, in value terms, the outstanding balance on these accounts was €4.8 billion, or 4.1 per cent of the total outstanding balance on all PDH accounts.[599] By the end of December 2012, there were 94,488, or 11.9 per cent, of PDH accounts in arrears of more than 90 days. The outstanding balance on these accounts was €17.5 billion which is equivalent to 15.8 per cent of the total outstanding balance on all PDH mortgage accounts.[600]

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[597] Nathalie Girouard, Mike Kennedy, Paul van den Noord and Christophe Andre, 'Recent House Price Developments; The Role of Fundamentals' (Economics Department Working Paper No 475, OECD 2006) 8 and 9. The authors point out that by 2005, net household wealth had grown to a level of about seven times disposable income in several OECD countries, the gains stemming primarily from a rise in the non-financial wealth component, which was in turn linked to house price appreciation.
[598] David Duffy and Niall O'Hanlon, 'Negative Equity in the Irish Housing Market: Estimates using Loan Level Data' (Working Paper No 463, Economic and Social Research Institute (ESRI) July 2013) 19.
[599] Jean Goggin, 'Mortgage Arrears in Ireland: Introducing the Enhanced Quarterly Statistics' (Central Bank Quarterly Bulletin 04, Central Bank of Ireland October 2013).
[600] 'Residential Mortgage Arrears and Repossessions Statistics: Q4 2012 (Central Bank of Ireland 7 March 2013).

5.2.3. Facilitative Sphere - Financial Services Framework

In Ireland, the constitutive sphere of residential mortgage regulation remained comparatively static in the period 2009 to 2012, as the framework of mortgage law established under the LCLRA 2009 remained unchanged.[601] In contrast, there was reform of the facilitative sphere, although, notably there is a distinction between the dual components of consumer law and financial services regulation in this regard. The framework of consumer law remained static and the dynamic component was the conduct of business regimes created by the national supervisory authority, i.e. the Financial Regulator and, subsequently the CBI. Crisis related reform was thus manifest in the evolution of the Consumer Protection Code 2006 (CPC 2006), which regulated the ex-ante engagement of borrowers and lenders, moving from a principles based to a more prescriptive regime. There was also the emergence of an equivalent framework for the ex poste interaction of the contractual parties in the context of mortgage default. The CPC predates the financial crisis and, notwithstanding that reform of the code from 2009 onwards was linked to the deficits exposed by the crisis, its origins lie in a proactive initiative by the Financial Regulator to further consumer protection. In contrast, the introduction of a Code of Conduct on Mortgage Arrears (CCMA) was a wholly reactive development, born of circumstance and necessity as an unprecedented arrears crisis emerged among Irish mortgage consumers from 2009 onwards.

5.2.3.1. Code of Conduct on Mortgage Arrears (CCMA)

The Financial Regulator introduced the first Code of Conduct on Mortgage Arrears (CCMA) with effect from 27 February 2009. It applied to the 'mortgage lending activities' of regulated entities 'to consumers in respect of their principal private residence' in the State.[602] The Code of Conduct on Mortgage Arrears 2009 (CCMA 2009) was broadly similar to the pre-existing Irish Banking Federation (IBF) voluntary code of practice on mortgage arrears with the notable distinction that the CCMA imposed a moratorium on the initiation of repossession proceedings by the

[601] Although the LCLRA 2009 remained unchanged during the period 2009-2012, it was subsequently amended via the Land and Conveyancing Law Reform Act 2013 (LCLRA 2013). The latter statute addressed among other issues, the lacuna created by the LCLRA 2009 in respect of summary enforcement under s 62(7) of the Registration of Title Act 1964 which was identified *in Start Mortgages & Ors v Gunn & Ors* [2011] IEHC 275.

[602] 'Code of Conduct on Mortgage Arrears' (Financial Regulator February 2009) 2. Regulated entities encompasses credit and non-credit institutions operating in Ireland.

lender. The moratorium was 12 months for banks which had been recapitalised by the Irish State and 6 months for all other lenders.[603] Fundamentally, the CCMA imposed and continues to impose in its later incarnations, a statutory obligation on the lender to engage with the borrower in an attempt to put in place arrangements to resolve payment difficulties. The underlying rationale was that a moratorium would provide 'breathing space' for consumers and that mandated engagement between lenders and borrowers would facilitate some arrangement pursuant to which rehabilitation of the loan could be achieved.[604] Lenders were under a requirement to demonstrate compliance with the code to the supervisory authority but it was emphasised that the contractual rights of the lender were unaffected. The moratorium was inapplicable where the borrower did not engage with the lender or there was fraud or a breach of contract by the borrower other than the breach constituted by the arrears.[605] The applicability of the CCMA was extended for a further 12 month period from February 2010, against the backdrop of a continued deterioration in the rate of arrears, and the duration of the moratorium on repossession was extended from six to twelve month for all lenders. Notwithstanding these temporal extensions, by the end of 2010, the arrears rate had significantly worsened and, subsequent to a consultation process, a new Code of Conduct on Mortgage Arrears came into effect from 1 January 2011 (CCMA 2011).[606]

5.2.3.1.1. Code of Conduct on Mortgage Arrears 2011

The original CCMA came into effect when an arrears situation arose. However, the Code of Conduct on Mortgage Arrears 2011 (CCMA 2011) had a preventative as well as a responsive component in that it was applicable both where the borrower was having and where the borrower anticipated having difficulty, in meeting their repayment obligations under the mortgage contract.[607] The CCMA 2011 differed

[603] The recapitalised banks in question were Bank of Ireland (BOI) and Allied Irish Banks (AIB).
[604] 'Review of Code of Conduct on Mortgage Arrears' (Consultation Paper CP 46, Financial Regulator August 2010) i. 'The main provisions include communicating promptly and clearly with the borrower as soon as an arrears situation develops, handling genuine arrears cases positively and sympathetically, and exploring various alternative repayment measures with the borrower'.
[605] 'Code of Conduct on Mortgage Arrears' (Financial Regulator February 2009) 3, 6 and 7.
[606] The first statistics in September 2009 cite 3.3 per cent of the total stock of PDH accounts and, in value terms, 4.1 per cent of the total outstanding balance on all PDH accounts in arrears over 90 days. By December 2012, these figures were 11.9 per cent of total accounts which equates to 15.8 per cent of the total outstanding balance on all PDH mortgage accounts.
[607] Per chpt 1, 2 the CCMA is applicable to those in arrears and in pre-arrears. Per chpt 2, 3, An arrears situation arises where a borrower fails to make a mortgage payment or only makes a partial

from its predecessor in two other significant respects.[608] The first was the removal of temporal limitations on the existence of the framework, thus what had been a temporary measure for a specified 12 month period became a permanent framework. This assertion is qualified by the capacity of the CBI to revoke the code in consultation with the Minister pursuant to section 117 of the CBA 1989. The second change relates to the content of the CCMA. Notwithstanding, that in broad terms the CCMA 2011 still mandated engagement and imposed a moratorium on the initiation of repossession proceedings, it did so whilst incorporating new procedural requirements which acknowledged issues which were arising in the interaction of lenders and borrowers, e.g. excessive communications, privacy, adequacy of staff training in arrears handling, relevant IT requirements etc.[609] It also established a framework known as the Mortgage Arrears Resolution Process (MARP), development of which had been recommended by the Cooney Report[610] in 2010, and endorsed by the Keane Report in 2011 as 'a very important foundation to the

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mortgage repayment by the scheduled due date. A pre-arrears case arises where either: a) the borrower contacts the lender to inform it that he/she is in danger of going into financial difficulties and/or is concerned about going into mortgage arrears; or b) the lender establishes that the borrower is in danger of going into financial difficulties which may impact on the borrower's ability to meet his/her mortgage repayments.

[608] The original CCMA related 'only to mortgage lending activities to consumers in respect of their principal private residence in this State' whereas the CCMA 2011 applied to 'the mortgage loan of a borrower which is secured by their primary residence'. Notwithstanding that broadly speaking these terms may have the same import, the 2011 code is less ambiguous in applying to loans *secured* on the primary residence.

[609] 'Review of Code of Conduct on Mortgage Arrears' (Consultation Paper CP 46, Financial Regulator August 2010). The consultation paper, as part of a process which led to reform of the CCMA, identified issues in respect of excessive communication, definition of what constituted arrears, what property was protected by the CCMA and the requirement for an external appeals body.

[610] 'Mortgage Arrears and Personal Debt Group Final Report' (Department of Finance 16 November 2010) 1- 3. Chaired by Hugh Cooney, the group was established in February 2010 and 'tasked with making recommendations to the Minister for Finance on options for improving the current situation for families with mortgage arrears on their principal private residence and with personal debt'. The group published an interim report in July 2010 which contained recommendations for responding to the evolving mortgage arrears crisis. These proposals were substantially implemented in the CCMA 2011. The recommendations include; the requirement for lenders to establish a MARP as a framework for handling arrears and pre-arrears cases, a prohibition on the imposition of penalty interest and arrears charges to borrowers who are participating in the MARP, the development of a Standard Financial Statement (SFS) for use by lenders in assessing the financial position of the borrower, a prohibition on a requirement for borrowers to surrender a low cost tracker mortgage or existing financial product where this is financially disadvantageous and the establishment of a centralised and dedicated Arrears Support Unit (ASU). In the interim report the role of the ASU was to 'to manage pre-arrears under the MARP'; however in the CCMA 2011, 'the ASU is responsible for assessment of all MARP cases'.

individual case by case assessment approach' which 'should ensure consistency of approach both within and between lenders'.[611]

The CCMA 2011 requires each lender to establish a MARP which provides a structured framework for engagement with borrowers. The provisions of the CCMA outline the protocols for communication with the borrower, financial information requirements, the process of assessing borrowers' financial circumstances, potential resolution of the arrears by means of an alternative repayment arrangement and the requirement for an appeals process.[612] The CCMA 2011 also imposes a requirement on lenders to establish an appeals board. The appeals board was the forum through which borrowers could appeal the decision of the lender's Arrears Support Unit but also the lender's treatment of the borrower's case under the MARP process and, the issue of the lender's compliance with the requirements of the CCMA.[613] Fundamentally the CCMA 2011 provided the statutory parameters within which the lenders MARP protocols operated and identified the minimum mandatory requirements of these protocols. It imposed a statutory obligation on lenders not to apply for an order of repossession until 'every reasonable effort' has been made to agree an alternative repayment arrangement.[614] That general obligation was

[611] 'Interdepartmental Mortgage Arrears Working Group Report' (Department of Finance 30 September 2011) 1 and 17. Chaired by Declan Keane, the inter-departmental group was requested by the Government's Economic Management Council (EMC) 'to consider further actions to alleviate the increasing problem of mortgage arrears'. The report identifies an ongoing role for the CCMA and the MARP therein, 'will continue to play an important role in structuring the case by case engagement between the parties'. However the report also acknowledged the 'need to change behaviour and ensure mortgage lenders and mortgage holders agree more sustainable solutions'. 'Many people are entering forbearance agreements or are sheltering behind the moratorium on legal action or the slow legal process, when in reality their mortgages are unsustainable'. 'Forbearance is a very useful and appropriate solution in many cases. However it is not the solution in all situations. The suitability of forbearance arrangements for a mortgage holder should be assessed based on their future prospects. Where there is little prospect of ever being able to build up reasonable equity in the property, forbearance may not be appropriate'. The report proposed a range of potential outcomes arising from the MARP assessment in compliance with the CCMA depending on the financial circumstances of the borrower; forbearance, sale (including sale by voluntary agreement), trade down mortgages, mortgage to rent (MTR) and split mortgages. Where these options were not included in the CCMA 2011, they have been included in the CCMA 2013 i.e. split mortgages and mortgage to rent. Split mortgages is now included in the restructuring options which *may* be considered by lenders (chpt 3, s 39) and mortgage to rent (MTR) has been added to the list of alternatives (i.e. trading down, voluntary surrender and sale) in respect of which the lender is required to inform the borrower where they are unwilling to offer an alternative repayment arrangement (ARA) (chpt. 3, s 45).
[612] Chpt 3, ss 15-51.
[613] Chpt 3, s 42.
[614] Chpt 3, s 46.

supplemented with specific temporal limitations on the commencement of legal action for repossession of the primary residence. Where a borrower was co-operating with a lender, the CCMA 2011, in common with its predecessor, imposed a twelve month moratorium; dated from the point where the borrower was classified as a MARP case, i.e. 31 days after the arrears have arisen.[615] However, this excludes any periods of time where the borrower was adhering to an alternative repayment arrangement, considering an appeal against the decision of the ASU, an appeals process was on-going or any period during which a complaint against the lender regarding the CCMA was being processed by the Financial Services Ombudsman.[616]

The moratorium was inapplicable in the context of fraud or non-co-operation by a borrower. It was also inapplicable to any breach of contract other than the existence of arrears.[617] The CCMA 2011 defines non co-operation by a borrower as where 'a) the borrower fails to make a full and honest disclosure of information to the lender, that would have a significant impact on their financial situation; b) the borrower fails to provide information sought by the lender relevant to the borrower's financial situation ; or c) a three month period elapses during which the borrower: (i) has failed to meet his/her mortgage repayments in full as per the mortgage contract or has failed to meet in full repayments as specified in the terms of an alternative repayment arrangement; and (ii) has not made contact with, or responded to, any communications from the lender or a third party acting on the lender's behalf'.[618]

Notwithstanding the commencement of legal action, the CCMA 2011 requires lenders to attempt to maintain contact with the borrower or their representative.[619] 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.[620] Where a borrower is engaged in the process, the CCMA imposes restrictions on the charges and/or surcharge interest on arrears to

[615] Arrears arise where a borrower misses a scheduled repayment.
[616] Chpt 3, s 47.
[617] Chpt 3, s.48.
[618] Chpt 2.
[619] Chpt 3, s 50. Pursuant to s 49 the lender is required to inform the borrower in writing immediately before it commences legal action for repossession.
[620] Chpt 3, s 50.

prevent an escalation of the borrowers' indebtedness.[621] The CCMA 2011 addresses organisational aspects of the arrears process, such as personnel and contact points, staff training and systems requirements; issues which were not a feature of the prior temporary codes. It also mandates the scope and content of information to be provided to borrowers.[622] In common with the Consumer Protection Code (CPC), there is a requirement for the rationale and processes used within the process to be documented, thereby assisting the lender in discharging its obligation to be able to demonstrate compliance with the Code, and in the assessment of this compliance by the CBI.[623] 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 2011 outlines the requirements imposed on lenders where the MARP process results in a finding that the loan is not viable.[624]

5.2.3.2. Consumer Protection Code 2012

The existence of a significant affordability crisis among mortgage consumers was indicative of a deficit in the existing regulatory framework for mortgage loan origination. Notwithstanding, the manifest need for some regulatory response to address this issue, the Consumer Protection Code 2006 (CPC 2006) remained unaltered in the period from 2006 to 2011; save for a 2008 addendum which extended the scope of applicability to non-credit institutions.[625] However, pursuant to a consultation process from 2010 onwards,[626] a revised CPC was issued with effect from 1st January 2012 (CPC 2012). [627]

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[621] Chpt 3, s 9. The Cooney report had recommended a prohibition on the imposition of penalty interest and arrears charges for borrowers participating in the MARP.
[622] Chpt 3, ss. 1 - 14.
[623] Chpt 3, ss 52 - 56.
[624] Chpt 3, ss 39, 40, 49-51.
[625] Pursuant to the Markets in Financial Instruments and Miscellaneous Provisions Act 2007, an addendum of May 2008 brought retail credit firms and home reversion firms within the scope of the CPC.
[626] The Consumer Protection Directorate of the CBI reviewed the existing CPC and on 28th October 2010, published a Consultation Paper, 'Review of Consumer Protection Code' (CP47). The paper outlined proposals for a revised Consumer Protection Code. In response to submissions received and issues raised, a second Consultation Paper CP54 was issued in June 2011, which offered a further opportunity for input by interested parties.
[627] The legislative basis for the CPC 2012 is; s 117 of CBA 1989; s 23 and s 37 of the Investment Intermediaries Act 1995, s.8(h) of the CCA 1995 and s.61 of the Insurance Act 1989. The power to administer sanctions for a contravention of the Code is derived from Part IIIC of the CBA 1942.

The Consumer Protection Code 2012 (CPC 2012), like its predecessor is applicable to the regulated activities of regulated entities operating in the State, and in a mortgage context this includes, credit[628] and non-credit institutions and mortgage intermediaries.[629] A notable distinction between the CPC 2012 and its 2006 predecessor is the differential approach to the definition of consumer and the associated obligations. The CPC 2006 had been noted for its broad definition of consumer which extended beyond natural persons and encompassed companies with a turnover of less than €3 million, clubs, partnerships, charities and trusts.[630] The provisions of the code which were principles based, were universally applicable to consumers as defined therein.[631] In contrast, the more prescriptive CPC 2012, restricts the applicability of certain provisions with reference to the nature of the consumer.[632] Certain provisions, including those relating to credit, are applicable not to the general class of 'consumers' but rather to the subset 'personal consumers', a class which accords with the traditional statutory definition of 'a natural person acting outside his or her business, trade or profession'.[633]

A significant inclusion is the concept of the 'vulnerable consumer', as a subset of the personal consumer. A vulnerable consumer is defined in the CPC 2012 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

[628] Credit unions were exempt as there was a specific Code of Conduct for Credit Unions.

[629] 'Subject to the exclusions set out in the following paragraphs this Code applies to the regulated activities of regulated entities operating in the State, including: financial services providers authorized, registered or licensed by the Central Bank; and financial services providers authorized, registered or licensed in another EU or EEA Member State when providing services in this State on a branch or cross-border basis'.

[630] For analysis of the innovative nature of the Code at the time see Mary Donnelly, 'The Consumer Protection Code: Regulatory Innovation from the Irish Financial Regulator' in Deborah Parry, Annette Nordhausen, Geraint Howells and Christian Twigg Flesner (eds), *Yearbook of Consumer Law 2009* (Routledge 2008).

[631] In the CPC 2006, the general principles in chapter 1 were applicable to all 'customers' in the State, and the chapters thereafter were restricted to consumers, although as noted consumer was very broadly defined. In the 2012 Code, the distinction is that within the context of provisions applicable to consumers, there is restricted applicability of certain provisions to 'personal consumers'.

[632] The general principles of the CPC 2012 contained in chapter 2 are still of universal applicability.

[633] 'Consumer Protection Code 2012 Guidance' (Central Bank of Ireland December 2011) 3 and 4. The credit provisions are applicable to 'personal consumers' for credit amounts in excess of €200 to the extent that the provisions are not rendered inapplicable by the EC (Consumer Credit Agreements) Regulations 2010. The Code of Conduct for Business Lending to Small and Medium Enterprises (SME Code) is identified as the source of protection for consumers other than personal consumers, where applicability is restricted to the latter.

her own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health difficulties)'.[634] 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'.[635] 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'.[636] The issue of vulnerability is traditionally associated with the equitable jurisdiction of the common law courts. It is not, broadly speaking, a feature of the legislative framework applicable to residential mortgage loans. There is no comparable concept in the CCA 1995, the LCLRA 2009 or the UTCC Regs; although, as noted in chapter four, there is the inclusion of an analogous concept in the UCPD and its transposing legislation, the CPA 2007. Nonetheless, the inclusion of the concept within the CPC 2012 and its scope as identified within the guidance document are an innovation, if not within the entire facilitative sphere, then at a minimum within the financial services framework.

There is a distinction is the terminology used to identify loans which are the subject of the various components of the Irish regulatory frameworks. The relevant provisions of the CCA 1995 and the LCLRA 2009 are applicable to 'housing loans' and 'housing loan mortgages' respectively; however, the provisions of the CPC 2012 are applicable to 'mortgage credit'. The question which follows is whether there is a difference in the scope of applicability. A guidance document clarifies that for purpose of CPC, a mortgage is a loan secured by property, and provisions in respect of mortgage credit apply to all such credit sought or obtained by *personal consumers*, whether in respect of a principal private residence or investment property.[637] Accordingly, the CPC 2012 establishes a universal threshold of treatment for all personal consumers obtaining mortgage loans irrespective of the function of the

[634] Chpt 12.
[635] 'Consumer Protection Code 2012 Guidance' (Central Bank of Ireland December 2011) 75.
[636] Ss 3.1. S 3.7 imposes an obligation on the regulated entity to verify the legitimacy of a power of attorney which permits a person to act on behalf of a consumer. It further places an obligation on the regulated entity to operate within the limitations contained within the power of attorney.
[637] 'Consumer Protection Code 2012 Guidance' (Central Bank of Ireland December 2011) 3, 4 and 73.

property, potentially exceeding the applicability of the other relevant statutes in this regard.[638]

The various chapters of the 2012 code outline the requirements imposed on the regulated entity in its interaction with the consumer, together with clarification as to the scope of the provisions applicability. The chapters are delineated by the specific aspect of interaction addressed. Consistent with the disclosure based paradigm manifest in the CCA 1995, the Code incorporates an information based approach to consumer protection whereby the objective is to provide consumers with clear, understandable, relevant and accurate information regarding the nature and effect of the obligation being entered into. In support of this objective the Code specifies the content,[639] format, presentation[640] and timing[641] of information and warnings[642] in respect of particular products and services. It also imposes disclosure requirements which increase transparency regarding charges[643] and the basis of the commercial arrangements between mortgage intermediaries and product producers to ensure that the consumer is aware of any incentives that the agent is receiving and, the basis upon which services are being provided, e.g. the extent to which they are being provided with a fair analysis of the market.[644] In common with the CCA 1995, the provision of information is aligned substantive requirements in the form of restrictions and prohibitions in respect of certain practices. In the CPC 2012, these centre on tying, bundling, contingent sales and the consolidation of charges.[645]At EU level, product tying had been identified as an impairment to consumer mobility

[638] See chpt 4 and the doubt raised regarding the applicability of 'housing loan provisions' to buy to let properties.
[639] See ss 4.21, 4.25, 4.27, 4.41, 4.42, 4.43, and 4.44.
[640] The 2006 code required clear comprehensible information - the equivalent 2012 provision (s 4.1) requires the information to be 'clear, accurate, up to date, and written in plain English' and the method of presentation must not 'disguise, diminish or obscure important information'. S 4.4 requires a font size which is clearly legible and this is supplemented by a requirement that the font size is appropriate to the type of document and the information contained therein.
[641] See ss 4.2, 4.23, and 4.26.
[642] See ss 3.9, 4.23, 4.26, 4.45.
[643] See ss.4.54, 4.55, 4.56.
[644] A newly introduced section on remuneration attempts to create transparency regarding the nature and extent of the financial relationship between intermediaries and product producers. See ss 4.57, 4.58, 4.59, 4.60 and 4.61.
[645] The 2006 Code permitted a combined form to be used for a loan and payment protection insurance, subject to a physical distinction between the components; this is precluded by s 3.24 of the 2012 code. Similarly s 3.16 introduces a requirement that personal consumers must be given the option of paying charges associated with a loan separately i.e. must not be included in the loan as a matter of form.

which was prevalent within the mortgage sector.[646] The CPC 2012, contains five newly introduced provisions which specify the obligations and restrictions imposed on regulated entities with respect to tying and bundling practices and, reiterates the 2006 restriction on contingent sales.[647]

As noted in chapter four, the CCA 1995 imposes a prohibition on the linking of services in the context of housing loans, and had also imposed restrictions on the extent to which costs incurred in the loan application process could be passed along to borrowers. The obligations imposed in the CPC 2012 in respect of charges are wholly information based.[648] A contemporary issue addressed in the code which does not have a counterpart in the CCA 1995, is the extent of contact permitted between lenders and borrowers. The consultation paper which preceded the CPC 2012 noted that '….pressurised selling of financial products to consumers, under any circumstances, is of particular concern in light of the consumer detriment which can occur ….following a review of the submissions, we have decided to focus on strengthening protection for consumers against unsolicited personal visits from representatives of regulated firms'.[649] There is a marked departure from pre-existing provisions in the approach adopted by the CPC 2012. Whereas the CPC 2006 makes no distinction between the forms of contact, its successor contains an absolute prohibition on unsolicited personal visits to a consumer who is an individual. It also imposes restrictions on the circumstances in which telephone contact can be made.[650]

Notwithstanding the benefit consumers derive from provisions which offer increased transparency in respect of products and costs, there are noted limitations to information based paradigms of consumer protection.[651] Similarly, the regulation of market practices such as linking, and product tying and bundling or the extent of

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[646] See Commission, 'Accompanying Document to the White Paper on the Integration of EU Mortgage Credit Markets - Impact Assessment' (Commission Staff Working Document) SEC (2007) 1683, 17; Commission, 'Sector Inquiry under Article 17 of Regulation (EC) No. 1/2003 on Retail Banking -Final Report' (Communication) COM (2007) 33 final.
[647] See ss 3.18, 3.19, 3.20, 3.21, 3.22.
[648] Chpt 4, ss 4.54-4.56.
[649] 'Feedback to CP 54 Review of the Consumer Protection Code' (Central Bank of Ireland 2011) 6.
[650] See s 3.39 re concept of informed consent in this context. See ss 3.40(b), 3.41, 3.43 re changes to the telephone contact and ss 3.44 and 3.45 for other relevant changes.
[651] See Mary Donnelly and Fidelma White, 'The Effect of Information Based Consumer Protection: Lessons from a Study of the Irish Online Market' in Christian Twigg Flesner et al (eds), *Yearbook of Consumer Law 2008* (Ashgate 2008).

permissible charges, whilst beneficial, do not ensure the affordability of the primary obligation over the duration of the contract. From this perspective, it is the substantive obligation to assess the suitability of the product which offers the greatest scope to increase the protection offered to personal consumers. This is premised on the extent to which the relevant provisions have the capacity to preclude sales which have affordability issues both at the outset and in the longer term. These may be related to the quantum of debt, or the repayment capacity of the borrower, or both. The issue of affordability in a residential mortgage context is problematic due to the extended duration of loan agreements which creates the potential for ex poste alterations in the borrowers' circumstances. However, there is a necessary distinction between the subsequent occurrence of an event which was unforeseeable at the conclusion of the contract, and those events which were foreseeable but to which insufficient consideration was given, i.e. change in income linked to the nature of employment, personal circumstances of the borrower etc. which could have been anticipated at the outset.

The general requirement, introduced in the 2006 code, to gather sufficient information from the consumer to facilitate an appropriate product recommendation remains. The requirement is bolstered by the newly introduced provisions which specify the minimum necessary content of this information under the headings; needs and objectives,[652] personal circumstances[653] and financial situation[654]. Reflecting an emphasis on ongoing suitability 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.[655] In the context of mortgage lending to personal consumers, there are provisions which address the verification of information which will be used for underwriting purposes.[656] The affordability of

[652] S 5.1(a) Length of time for which the consumer wishes to hold a product/need for access to funds/accumulation of funds.
[653] S 5.1(b) Age / health / dependents / employment status/known future changes to circumstances/knowledge and experience of financial products.
[654] S 5.1 (c) and (d). Income/savings/financial products and other assets/debts and financial commitments/attitude to risk and importance of capital security.
[655] See ss 5.3, 5.4 and 5.5. The prohibition imposes a requirement to note the refusal on the consumers record.
[656] See ss 5.6 – 5.8.

credit is one aspect of the assessment of suitability within the CPC 2012.[657] The affordability assessment is intended to 'ascertain the personal consumer's likely ability to repay the debt over the duration of the agreement'.[658] It uses the personal and financial information gathered and, includes a requirement for stress testing of the interest rate, the extent of which varies according to the nature of the mortgage product.[659] In the context of variable rate products, there is a requirement to provide the 'personal consumer' with details which reflect the stress test i.e. revised instalment reflecting the increase in interest rates.[660] The CPC 2012 imposes a requirement for an additional affordability and suitability assessment prior to any further extension of credit to a 'personal consumer'.[661] The obligation is applicable regardless of whether the form of credit is via a top up of existing facilities, or an entirely new agreement and, it is intended to prevent the responsible lending/borrowing ethos of the prior sections from being undermined.[662] Although there are a number of exemptions to the knowing the consumer and suitability provisions, the provisions are mandatory where a 'personal consumer' is seeking a mortgage or a home reversion agreement or where the amount of credit amount is in excess of €75,000 Euro.[663] The CPC 2012 asserts that it is mandatory to take account of assessments of affordability when deciding 'whether a personal consumer is likely to be able to repay the debt for that amount and duration in the manner required under the credit agreement'; although, this does not of itself amount to a prohibition on lending in the context of a negative assessment of affordability.[664] It is noteworthy, with reference to the point raised by Therese Wilson regarding responsible lending regimes that the obligations contained in the CPC place the onus on the lender for determining the suitability of the product and that the role of the borrower is the provision of information to facilitate that assessment.

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[657] Ss 5.9-5.15.
[658] S 5.9.
[659] Ss 5.9(b), 5.11, 5.12. Pursuant to the latter sections, where the product is an interest only mortgage the lender must also assess the likely ability to repay the principal at the end of the mortgage term. Where the duration of the interest only basis is less than the term of the mortgage, the assessment is directed at the probability of 'personal consumers' ability to repay capital and interest instalment amount applicable at the end of the interest only period. There is no guidance as to how this is going to be assessed.
[660] S 5.14.
[661] S 5.15.
[662] Ss 5.19 – 5.23 outline the requirements regarding the provision of a statement of suitability to the consumer.
[663] S 5.24.
[664] S 5.13.

5.2.3.3. Enforcement of the CPC/CCMA

The CPC 2012 states that its provisions 'are binding on regulated entities and must, at all times, be complied with when providing financial services'. In the CCMA 2011, 'lenders are reminded that they are required to comply with this Code as a matter of law'.[665] Part IIIC of the Central Bank Act 1942 (CBA 1942) as amended, identifies breach of a code or a direction given pursuant to a code as a 'prescribed contravention' and provides escalating administrative sanctions which include a caution or reprimand, a monetary penalty and disqualification for a specified period from participation in the management of a regulated service provider.[666] The monetary penalties which may be imposed on the regulated entity or individual may not be such as to cause the former to cease business or the latter to be declared bankrupt and, where there are multiple contraventions, only one monetary penalty may be imposed in respect of the same conduct.[667] Where a contravention is also an offence under a law of the state, the contravening party may not be subject to sanction under both provisions, i.e. may not otherwise be prosecuted or punished in respect of the same offence.[668] The decision of the Central Bank pursuant to an inquiry may be appealed and chapter III of Part IIIC identifies procedural requirements in respect of an inquiry.[669]

5.2.3.3.1. Judicial Role re: Statutory Codes of Conduct

As noted above, the statutory basis for the establishment of Codes of Conduct by the Central Bank is section 117 CBA 1989, and as outlined, breach of the provisions

[665] 'Consumer Protection Code 2012' (Central Bank of Ireland December 2011) 4. 'Code of Conduct on Mortgage Arrears' (Central Bank of Ireland 2010) 1. The CBI states that 'compliance is monitored through practices such as reviews, themed inspections, mystery shopping and advertising monitoring and, compliance is promoted by providing feedback on themed inspections and publishing the main issues identified on the Central Bank website'.

[666] Part IIICA inserted by s 10 CBFSAI Act 2004. See ss 33AN, 33AO, 33AP, 33AR for provisions regarding what constitutes a contravention and procedural aspects of inquiries into contravention. S 33AQ (3) identifies the potential sanctions for contravention.

[667] S 33AS.

[668] S 33AT.

[669] S 33AX. 'A decision of the Bank made at the conclusion of an inquiry held under s 33AO or s 33AR is an appealable decision for the purposes of Part VIIA.

incurs administrative sanction pursuant to Part IIIC CBA 1942.[670] However, notwithstanding the extent to which the various incarnations of the CCMA or the CPC impose procedural requirements; the former as a precursor to enforcement of the security, and the latter in the engagement with the borrower in the pre-contractual phase, nothing in the Codes or the Central Bank Acts imputes any alteration to the contractual rights of the lender. Nonetheless, the question of whether breach by the lender of the provisions of the statutory codes, (e.g. non-compliance with the protocols of the CCMA prior to initiating legal action for repossession or the provision of a product which is manifestly unsuitable for the borrower in contravention of the CPC 2012), have the capacity to impact the contractual rights of the parties or indeed the validity of the loan contract was an issue of judicial scrutiny in the period from 2009-2012.

5.2.3.3.1.1. Case Law Relevant to CPC: 2009-2012

There was no direct judicial consideration of the impact of non-compliance with the obligations contained in the Consumer Protection Code 2006 (CPC 2006) in the period up to 2012. This dearth of case law is attributable to two factors. The first is the restricted applicability of the CPC 2006 to pre-crisis loans and the limited nature of the obligations contained therein and, the second is the issue of economic context. The original CPC came into effect on 1st July 2007 for credit institutions and from 1st February 2008 for non-credit institutions, and thus it is of limited applicability to pre-crisis mortgage loans, where the most significant issues of affordability or product suitability may arise.[671] Even if the measures had been of increased temporal applicability to pre-crisis loans, and without reference to limitations arising from the legal basis of the codes, it is unlikely that broader applicability would have been of significant benefit to mortgage consumers. This assertion is premised on the issues associated with the principles based content of the CPC 2006 as compared with its more prescriptive 2012 successor, and in particular the utility of the substantive

[670] Although s 117 CBA 1989 is the sole basis of the CCMA, in the context of the CPC this is supplemented by other statutory provisions, the most relevant for current purposes is s 8H CCA 1995.

[671] The Central Bank Act 1997, as amended by the Markets in Financial Instruments and Miscellaneous Provisions Act 2007, confers authorisation and supervision functions on the Financial Regulator in respect of retail credit firms and home reversion firms. With effect from 1 February 2008, these entities were required to apply for authorisation and were subject to the requirements of the CPC. The deadline for registration of existing market participants was 30 April 2008 and the Financial Regulator reserved the right to impose the CPC at any stage of the application process.

requirements to know the customer and assess the suitability of the product in light of the recent Supreme Court ruling in *Dunne*.[672] With reference to this judgement, it is likely that the absence of sufficiently precise parameters regarding the standards to be met would have limited the utility of the obligations. Notably, the CPC 2006 remained applicable for post-crisis loans concluded up to 1 January 2012. However, concerns regarding loans originated between 2009 and 2012, with reference to the lesser obligation imposed by the original code are counter-balanced by the national economic context in this period. The Irish banking crisis and issues of liquidity led to self-imposed underwriting criteria from 2008 onwards, thereby minimising responsible lending concerns in regard of contracts concluded during this period.
To the extent that there has been judicial consideration, directly or indirectly, of issues associated with lending or the CPC 2006, there has been a manifest resistance by the Irish judiciary to any blurring of the boundaries between the respective roles of the judiciary and the legislature. In *Zurich Bank v McConnon*[673] the issue of the codes was raised, although the related observations were *obiter dicta*, as the respondent did not qualify as a consumer for the purposes of the CPC 2006 and the execution of the loan predated the entry into force of the Code. In rejecting the contention that the provisions of the code created any justiciable rights for the borrower, Birmingham J contrasted the CPC 2006 with the CCA 1995 to highlight the distinction in the provisions as evidence of statutory intent. 'Entirely lacking is any suggestion that a breach of the Code renders the contract null and void or otherwise exempts a borrower from the liability to repay…..the contrast between the approach taken in the Code and the approach of the Consumer Credit Act is striking. Section 30 of the Act contains mandatory provisions….section 38 of the Act deals with the consequences of failing to comply with the requirements of the section and provides that a creditor will not be entitled to enforce a credit agreement or contract of guarantee and that any security given shall not be enforceable. There are no comparable provisions whatever in the Code'.[674] Birmingham J also rejected the contention that the provisions of the Code were implied contractual terms; '…the question arises by what method it is suggested that a term has been implied. It is not the case that any terms have been implied by statute. There is also the question of

[672] Irish Life & Permanent plc v Dunne & Dunphy [2015] IESC 46.
[673] [2011] IEHC 75. (Note there is no numbering on the sections of the judgement)
[674] [2011] IEHC 75.

what term would be implied if a mechanism for doing so was found. The only implied term that would assist the defendant would be a term…… that the consequence of non-compliance was that the borrower was exempted from the liability to repay the loan. If one introduces the traditional officious bystander into the equation then it would be seen that such a suggestion has little reality……in summary I can see no basis for suggesting that any alleged breach of the Code exempts the borrower from repaying the loan'.[675]

There was judicial consideration of 'reckless lending' in the *ICS Building Society v Grant* in 2010, where the former was raised as a defence in respect of loans for the purchase of a development property.[676] Notwithstanding, that the obligations contained in the CPC 2006 were not in issue, the judgement is nonetheless relevant as identifying the status of civil liability for lending decisions in Ireland. Charleton J reiterated the classic common law view of party autonomy with respect to contracts stating, 'contract law assumes that those entering into an agreement intend that it should be legally enforceable and, unless the contrary is shown, have acted in relation to each other by their mutual choice and not out of compulsion. People can enter into bad bargains. The law never inquiries into the adequacy of any consideration for a contract. There can be situations where somebody is forced into an apparent agreement where the court can interfere. That power is derived from existing law whereby undue influence can upset a contract, declaring it void. Undue influence is not even asserted here. Here what is asserted is some alleged wrong akin to reckless lending. The argued for tort of reckless lending does not exist in law as a civil wrong. It is not within the competence of the court to invent such a tort'.[677] In *McConnon v President of Ireland & Ors* Kelly J stated 'insofar as it may be

[675] [2011] IEHC 75.

[676] [2010] IEHC 17 at 2. Charleton J affirmed that the contract entered into by the plaintiff was a contract to repay the monies 'it is not accurate to claim that by entering into a mortgage deed with a bank that a borrower has thereby secured a promise that a bank will in the event of default simply secure possession of the property and sell it for what it may be then worth, taking whatever the proceeds are and surrendering the rest of the debt. Such a contract is possible. That is not the case here'. He was also satisfied that there was nothing to suggest that the plaintiff bank had acted negligently in selling the property.

[677] [2010] IEHC 17 at 6. Charleton pointed out that 'reckless trading' is both a criminal offence and a civil wrong but that this must involve 'some lack of prudence going beyond the risk taking that is inherent in the enterprise of business so that a real and apparent risk emerges that a company will be unable to pay its debts. In those circumstances, the controllers of a company must also think of their debtors and make some provision for the repayment of obligations. Here what is asserted is some alleged wrong akin to reckless lending'

suggested that Mr. McConnon is seeking relief in respect of an alleged tort of reckless lending …I am satisfied such a tort does not exist as a civil wrong in Irish law. In this respect, I agree with the judgment of Charleton J. in *ICS Building Society v. Grant*'.[678]

5.2.3.3.1.2. Case law Relevant to CCMA: 2009-2012

In respect of housing loan mortgages entered into from 1 December 2009 onwards, the LCLRA 2009 imposes a statutory requirement for a court order for possession or sale of the property.[679] The CCMA 2011 and its predecessors required compliance with certain protocols as a pre-requisite to the initiation of legal proceedings for repossession, and ostensibly, the assessment of compliance is a matter for the CBI. Notwithstanding that the CCMA 2011 asserts a lack of any legal impact on existing private law rights, the imposition of procedural pre-requisites to the exercise of the lenders right to possession, aligned with the role of the courts in granting possession and sale orders in the context of distressed residential mortgages meant that it was inevitable that the dynamic between the CCMA protocols and the private law rights of the lender would be subject to judicial scrutiny. The fundamental issue is whether the right of the lender to pursue enforcement of the security is impacted by non-compliance with the provisions of the CCMA.

In 2012, Ms Justice Mary Laffoy in the High Court refused an order for possession in *Stepstone Mortgage Funding Limited v Fitzell & Anor*[680] stating:

> 'I find it impossible to agree with the proposition that, in proceedings for possession of a primary residence by way of enforcement of a mortgage 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'.[681]

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[678] [2012] IEHC 184 at 62.

[679] Ss 97 and 100(2) LCLRA 2009 effectively imposes a requirement for a court order for possession and precludes the exercise of the power of sale in the absence of a court order. See Mary Donnelly, the Law of Credit and Security (Round Hall 2011) 714 at 20-121and 20-122 re the impracticality of a sale out of court with the mortgagors consent as provided for under s 100(2).

[680] [2012] IEHC 142.

[681] [2012] IEHC 142 at 5.5.

Non-compliance on the part of the lender was established due to its breach of section 45 of the CCMA 2011, pursuant to which, the borrower must be given a minimum 20 day period from notification of the decision of the ASU to consider submitting an appeal against the decision to the Appeals Board.

5.3. Post Crisis Stage One Reform - Spain

In Spain, the period 2009-2012 was also a period of reform in the legal framework applicable to residential mortgages. As in Ireland, the reforms had a dual orientation. There were provisions which offered a measure of relief in respect of the difficulties experienced by mortgagors who had contracted in the pre-crisis inflationary context. These were aligned with reform of the frameworks for future lending in recognition of the difficulties which had arisen. Notwithstanding a commonality in the stimulus for reforms, the approach taken in Spain differed from that in Ireland in a number of respects. Notable among these is the legal form and scope of responsive measures and the judicial role in the process of legislative reform. A further contrast with Ireland is the absence of any reform of the institutional framework for the supervision of mortgage lenders and intermediaries. In contrast to reforms identified in the respect of the CBI, the structure, statutory objectives and mandate of the Banco De Espana (BDE), remained for current purposes unaltered in the post-crisis period. Post crisis reform of Spanish frameworks, in common with the Irish equivalent, is set against a backdrop of deteriorating macroeconomic conditions which led to a significant increase in the rate of unemployment and a rise in repossession of residential properties. In the period from 2006 to 2014, the national rate of unemployment grew from 8.26 per cent to 23.7 per cent, whilst in a three year period from 2010 to 2013, there were 285,000 residential evictions.[682]

5.3.1. Facilitative Sphere – Consumer Law

As outlined in the previous chapter, the pre-crisis protections for residential mortgage consumers in the Spanish facilitative sphere, in common with their Irish counterpart, were dispersed between consumer law and financial services frameworks. The former were manifest in the general principles and the unfair

[682] Sergio Nasarre Aznar, 'Robinhoodian Courts Decision on Mortgage Law in Spain (2015) 7(2) International Journal of Law in the Built Environment 127, 127. The evictions figure includes both owner occupiers and tenants.

contract terms provisions of RDL 1/2007, and the latter, in the transparency regime for the financial conditions of mortgages pursuant to the mandate contained in Ley 26/1988 on the Discipline and Intervention of Credit Institutions. As the title of the latter statute suggests, the transparency provisions were applicable only to mortgage lenders who were credit institutions.[683] The applicability of the Spanish facilitative sphere to mortgage lenders and intermediaries was thus notably more fragmented that it's Irish counterpart. In Ireland, the consumer law framework was of universal pre-crisis applicability, i.e. CCA 1995/UTCC Regs/CPA 2007, and the financial services framework, i.e. CPC 2006 introduced in July 2007, was of universal applicability from February 2008 onwards. In Spain, only the provisions of RDL 1/2007 were of universal applicability in the pre-crisis period. In practical terms, the significance of the non-applicability of this financial services regulation is determined by the extent to which non-credit institutions were originators of mortgage loans in that period, and the efficacy of the protections offered by the regime; nonetheless the distinction is worth noting.[684] From a temporal perspective, one of the first post-crisis reforms of the Spanish legal framework was an extension in the scope of consumer law to encompass a regulatory framework for non-credit institutions who offered mortgage loans and intermediation services.

5.3.1.1. Ley 2/2009, de 31 de marzo

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 is the regulatory framework

[683] There are six variants of credit institution within the Spanish regulatory framework. Financial Credit Entities (Establecimientos Financieros de Crédito) (EFCs) are one of these variants and they may provide residential mortgage loans but cannot take deposits or repayable funds from the public. This characteristic would result in the entity falling outside the scope of the term credit institution from an EU or Irish perspective, despite its classification as such within the Spanish framework. A report by London Economics for the EU Commission in 2008 noted; 'historically, different types of credit institutions had been limited by their scope of activity (Royal Decree 771/1989 of June 23) but currently they are limited by their financing options'. In Ireland, the forms of credit institution are banks, trustee savings bank, Post Office Savings Bank, or building society. The scope of the term Bank and Building Society are with reference to the Central Banks Acts 1942-2011, and the Building Societies Act 1989 respectively.

[684] 'Study on the Role and Regulation of Non-Credit Institutions in EU Mortgage Markets' (London Economics for DG Internal Market and Services, 2 September 2008) 143. The report notes that statistics from the BDE relate to credit institutions only. Whilst the Spanish Treasury and the Spanish Mortgage Association asserted that it was not possible to ascertain the market share of non- credit institutions, both indicated that any lending by non-credit institutions was marginal.

applicable to non-credit institutions.[685] It imposes information based obligations, and in doing so it extends the applicability of selected provisions of the pre-existing transparency regime contained in Orden de 5 de mayo de 1994, to non-credit institutions which provide mortgage loans or intermediation services. This establishes a universal minimum threshold in terms of the content and format of information provide to borrowers irrespective of the classification of mortgage lender or intermediary.[686] A report by London Economics for the EU Commission notes a pre-crisis intention to extend the applicability of the transparency regime to non-credit institutions, the bill having been expected to be read and passed by the Spanish Parliament in 2007. Although this intention did not come to fruition at that time, it may help to explain why this was one of the first reform initiatives.[687]

Other provisions contained in Ley 2/2009 impose obligations on non-credit institutions regarding transparency and clarity in respect of costs and charges. These are exemplified in the provisions addressing the mandatory inclusion of APR in advertising and marketing, the presentation of information regarding charges in communications related to debt consolidation, and a prohibition on any references to downward adjustment in monthly repayments which do not include details of the corresponding increase in the capital balance.[688] Whilst the general principle of freedom to contract is asserted with reference to the setting of fees and charges this is expressly stated to be subject to any limitations imposed within Ley 2/2009 itself, the unfair terms provisions of RDL 1/2007, and regulations on the early repayment of mortgage loans.[689] The law provides that fees or charges in respect of mortgage loans shall accrue once and shall include all processing costs, expenses and currency exchange fee, and that any additional fees or charges must correspond with 'the provision of a specific service other than the granting or the ordinary administration

[685] Law 2/2009 of 31 March regulating mortgage loan contracts and brokerage services provided to consumers.
[686] In the period from 2009 to 2011, these were contained in Order 5 May 1994 and thereafter in Order EHA 2899/2011. Pursuant to art 14(4) the autonomous communities are entitled to compel the inclusion of additional pre contractual information to enhance the protection offered to consumers, provided that this is compatible with EU law.
[687] 'Study on the Role and Regulation of Non-Credit Institutions in EU Mortgage Markets' (London Economics for DG Internal Market and Services, 2 September 2008) 142.
[688] Arts 12(1) and 12(2).
[689] *Ley 2/1994, de 30 de marzo, sobre subrogación y modificación de préstamos hipotecarios*, (i.e. Law 2/1994 of 30 March on Subrogation and Loan Modification) sets a ceiling on fees for early repayment of mortgage loans.

of the loan or credit'.[690] Companies are required to provide the list of charges, commissions, fees and expenses to the register in which they are inscribed, prior to implementation of these fees and they are prohibited from charging amounts in excess of the maximum prices listed or from imposing 'more onerous conditions or unforeseen expenses'.[691]

The disclosure and transparency requirements in Ley 2/2009 extend not just to the products, services and costs but also in relation to the entity itself. Article 3 requires companies, prior to the commencement of activity, to be listed in the register of the autonomous community in which the company is registered. Foreign companies who do not have a registered office in the Spanish territories must be inscribed in the state register at the Instituto Nacional del Consumo (INC).[692] Companies are under a statutory obligation to provide 'truthful and verifiable information' to the public authorities and those responsible for maintaining the records.[693] A pre-requisite to registration is that the entity must obtain civil liability insurance or a bank guarantee to cover the liability they might incur vis a vis the consumer in its lending activities or intermediation services.[694] A regulatory or supervisory role is not envisaged for the BDE in respect of the entities covered by Ley 2/2009. These non-credit institutions are excluded from the financial services framework and are instead aligned with general consumer protection framework.

Ley 2/2009 provides for an injunction against conduct which adversely affects the collective consumer interest and confers standing on consumer associations and users in this regard.[695] It also imposes specific obligations on notaries and registrars, who are expressly prohibited from authorizing and registering 'loan or home equity' that

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[690] Art 5(2)(b).

[691] Arts 5(3), 5(4) and 5(5) The prices, charges, commissions and expenses should be contained in a prospectus which is available to the public on their bulletin board and, which is written in a manner which is 'clear, concrete and easily understood by the consumer, including avoidance of any unnecessary or irrelevant concepts'.

[692] It was envisaged that the State Register would contain information available electronically and free of charge which identified the company, the geographical areas in which it operates, the activity conducted, the entity with which it has contracted liability insurance.

[693] Art 3(5).

[694] Art 7. The quantum of the indemnity was not specified in the statute. It was intended that it would be determined by subsequent regulations.

[695] Art 11.

‘does not comply with the law and in particular with the requirements of this act’.[696] Notaries are also 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.[697] In the event that an inconsistency is discovered, they are required to inform the consumer of the differences and their right to cancel the transaction.[698] There are specific checks which must be carried out in respect of eligible benchmark or index rates, interest rate variation and introductory rates in the context of variable rate loans.[699] It is of note that there is no substantive obligation imposed in respect of responsible lending. Ley 2/2009 predates the introduction of the statutory obligation in Spanish law under *Ley 2/2011, de 4 de marzo, de Economía Sostenible* (SEL 2/2011), i.e. Sustainable Economy Law 2/2011 and its omission in the original enactment is therefore unsurprising. However, the decision not to include non-credit institutions within the scope of the obligation when it was introduced is a clear policy choice.

5.3.1.1.1. Enforcement & Sanctions

The provisions of Ley 2/2009 are mandatory and the rights conferred on consumers cannot be waived.[700] As a component of the consumer protection framework, breach of the obligations is regulated by RDL 1/2007.[701] The regime applicable to non-credit institutions in Spain, is in some respects comparable to the regime applicable to consumer credit in Ireland pursuant to the CCA 1995. This is reflected by the emphasis placed in both regimes on the serious nature of offence committed where there is non-compliance with registration requirements. Pursuant to Ley 2/2009, breach of the registration obligation contained in article 3 is identified as a very serious offense, resulting in the imposition of sanctions by the INC, pursuant to articles 51 and 52 of RDL 1/2007. Under the CCA 1995, falsification or alteration of a mortgage intermediary’s authorization is one of only two indictable offences which can arise in the context of housing loans.[702] In addition both statutes link compliance

[696] Art 18(1).
[697] Art 18 (2).
[698] Art 18(2)(a).
[699] Arts 18(2)(b) and 18(3).
[700] Art 2.
[701] Title IV Book I.
[702] Ss 12(1)(i) and 12(2)(d).

with certain statutory obligations with the enforceability of the contract. In Ley 2/2009, Article 14(3) of Law 2/2009 specifies failure by the lender to meet the requirements in respect of pre-contractual information may lead to the invalidity of the contract.[703] Again, this is comparable to section 38 of the CCA 1995, although as previously noted, this consequence is excluded in the context of 'housing loan mortgages'.

5.3.2. Facilitative Sphere - Financial Services Framework

The extension of the Consumer Law framework to include Ley 2/2009 did not change the regulatory framework applicable to credit institutions which remained in its pre-crisis state until reform was undertaken via the implementation of article 29 of *Ley 2/2011, de 4 de marzo, de Economía Sostenible* (SEL 2/2011) . Fundamentally, the reforms contained in article 29 had a dual orientation; the consolidation and enhancement of existing transparency requirements and the imposition of responsible lending obligations. These measures were given effect through *Orden EHA/2899/2011, de 28 de octubre, de transparencia y protección del cliente de servicios bancarios* (Orden EHA 2899/2011).[704]

5.3.2.1. Orden EHA/2899/2011

In Orden EHA 2899/2011, the provisions applicable to mortgage consumers are located in Title III, which contains chapters on 'responsible lending' and 'rules on loans and mortgages'; the latter comprising of six sections.[705] Although the definition of consumer in Spanish legislation habitually applies to 'natural or legal persons', the rules on loans and mortgages are applicable only to the former.[706] The provisions apply to loans to consumers which are secured by the consumers' primary

[703] Art 14(4). 'In accordance with the provisions of civil law and without prejudice to the integration of contracts as provided for in arts 61 and 65 of the General Law for the Defense of Consumers and Users and other complementary laws'.
[704] Order EHA/2899/2011 of 28 October on transparency and consumer protection in banking services.
[705] Section one of the 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.
[706] Art 19(1)

residence or, where the purpose of the loan is to acquire or retain rights in residential immoveable property.[707]

5.3.2.1.1. Transparency Requirements

The Banco De España was mandated to develop a 'Mortgage Loan Access Guide' with the objective of providing consumers with appropriate information to make a financing decision prior to the execution of the loan.[708] Article 21 specifies the need for 'clear and sufficient information' indicating the loan options available from the credit institution, to be available in a pre-contractual information sheet, i.e. *Ficha de Información Precontractual* (FIPRE). This generalized information is followed by a personalized information sheet, i.e. *Ficha de Información Personalizada* (FIPER) which must be provided once the credit institution has the necessary information in respect of the customers financing needs, financial situation and preferences.[709] Ostensibly the purpose of these sheets is to facilitate comparability of the loans on the market with a view to taking an informed decision on whether or not to accept the loan offered. Orden EHA 2899/2011 places an emphasis on ensuring that any changes in content between the personalized information and the loan offer are highlighted, and that any additional information or significant terms are not subsumed in the general content.[710] The transparency requirements inevitably extend to costs, charges and the calculation and composition of the APR is given particular attention in this regard.[711] Although the freedom to contract is asserted in respect of

[707] Art 19(1) refers to 'home mortgage or whose purpose is to acquire or retain property rights in land or buildings built or under construction'.

[708] Art 20. The guide must be available without charge both online and in branches of credit institutions.

[709] Art 22(2) states the personalised information sheet must be provided in good time and in any event before the customer is bound by any contract or offer. Annex I and II contain templates of the FIPRE and FIPER respectively. Both documents must be provided free of charge and the FIPRE must be available through all marketing channels used by the credit institution.

[710] Art 23. Where the content of the offer matches in its entirety the contents of the FIPER then a single document may be used; however, if the offer contains additional information, this must be provided in a separate accompanying document. Per arts 24 and 25, where there is hedging of interest rate risk or limits on interest rate variation, relevant information must be contained in an annex to the FIPER. Previously the requirement was to include this information in the loan agreement documentation. Art 26 mandates in the context of a variable rate product, the inclusion in a separate document attached to the FIPER an illustration of the impact of interest rate variation on the repayment obligations using maximum, average and minimum interest rates derived from the previous 15 year period, or the maximum possible term if the former is not feasible.

[711] Banco De España, 'Economic Bulletin January 2012: Financial Regulation Q4 2011', 129. Per art 31, the APR excludes any charges that the consumer would be liable to pay in the context of a breach

fees and where applicable interest rates, credit institutions are obliged to 'make available to customers the fees and interest rates that they normally charge for the services they most frequently provide, as well as the expenses they pass along to customers in respect of such services.[712] The legislation envisaged that they will be presented in a standard format established by the Banco De España thereby increasing the comparability of charges.

The Order contains differential obligations in the format and content of the information provided where the transaction relates to a reverse mortgage.[713] Annex III and IV provide specific templates for the FIPRE and FIPER in respect of such products and the BDE is required to develop a specific mortgage access guide.[714] In addition, there is an obligation to provide an independent advisory service alongside delivery of the binding offer.[715] The distinction drawn between mortgage equity release and other mortgages products in Spain is paralleled in the CPC 2012 in requirements relating to risk warnings and provision of information. A distinction would subsequently be drawn at EU level in the Mortgage Credit Directive and these measures are intended to create awareness of the distinct features and risk implications of these products as compared with the standard mortgage product.

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of contractual obligations but now includes 'the costs of maintaining an account when it is compulsory to open one to obtain the loan, unless the costs of such account have been clearly and separately specified in the loan agreement or in any other agreement with the customer'. Under the previous regulations certain expenses and fees, such as brokerage fees, notary expenses, taxes and charges for insurance or guarantees were not taken into account when calculating the rate.

[712] Art 3.

[713] Art 32. Udo Reifner, Sebastien Clerc Renaud, Elena F Pérez Carrillo, Achim Tiffe and Michael Knobloch, 'Study on Equity Release Schemes in the EU:Part I - General Report' (Project No MARKT/2007/23/H, European Commission January 2009). The report identifies equity release as taking two different forms: Loan Model ERS, also known as reverse mortgages or lifetime mortgages, provide a loan that will eventually be repaid from the sale proceeds of the property. Sale Model ERS, also known as home reversions, involve an immediate sale of the property but provide for the right to remain in occupation and to use the cash price for income in retirement.

[714] Banco De España, 'Economic Bulletin January 2012: Financial Regulation Q4 2011', 133. 'A reverse mortgage is defined as a mortgage loan or credit taking the form of a mortgage over real property constituting the principal residence of the applicant, provided that it meets the following requirements: a) the applicant and any beneficiaries designated by him or her must be aged 65 or over or in a situation of severe or considerable dependency; b) the mortgagor must draw the loan amount in periodic withdrawals or as a lump sum; c) the debt must only be claimable by the creditor and the security interest enforceable upon the death of the borrower or, if so stipulated in the contract, upon the death of the last of the beneficiaries; and d) the mortgaged residence must have been appraised and insured against damage'.

[715] Art 32(b).

As is evident from the previous chapter, transparency requirements were imposed on credit institutions from 1994 onwards; however, these are significantly enhanced by Orden EHA 2899/2011. The general and personalized information cards, i.e. FIPRE and FIPER, and the mortgage loan access guide were not provided for under existing provisions, nor was there a transparency regime for reverse mortgages. In addition, the requirement to enhance the visibility of floor and ceiling clauses via their inclusion in an annex to the FIPER is an improvement on the prior requirement to merely include in the contractual documentation. The replacement of the transparency regime contained in Orden de 5 de mayo de 1994 with the framework contained in Orden EHA 2899/2011 also had implications for the requirements imposed on non-credit institutions. Ley 2/2009 had provided that where the transparency requirements contained in Orden de 5 de mayo de 1994 were succeeded by new provisions; references to the former in Ley 2/2009 would be assumed to refer to the updated provisions and accordingly, relevant aspects of Orden EHA 2899/2011 were also applicable to non-credit institutions.[716]

5.3.2.1.2. Responsible Lending

A clearly identifiable post-crisis development in the frameworks within the Spanish facilitative sphere is the imposition in article 29(1) of SEL 2/2011 of a statutory obligation on credit institutions to assess the creditworthiness of a borrower prior to the conclusion of a credit or loan agreement.[717] To give effect to this obligation, title III, chapter I of Orden EHA 2899/2011 mandates the development of internal procedures by credit institutions for the purpose of assessing the clients' ability to meet the obligations under the agreement.[718] The 'solvency assessment' should be based on 'sufficient information obtained by suitable means to this end, including information provided by the customer at the request of the entity'.[719] The procedures

[716] Chpt 2 of Ley 2/2009 addressed mortgage loan contracts. Arts 13 (brochures on loans and mortgages), art 16 (binding offer), art 17 (loan contract) and art 18 (notary and registration duties) all imposed requirements which referenced requirements imposed by Orden de 5 de mayo de 1994.
[717] Art 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 practices per art 29 (2)(a) must be incorporated in written form and referenced in the institutions annual report.
[718] Art 18 (1).
[719] Art 18(6) provides that the solvency assessment is 'without prejudice to the freedom of contract that, in its substance and limitations ….should govern relations between banks and customers and, in no way affect the full force and effect, nor imply transfer liability from entities for breach of the obligations to the client'.

must be reviewed periodically by the entities, which are required to keep undated records of such reviews.[720] Article 18 provides that the 'solvency' or creditworthiness assessment must include at a minimum, an appropriate assessment of income and expenditure, e.g. employment status, income, savings, assets fixed costs, financial obligations and debts, and where relevant, the existence of other guarantees.[721] The lender is required to consider the potential impact of interest rate variations on repayment capacity and to ensure a prudent valuation of the collateral.[722] The decision to grant the secured loan, 'should be based preferably' on repayment capacity over the duration of the loan, and not solely on the expected value of the collateral.[723] Pursuant to article 18(4), the existence of insurance in respect of the loan should not alter the requirement for a positive assessment of the client's credit worthiness and repayment capacity. Where credit is refused on the basis of credit history and income status this should be disclosed to the client.[724] As in the equivalent Irish provisions, notwithstanding the emphasis on lending decisions which are premised on assessment of affordability, the provisions fall short of a prohibition in the context of a negative outcome. A point of distinction with the Irish frameworks is the fact that in Spain, the 'responsible lending' obligations are applicable on a differential rather than a universal basis and non-credit institutions are not subject to the requirements. A further point of interest is article 29(1) of SEL 2/2011, which requires credit institution to provide 'consumers 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'.[725] Whilst the concept of assessing the suitability of the product is comparable to that contained in the CPC 2012; notably in Spain, the onus in respect of the assessment appears to be on the borrower rather than the lender.

[720] Art 18(1).
[721] Art 18(2)(a) and (b). This assessment of repayment capacity also extends to the guarantor where applicable.
[722] Art 18(2)(c) and (d).
[723] Art 18(3).
[724] Banco De España, 'Economic Bulletin January 2012: Financial Regulation Q4 2011', 132.
[725] ibid, 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'.

5.3.2.1.3. Enforcement / Sanctions

In contrast to Ley 2/2009, the sanctions for breach of the provisions of Orden EHA 2899/2011 are pursuant to Ley 26/1988 on the discipline and intervention of credit institutions and the Banco De España is the relevant authority for supervision and enforcement.[726] Article 14(2) of Orden EHA 2899/2011 asserts that 'the provisions of this order shall be without prejudice to the general legislation on consumers and users', thereby providing that the applicability of EHA 2899/2011 does not preclude liability under the Consumer Law Framework where there is a breach of provisions therein.

5.3.3. Constitutive Sphere – Contract and Mortgage Law

A parallel between Ireland and Spain in the post-crisis period has been the emergence of affordability issues among residential mortgagor consumers who transacted in the pre-crisis context. In Ireland, the primary response was the introduction and development of the CCMA, thereby providing a moratorium of universal applicability, which in the period up to 2013, could delay enforcement for co-operating borrowers for a minimum 12 month period. In contrast, the initial Spanish response had a dual orientation; a moratorium based aspect to offer temporary relief to mortgagors and reform of the framework of mortgage law to address the financial aspects of enforcement. Against a backdrop of deteriorating economic and social conditions, there were multiple legislative enactments in Spain over the period from 2009-2012 with varying objectives, approaches and durations. The first of these was *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*.[727]

5.3.3.1. Real Decreto 1975/2008

In Spain, as in Ireland, the initial response to issues of affordability among residential mortgage consumers was the use of a moratorium to provide 'breathing space'. A legal point of distinction between the national measures was the fact that in Ireland, the moratorium was a component of the conduct of business framework developed

[726] Art 29(2) of SEL 2/2011 de 4 de marzo and art 14(1) Orden EHA 2899/2011.
[727] Royal Decree 1975/2008 on urgent measures to adopt in respect of the economy, taxation, employment and housing.

by the national supervisory authority and was of mandatory applicability to all lenders, whilst the Spanish moratorium was premised on primary legislation and the voluntary participation of lenders.[728] In addition, the moratorium contained in *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* (RD 1975/2008) was directed towards contractual repayment obligations rather than enforcement of the security. The law provided for a partial moratorium on the payment of loan instalments by a specific niche of debtors, identified with reference to economic criteria and loan characteristics.[729] The pre-requisites related to employment and income status and the loan had to be in respect of the principal residence of the debtor. 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 ongoing financial obligations had deteriorated due to the downturn in the Spanish economy.[730] The moratorium did not in any way alter the extent of the financial obligations under the loan contract as the legislation specified a repayment period in respect of the deferred obligations.[731] RD 1975/2008 provided that the moratorium applied to a maximum of 50% of the monthly fees, subject to a €500 euro maximum threshold, for the period from 1 January 2009 to 31 December 2010. The offset period for the deferred obligation commenced on 1 January 2011 and was for a maximum 10 year period. As with the first CCMA, the Spanish scheme was intended to be a temporary measure of fixed duration, i.e. 24 month period from 1 January 2009 to 31 December 2010.[732] However, the persistence and escalation of affordability issues among mortgage consumers led to an extension in the scope and temporal applicability of the scheme in *Real Decreto 97/2009, de 6 de febrero, por el*

[728] Art 3, 'implementation of these measures will require agreement between the applicant and the lending bank'.
[729] Art 3 identified the moratorium as applicable to mortgages for the purchase of the principal residence entered into prior to 1 September 2008 which did not exceed a value of 170,000 Euro. Art 5(1) outlines the socio economic eligibility criteria which had to be met as of 1 January 2010; those unemployed for a three month period, self-employed with an income less than three times the PME for a three month period and pensioners whose spouse has died since entering into the mortgage or in the period after 1 September 2008. Art 5(2) stipulates that it is a pre-requisite to eligibility that the borrower is in default.
[730] The emphasis in the preamble was on the impact of the economic downturn on employment in Spain and the objective of the measures was to facilitate a return to employment or the resumption of self-employment by borrowers through a reduction in the ongoing financial obligation and preventing the loss of the primary residence.
[731] Art 4.
[732] Art 4.

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 (RD 97/2009).[733] Pursuant to this legislation, there was a slight extension in the duration of the moratorium on payment, a delay in the commencement of the offset period and, a significant extension in the maximum duration of the period for the repayment of the deferred portion of the loan obligation. The quantum of the moratorium remained unaltered. RD 97/2009 provided that the moratorium was applicable to monthly payments up to a 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.[734] This provided a 12 month period from the expiration of the moratorium to the commencement of the offset period. There was no further utilisation in Spain of moratoria in respect of contractual repayments and subsequent measures had a notably different focus.

5.3.3.2. Real Decreto-ley 8/2011

Notwithstanding an escalating arrears crisis among residential mortgage consumers in the period from 2009 to 2012, there was minimal enforcement activity in Ireland.[735] Figures from the Central Bank of Ireland identify a total of 1,575 primary dwellings taken into possession by lenders in the period from January 2010 to December 2012.[736] This was not, however, true of Spain where there were 48,213 foreclosures in the first six months of 2012 alone; although a caveat with figures from the *Consejo General del Poder Judicial* (CGPJ)[737] is that they do not identify the precise number of procedures related to primary dwellings.[738] In view of this distinction, it is perhaps unsurprising that Spanish measures were introduced to

[733] Royal Decree 97/2009 of 6 February 2009.
[734] Art 4 as amended.
[735] There are both legal and economic factors which may have contributed to this trend. In respect of the former, the existence of a moratorium pursuant to the CCMA and the lacuna created by the LCLRA 2009 which was not remedied until 2013 are relevant. From an economic perspective, it is arguable that there was little desire on the part of lenders to crystallise losses in a subdued and deflated property market.
[736] There were 397 properties held by banks at the beginning of 2010 and the number taken into possession in the subsequent three year period was 1,575; 363 from Q1 to Q4 2010, 608 from Q1 to Q4 2011 and 604 from Q1to Q4 2012.
[737] General Council of the Spanish Judicial Authority.
[738] A total of 397,651 procedures were initiated in the period from 2007 to mid-2012. As noted these figures include both residential and commercial property.

address the financial implications of the enforcement process for the borrower.[739] *Real Decreto-ley 8/2011, de 1 de julio*, (RDL 8/2011) addresses debtors for whom residential mortgage obligations were unsustainable and who were subject to enforcement of the security by lenders.[740] The preamble states that the reforms were introduced with the objective of protecting low income families and ensuring that 'foreclosures are conducted without causing abusive situations or underselling of effective assets'. The law amended article 607.1 of *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil* (LEC) to increase the threshold of income which is exempt from attachment in respect of the post enforcement debt obligation, thereby preserving a minimum income for those families who had lost their primary residence as a result of 'difficult economic circumstances'.[741] There was also reform of the provisions which govern the auction of mortgage assets in the context of enforcement proceedings.[742] The amendments increase the minimum value for which the enforcing creditor can be awarded the property where the auction failed to meet the reserve or where there were no bidders.[743] It also reduced the deposit, required by bidders as a pre-requisite to participation, from 30% to 20% of the appraised value.[744] The objective of these provisions is to optimize the price which may be obtained for the property, thereby reducing the residual debt obligation for debtors who have lost their primary residence. RDL 8/2011 cites the protection of the economic, social and legal status of the family; however, the competing policy objectives in the mortgage context are manifest in the preamble which identified the

[739] The relevant provisions of the statute are expressly stated to be in response to the plight of mortgage debtors who contracted at the height of the inflationary trend in the Spanish property market and who were unable to sustain their contractual obligations.

[740] *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*. (i.e. Royal Decree Law 8/2011 of 1 July, of measures to support mortgagors, control of public spending and cancellation of debts owed by companies and autonomous local authorities, to promote entrepreneurship and momentum rehabilitation and administrative simplification).

[741] Art 1 of RDL 8/2011 increases the threshold of income exempt from attachment from the minimum wage to 150% of the minimum wage. The threshold increases by an additional 30% in respect of each member of the household who does not receive an income, salary or pension in excess of the minimum wage. Household is defined as 'spouse or domestic partners, ascendants, descendants of the first degree' who live with the owner occupier in the dwelling.

[742] Arts 670 (4) and 671 LEC which govern the approval of the final bid, the adjudication of the assets to the creditor and the context of auction with no bidders, and Art 669 LEC which regulates the deposit required by potential auction participants.

[743] Arts 670(4) and 671 LEC as amended provide that the property cannot be awarded for less than 60% of the appraised value of the property.

[744] Art 669 LEC.

objective of 'maintaining fully, however the fundamental elements of collateral for loans and, with them, the safety and soundness of our mortgage'.[745]

5.3.3.3. Real Decreto-Ley 6/2012

Aznar notes that in the period from 2010 to 2013 there were 285,000 residential evictions.[746] The extent of enforcement activity in Spain resulted in the establishment of civil society protest movements.[747] Whilst RDL 8/2011 addressed mortgage consumers who had lost their homes as a consequence of mortgage default, *Real Decreto-ley 6/2012, de 9 de marzo, de medidas urgentes de protección de deudores hipotecarios sin recursos* (RDL 6/2012) focused on mortgagors in a pre-enforcement context.[748] As with all previous statutes, it contextualizes the measures in terms of households who had suffered a negative income shock and were struggling to sustain contractual obligations on their primary residence. RDL 6/2012 creates a statutory framework for debt restructuring and forgiveness, however, the scope of applicability was restricted through a myriad of socio-economic and temporal criteria and the voluntary participation of lenders. 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.[749] The preamble identifies the objective of the statute as allowing flexibility in 'the implementation of the collateral' although 'without impairing the basic elements of the mortgage'.[750] The Code envisages three potential options for debtors dependent on their situation. Firstly, a debtor may request and obtain a restructuring of their mortgage debt so as to achieve medium to long term sustainability.[751] Where this is not viable a debtor may request a rebate on the

[745] Preamble to RDL 8/2011 of 1st July 2011. Where the income of these household members exceeds the minimum wage they will be attachable on an incremental basis according to the provisions of art 607(2) LEC.

[746] Sergio Nasarre Aznar, 'Robinhoodian Courts Decision on Mortgage Law in Spain (2015) 7(2) International Journal of Law in the Built Environment 127, 127. This figure includes both owner occupier and tenants.

[747] The most notable organisation in this regard is the *Plataforma de Afectados por la Hipoteca* (PAH) which was using civil disobedience and direct action to prevent evictions from November 2010 onwards.

[748] Royal Decree Law 6/2012 of 9 March 2012 on urgent measures to protect mortgage debtors without resources.

[749] Banco De España, 'Economic Bulletin April 2012: Financial Regulation Q1 2012' 147.

[750] Preamble to RDL 6/2012.

[751] Art 2 Annex RDL 6/2012. Banco De España, 'Economic Bulletin April 2012: Financial Regulation Q1 2012' 148. The relevant institution has one month from the time the application and the

outstanding principal amount, a request which the institution must reject or accede to within a one month period.[752] Although a request for a restructuring arrangement is not permitted where the property has already been listed for auction, this is not a bar to an application for a rebate. The third alternative is refered to as 'dation', i.e. *datio in solutum*, and it envisages delivery of the mortgage asset to the institution in full satisfaction0 of the debt.[753] When applying for *dation* the debtor may request to remain in the house as a tenant for a period of two years with a rent equivalent to 3% of the total amount of the debt at the time of surrender, potentially resolving the immediate housing needs of the debtor.[754]

Notwithstanding the potential of the framework, its applicability was limited by the voluntary participation of lenders and the capacity of the debtors to satisfy the eligibility criteria. The latter proved to be the greater challenge. The provisions are restricted to loans secured on and advanced for the purchase of the primary residence and the debtor must fall within the 'exclusion threshold' as of the entry into force of the decree, i.e. 11/3/2012.[755] In contrast to the Irish CCMA which has no temporal or economic restrictions on qualifying loans, RDL 6/2012 has retrospective applicability to a portion of pre-2012 mortgage loans. The criteria for the 'exclusion threshold' contained in article 3 relate to employment and income status[756] and, a

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accompanying documentation are filed to notify and provide the debtor with a restructuring plan. This may include a four year principal repayment grace period, extension of the repayment term to a total of 40 years from the date of origination of the loan, reduction of the applicable interest rate to one quarter of one percent over the Euribor rate and consolidation of the mortgagors' debt.

[752] Art 2 Annex RDL 6/2012. A plan is not deemed viable where the monthly mortgage under the restructuring arrangement exceeds 60% of the combined income of all members of the family unit. Art 2(b) outlines methods which may be used by the institution to determine the quantum of the rebate; these include a straightforward reduction of 25%.

[753] Art 3 Annex RDL 6/2012. Banco De España, 'Economic Bulletin April 2012: Financial Regulation Q1 2012' 148.

[754] Any arrears of rent during this period will incur a penalty of 20% interest. Art 3(d) provides that entities may agree with the debtor to transfer part of the capital gain from the sale of the house in consideration of co-operation provided by the debtor with the sale process.

[755] Arts 2 and 3(1)(d).

[756] The 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. Per art 3(1)(a) the family unit is defined as the debtor and spouse (if not legally separated) or registered domestic partner, and any children residing in the dwelling regardless of age. 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.

further pre-requisite is that the purchase price of the property must not exceed the value outlined in article 5 which is determined with reference to the population of the municipality in question.[757] A common feature of both RDL 6/2012 and the Irish CCMA 2011 are restrictions on financial penalties which can be imposed on mortgagors in default in an attempt to prevent an escalation of indebtedness.[758] In addition, both clearly provide for penalization of debtors who do not act in good faith; RDL 6/2012 asserting that the debtor 'shall be liable for damages that may have occurred, as well as all costs incurred in the implementation of these easing measures, without prejudice to the responsibilities of another order to the debtors conduct that could result'.[759]

In addition to providing a framework for distressed mortgagors, RDL 6/2012 also contained reforms to the out of court enforcement process in an attempt to prevent underselling of assets. In the Irish context, a court order would be a pre-requisite to possession or sale in the context of a 'housing loan mortgage' entered into from the commencement of the LCLRA 2009, and as previously noted, these were habitually sought prior to the imposition of this statutory obligation. However, Spanish mortgage law permitted an out of court process where this was provided for in the loan contract.[760] Under existing provisions there was the potential for the process to extend to three auctions depending on whether the reserve price was achieved. In the first auction the reserve price was that specified in the mortgage deed; if the auction was declared void, the second auction was held with a reserve price equal to 75% of the previous reserve price; if the second auction was unsuccessful a third auction was held without a reserve price. In any of those auctions, the creditor could request that

[757] Art 5(2) The monetary limitations in respect of which the Code is applicable is as follows; for municipalities with up to 100,000 inhabitants the purchase price cannot exceed €120,000, between 100,001 and 500,000 inhabitants the threshold is €150,000, municipalities with inhabitants from 500,001 to 1,000,000 or integrated townships in metropolitan areas with over 1,000,000 inhabitants the upper limit is €180,000. The maximum purchase price of €200,000 is reserved for municipalities with population in excess of 1,000,000 inhabitants. For assessments pursuant to the decree the statute provided that population figures can be verified in the Municipal register.

[758] Art 4. Where a debtor has satisfied the 'exclusion threshold' criteria, a remunerative interest of 2.5% of the outstanding principal of the loan is the maximum additional interest payable.

[759] Art 7(1).

[760] Art 12 RDL 6/2012 provides that in the context of enforcement against the debtors' primary residence, the extrajudicial enforcement process regulated by art 129 LH and arts 234 – 236 RH is subject to the provisions of article 12.

the asset be foreclosed[761] at the value specified in the mortgage deed. RDL 6/2012 responded to the potential for abuse of this process, via the underselling of assets in an extended process, by provisions which streamlined the process and amended the threshold values for which the property could be awarded; the objective being to minimize the potential for financial detriment to the debtor. RDL 6/2012 requires the process to take place through a single auction with a reserve price equal to 70% of the foreclosure value specified in the mortgage deed.[762] Where the reserve price is not achieved it can be awarded to the creditor for 60% or to a third party for 50% of the appraised value or the value of the outstanding claim.[763]

5.3.3.4. Real Decreto-Ley 27/2012

It is clear that in the period up to December 2012, there was a significant increase in the volume of repossessions in Spain. *Real Decreto-ley 27/2012, de 15 de noviembre, de medidas urgentes para reforzar la protección a los deudores hipotecarios* (RDL 27/2012) was an emergency measure introduced in response to incidents of suicide amongst distressed mortgagors facing eviction.[764] The law imposes a two year moratorium on the execution of eviction orders arising from enforcement proceedings by the creditor where the loan is granted for the purpose of and, secured on the debtors' sole residence.[765] 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, however, as with previous enactments there are socio economic criteria utilised to reduce the scope of relief. 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

[761] The term 'foreclosure' is used in Spanish legislation to refer to the enforcement of the security by the lender and its utilisation in the current work is to be construed accordingly.
[762] Art 12(1).
[763] Arts 12(2) - 12(5) RDL 6/2012.
[764] Royal Decree Law 27/2012 of 15 November on urgent measures to strengthen the protection of mortgagors. On Friday 9th November, 2012, 53-year-old Amaia Egana, jumped from her fourth-story window in the Basque Country as officials arrived to evict her from her home. Hers was the second eviction-related suicide in Spain in a matter of weeks. Public demonstrations followed and international media coverage ensued and 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."
[765] Arts 1(1) and 1(3)(d). The law also contains a proposal for a collaborative scheme, between the government and the financial sector to provide social housing on a rental basis. The proposal envisages 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.

family unit to work.[766] In addition, the debtor must fulfil specified economic criteria. The focus of the economic criteria is on aggregate household income and the proportion of income supporting the mortgage obligation.[767] The law stipulates that there must have been a detrimental change in economic circumstances in the four years preceding application.[768] This is assessed with reference to an increase in the mortgage debt burden relative to income.[769] The application can be made at any time prior to the execution of the eviction order and the manifest objective is to provide 'breathing space' to economically vulnerable borrowers facing eviction.[770] The reprieve whilst welcome was ultimately a temporary measure, which did not answer question of what would happen when the moratorium came to an end if the economic circumstances of the borrower had not improved.

5.3.4. Judicial Role in Reform: 2009 – 2012

Aznar notes that since the beginning of the systemic crisis in 2007, 'Spanish courts ….reacted faster than lawmakers in attempting to contain the negative side effects for consumers, by either applying the law or, occasionally, by contravening it, to "protect the weak" against the abuses of credit institutions'.[771] A section of the Spanish judiciary can be viewed as having played a significant role in precipitating reform of national frameworks of residential mortgage regulation through the

[766] Art 1(2)(a) – (g). a) Large families (in accordance with current legislation), b) single parent family with two dependent children, c) families with a child three years and under, d) family unit in which any of its members have a recognized disability of more than 33%, requiring long term care, or suffering from an accredited illness which renders them permanently unable to work, e) family unit in which the mortgagor is unemployed and has exhausted unemployment benefits, f) the family unit who live in the same household , where one or more persons who are connected with the mortgage holder or spouse by blood relationship to the third degree of consanguity, and who is disabled, requires long term care, or suffers from a serious illness which permanently prevents them from working) families in which there is a victim of domestic violence ,(as established in the current legislation), where the property subject to repossession is their principal residence.

[767] Art 1(3)(a) – (d). a) The total revenue of the members of the household does not exceed the limit of three times the Public Indicator of Multiple Effect Income (b) that, in the four years preceding the time of application, the family unit has undergone significant changes in their economic circumstances, in terms of effort to access to housing, c) that the resulting mortgage payment exceeds 50 percent of the net proceeds received by the set of members of the family unit d) that it is a credit or mortgage loan secured only falling upon the debtor's home ownership and granted for the acquisition of it.

[768] Art 1(3)(b).

[769] Arts 1(3)(c) and 1(4)(a). The amount of loan instalments must have increased by 150% relative to net income resulting in a mortgage payment greater than 50% of net income.

[770] Art 2 stipulates the documentation required to support the application.

[771] Sergio Nasarre Aznar, 'Robinhoodian Courts Decision on Mortgage Law in Spain, (2015) 7(2) International Journal of Law in the Built Environment 127, 128.

approach taken to the enforcement of pre-crisis residential mortgage loans. In the period from 2010 to 2013, there was a discrete body of Spanish case law in which there was a subversion of existing civil law in an attempt to provide an equitable outcome for consumers.[772] Aznar has termed this case law 'Robinhoodian' and has cited a number of distinct approaches manifest in the case law; including forced *datio in solutum*, 'fresh start' cases and 'floor clause' decisions.

The origins of the 'Robinhoodian' approach is traced to a decision of the Court of Appeal in Navarre which forced a *datio in solutum* in the context of an action for enforcement, thereby restricting the claim of the lender to the secured asset.[773] Aznar notes the extent to which the ruling is contrary to multiple provisions of existing Spanish civil law, and is premised on Article 7.1 of the Código Civil (CC), i.e. the general doctrine of 'not going against one's own acts', without any analysis of whether the requirements for application of the doctrine were satisfied.[774] This decision inspired a thread of case law in which limitations were imposed on the capacity of the lender to seek enforcement against assets of the borrower, in the context where house price deflation resulted in the value of the secured asset being insufficient to satisfy the contractual debt. The Court of Appeal in Girona precluded enforcement beyond the mortgaged property as an 'abuse of law' pursuant to Art. 7.2 CC.[775] Unjust enrichment was an argument raised by the Court of Appeal in Ciudad Real, notwithstanding that this is contrary to the case law of the Spanish Supreme Court which precludes the application of the unjust enrichment principle in areas which are regulated by statute.[776] An argument of 'disloyal delay' was raised by the same court where recovery of an outstanding debt was sought 14 years after the

[772] It is worth noting that notwithstanding the legal significance of the decisions, there were not representative of the approach taken by the judiciary generally. Aznar points to the thousands of cases in which relief to consumers was achieved through the correct application of existing contract and consumer law.

[773] (AAP) (Navarre 17 December 2010 [Second Section] [AC 2011/1]).

[774] Sergio Nasarre Aznar, 'Robinhoodian Courts Decision on Mortgage Law in Spain, (2015) 7(2) International Journal of Law in the Built Environment 127, 129-130. Aznar identifies the inconsistency of the ruling with art 1911 CC (universal liability of debtor), arts 666, 671 and 579 LEC and art 140 LH. He further notes a *contra legem* interpretation of arts. 1911 CC and 579 LEC in the case and the use of speeches by the Spanish Prime Minister José Luis Rodríguez Zapatero and President Obama of the U.S. as 'legal sources'.

[775] ibid, 130. The reasoning used was that the bank itself fixed the value of the property in the loan contract and it could not subsequently assert its insufficiency to satisfy the debt.

[776] (SAP) (Ciudad Real 17 January 2011[JUR 2011/119331]) claiming unjust enrichment where the lender refuses the datio in solutum notwithstanding the doctrine of the Supreme Court (TS) pursuant to (STS) (21 October 2005 [RJ 2005, 8274]).

enforcement of the mortgage, and this was subsequently used in a judgment of the Court of Appeal in Cordoba.[777] The extended duration of enforcement in the foregoing case highlights the scope of recovery accorded to the lender under the Spanish framework. Prior to 2015, there was no personal bankruptcy regime and article 1156 CC precludes bankruptcy as a mechanism of extinguishing obligations.[778] The 'fresh start' approach is exemplified by a decision of the Spanish Commercial Court in Barcelona in which the debts of two retirees were cancelled following an unsuccessful insolvency process.[779] A further thread of case law is that in which floor clauses in mortgage loan contracts were rendered void using 'economic or financial law reasoning and arguments that would in any case, be either inapplicable to the case or else simply wrong'.[780] Aznar identifies three common characteristics to these 'unfounded court decisions'; the economic situation of the debtor as a justifying factor in the approach taken, the use of paralegal sources to justify decisions, and the use of general legal principles as legal grounds for the decisions without proper justification for the non-applicability of relevant statutes.[781] Notwithstanding that in quantitative terms this case law was in the minority, pursuant to the theoretical framework used in this analysis, to the extent that it undermined legal certainty regarding the enforceability of contractual obligations, it had the capacity to negatively impact the Spanish mortgage market by dis-incentivising supply side market activity. Aznar addresses this aspect in his query '..are national or international investors really ready to accept that Spanish rules regarding immoveable securities or on insolvency can change, either retrospectively or on an

[777] (AAP) (Cordoba 1 February 2012 [AC 2012/315]).
[778] Sergio Nasarre Aznar, 'Robinhoodian Courts Decision on Mortgage Law in Spain, (2015) 7(2) International Journal of Law in the Built Environment 127, 130-131.
[779] (SJM no. 3) (Barcelona 26 October 2010 [AC 2010/1828]). Aznar observes that the 'legal grounds used…was that of sparing the debtors the liability of paying their debts twice over' noting that the judge relied on the lessons from Sisyphus, King of Ephra in Homers Odyssey.
[780] Sergio Nasarre Aznar, 'Robinhoodian Courts Decision on Mortgage Law in Spain, (2015) 7(2) International Journal of Law in the Built Environment 127, 131-132. The decision of the Commercial Court in Seville (SJM no. 2) (Seville 30 September 2010 [AC 2010/1550]) inspired other judgments in which floor clauses were declared void and asserted as being abusive due to an asymmetric relationship between the floor clause and the correlated ceiling clause. Aznar notes that the 'economic' argument upon which the judgment is funded is flawed as the clauses are independent and do not need to be symmetric 'and moreover, they are part of the price and cannot be rendered abusive'. He contrast these decisions based on asymmetry with valid decisions on bad banking practices which were based on 'vices of consent' and suggests that a preferable approach would have been with reference to the manner in which such clauses were commercialised. Notably this reasoning is supported by the Spanish Supreme Court in (STS) (9 May 20 2013 [RJ 2013/3088]).
[781] ibid, 132.

ongoing basis depending on the judge or the economic situation of the debtor? What cost would this uncertainty involve, for instance, in the pricing of new mortgages? What impact does this have on the international credibility and the solvency of Spanish lending institutions, which are also directly linked to their funding needs?'.[782] Notwithstanding the negative impacts from this perspective, Aznar acknowledges that this 'judicial activism' did stimulate reform of existing legal frameworks by the legislature in the period from 2013 to 2015.[783]

5.4. EU Role: 2009 - 2012

The previous chapter identified the peripheral role of the EU with respect to Member State mortgage markets in the pre-crisis period. This was attributed to issues of legal competence, economic context and the prevailing regulatory ethos. The period from 2009-2012, is significant from an EU perspective, as notwithstanding that the locus of reform activity in respect of residential mortgages was at national level, there were EU developments which provided the basis for an EU regulatory role in Member State markets from 2013 onwards. These developments had both an institutional and legislative component and, in common with the equivalent Irish reforms, there is a contrast in the role of mortgage markets as a causal factor precipitating legislative reform but an almost incidental recipient of institutional reform which had a broader systemic focus. Although a draft directive on mortgage credit was introduced by the EU Commission in March 2011, this would not come to legislative fruition until March 2014.[784] Accordingly, the development of most significance during this period was the establishment of a new EU institutional framework of financial market supervision.

5.4.1. Constitutional Reform – Lisbon Treaty

The Lisbon Treaty was signed by EU Member States on 13 December 2007; however, it did not come into effect until 1st December 2009. In the current analysis, it is relevant to establish the extent to which the Lisbon Treaty had a substantive impact on EU competences relevant to the mortgage context. The objective of this inquiry is to determine whether the post-crisis EU regulatory role in national

[782] ibid.
[783] ibid, 139.
[784] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Credit Agreements Relating to Residential Property' COM (2011) 0142 final.

mortgage markets is attributable to an enhanced mandate for intervention arising from pre-crisis EU treaty reform which came into effect in the post-crisis context. Significantly, the Lisbon Treaty does not alter in any substantive or relevant manner the treaty provisions on the approximation of laws, consumer protection, territoriality of property rights or free movement of capital.[785] The scope of the EU mandate is unchanged in these areas, and thus there is no enhanced legal basis for EU intervention arising from the Lisbon Treaty. However, the Lisbon Treaty is relevant to the extent that it provided clarification as to the allocation of competence between Member States and the EU in respect of the treaties and the implications in terms of the capacity of Member States to act. Article 4(2) TFEU identifies the internal market and consumer protection as areas of shared competence between the EU and Member States.[786] A new protocol under Lisbon provides, that in areas of shared competence 'when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'.[787] Accordingly, Member States have the capacity to act in areas of shared competence, either where there is no existing EU legislation or, where the relevant EU legislation does not address the aspect in question. The Lisbon Treaty also replaced the existing protocol on subsidiarity and proportionality with a new protocol which enhances the role of national parliaments and the Court of Justice in monitoring compliance with the principles. The protocol provides for an ex ante 'early warning' of non-compliance through the provision of a 'reasoned opinion' by national parliaments on draft legislation. It also confers on the CJEU jurisdiction to hear actions on the basis of infringement of the principle by existing EU legislation, i.e. an ex poste mechanism.[788] In general terms, the Lisbon treaty is of significance in that it incorporates the EU Charter of Fundamental Rights (EUCFR) into EU law.[789] The question is whether this has any implications for the current analysis. Certainly, the

[785] The relevance of the latter stems from the postulation that capital provisions as a fundamental freedom might offer scope to counter the territoriality of property rights which is a bulwark against incursion into national property law regimes.
[786] Art 2(2) TFEU provides that 'When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence'.
[787] Protocol 25.
[788] Protocol 2, arts 6-8.
[789] Art 6. Charter of Fundamental Rights of the European Union OJ C 326/391.

EUCFR contains provisions on property rights,[790] respect for private and family life,[791] and consumer protection.[792] The rights in the Charter are broadly analogous to the existing treaty provisions and, as noted in chapter four, the constitutional provisions of the Member States under review; thus with reference to the approach taken in the current analysis, they do not directly enhance the mandate for EU regulatory intervention. However, as will be noted in chapter six, the fundamental rights contained in the charter have been used alongside EU consumer law in judicial proceedings which challenge national frameworks of enforcement in the residential mortgage context.

5.4.2. Institutional Reform – European System of Financial Supervision (ESFS)

As noted in chapter four, the Committees within the Lamfalussy Framework had no pre-crisis role in the residential mortgage markets of Member States. There was however, a significant change in the relevance of the EU institutional framework for national markets in the period from 2009 to 2012. This change stemmed from proposals contained in a report by a high level group, chaired by Jacques de Larosière, who were tasked with making recommendations on a range of financial crisis related issues, including the supervision of EU financial markets and institutions.[793] The De Larosière report recommended the establishment of a new institutional framework for financial market supervision; the European System of Financial Supervision (ESFS).[794] The ESFS was based on a network model and it necessitated the establishment of three sectoral European Supervisory Authorities (ESA's) to replace the existing Committees, and the establishment of a new body, the European Systemic Risk Council (ESRC), whose function was to gather information

[790] Art 17.
[791] Art 7.
[792] Art 38.
[793] 'The High Level Group on Financial Supervision in the EU' (Report for the EU Commission, 25 February 2009). The report was commissioned by the President of the European Commission, José Manuel Barroso.
[794] 'The High Level Group on Financial Supervision in the EU' (Report for the EU Commission, 25 February 2009)recommendation 18 at 48. Notably the group did not at that juncture recommend a role for the ECB in micro-prudential supervision; '..while the Group supports an extended role for the ECB in macro-prudential oversight …it does not support any role for the ECB for micro-prudential supervision'. In 2014, a move towards Banking Union led to such a transfer of micro prudential competence to the ECB with the introduction of the Single Supervisory Mechanism (SSM).

on macro prudential risk in the EU.[795] The ESFS framework proposed by the De Larosière Report was subsequently implemented, although the European Systemic Risk Council was ultimately named the European Systemic Risk Board (ESRB).[796] The primary objective of the ESFS, as stated in founding regulations, is to 'ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services'.[797] The sectoral authorities, i.e. ESA's, established pursuant to the ESFS were the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). The ESA's are EU bodies with legal personality and they operate within a network of national competent authorities (NCAs) and the Joint Committee of the ESAs (JC).[798] Responsibility for day to day micro prudential supervision remained, in the period up to November 2014, the province of the national authorities with the ESA's 'charged with distinct supervisory and quasi regulatory responsibilities designed to enhance pan EU supervision and rule making'.[799] The ESRB, which in contrast to the ESA's was not a legal entity, was mandated to monitor the pan EU financial system for macro prudential and systemic risks. Within the context of the current analysis, the significance of this new EU institutional framework stems from the supervisory and regulatory role accorded to the European Banking Authority (EBA).

[795] ''The High Level Group on Financial Supervision in the EU' (Report for the EU Commission, 25 February 2009)recommendation 16 at 46. It was envisaged that the ESRC would 'work closely with the IMF, FSF, G20 at global level'.

[796] A proposal to put forward draft legislation to establish an ESFS was contained in the EU Commission Communication of 4 March 2009, 'Driving European Recovery' and a subsequent Communication of 27 May 2009 'European Financial Supervision', contained details of the new institutional framework which were broadly consistent with the De Larosière Report'.

[797] Art 2(1) of Regulation (EU) 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L331/12.

[798] Commission 'Report to the European Parliament and the Council on the Operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)' COM (2014) 509 final 2. Pursuant to article 54 of Reg 1093/2010 the Joint Committee serves as a forum to ensure cross sectoral consistency between the ESAs. It is composed of the chairperson of each ESA and where applicable the chairperson of any subcommittee established under article 57.

[799] European Union Committee, 'The Post Crisis EU Financial Regulatory Framework: Do the Pieces Fit?' (HL 2014-15 103, Stationery Office 2 February 2015)23.

5.4.2.1. European Banking Authority (EBA)

Regulation 1093/2010 establishes the European Banking Authority (EBA) as a constituent of the European System of Financial Supervision (ESFS) with effect from 1 January 2011.[800] In common with the other ESA's, the EBA was established pursuant to Article 114 TFEU on the approximation of laws in furtherance of the internal market objective and, it is answerable to the European Parliament and the Council.[801] Its remit is in respect of the activities of financial institutions and the competent authorities which supervise them.[802] In the current analysis the competent authorities referred to are the national supervisory authorities for financial markets and services, i.e. CBI in Ireland and BDE in Spain, and the entities which they supervise comprise credit and non-credit institutions to the extent that they are subject to EU regulation. The decision making body of the EBA, as with the other ESA's, is the Board of Supervisors, the voting members of which are the heads of the National Competent Authorities.[803] As a result of this composition, national expertise and concerns can be reflected in decision making of the Board of Supervisors; although notably members are charged with acting independently and objectively in the interests of the EU as a whole.[804]

5.4.2.1.1. EBA Objectives

Article 1(5) of Regulation 1093/2010 cites the primary objective of the EBA as protecting 'the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses'. The constituents of this objective identified in the section include 'improving the functioning of the internal market, including in particular, a sound, effective and consistent level of regulation and supervision', 'ensuring the integrity, transparency, efficiency and orderly functioning of financial markets' and

[800] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331/12.
[801] Recital 17 and art 3 Reg 1093/2010.
[802] Art 2 Reg 1093/2010.
[803] Art 40. Non-voting members are the representatives of the EU Commission, the ECB, ESRB, EIOPA, ESMA, and the Chairperson of the EBA.
[804] European Union Committee, 'The Post Crisis EU Financial Regulatory Framework: Do the Pieces Fit?' (HL 2014-15 103, Stationery Office 2 February 2015)34. This obligation extends to the authority as a whole.

'enhancing consumer protection'.[805] The regulation specifies that the EBA will further these objectives through the establishment of 'high quality common regulatory and supervisory standards and practices, in particular by providing opinions to the Union institutions and by developing guidelines, recommendations, and draft regulatory and implementing technical standards which shall be based on the legislative acts referred to..' and by ensuring 'the consistent application of legally binding Union Acts, in particular by contributing to a common supervisory culture…'.[806] The EBA has a mandate to undertake peer reviews of the activities of competent authorities in order to strengthen consistency in supervisory outcomes.[807] It is envisaged that these peer reviews will facilitate identification of the degree of convergence in supervisory and enforcement practices by national authorities, and thereby provide a basis for the issuance of guidelines and recommendations to enhance convergence.[808]

5.4.2.1.2. EBA Regulatory Mechanisms

A report by a committee of the House of Lords notes the 'quasi rule making' capacity of the EBA in its development of regulatory and implementing technical standards, guidelines and recommendations.[809] However, there are significant distinctions in the legal impact of the respective measures and the manner in which they arise. Regulatory and implementing technical standards, as the name implies, are technical in nature and do 'not imply strategic decisions or policy choices'.[810] Regulatory technical standards are a delegated act pursuant to Article 290 TFEU which permits a delegation of competence to the EU Commission within a legislative act, to facilitate the adoption of 'non legislative acts of general application that supplement or amend certain non-essential elements' of the act'.[811] Article 10 of

[805] Arts 1(5)(a), (b) and (f). Notably, the consumer protection objective is the final item in the list after the internal market, financial stability and other related objectives i.e. strengthening international supervisory co-ordination and preventing regulatory arbitrage and promoting equal conditions of competition. This is consistent with the list of functions in the context of the Central Bank of Ireland.
[806] Arts 8(1)(a) and (b).
[807] Art 30.
[808] Arts 30(2)(b)-(d), art 30(3). The peer review also has the capacity to act as a benchmarking exercise in respect of best practices across Member States.
[809] European Union Committee, 'The Post Crisis EU Financial Regulatory Framework: Do the Pieces Fit?' (HL 2014-15 103, Stationery Office 2 February 2015) 34.
[810] Arts 10 and 15.
[811] <www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aai0032> last accessed 25 September 2016. Introduced under the Lisbon Treaty, 'delegated acts may add new (non-essential)

Regulation 1093/2010 empowers the EBA to develop draft standards in the context of such a delegation, the objective of which is to ensure consistent harmonisation in the area identified. Article 29(2)(a) of the Mortgage Credit Directive exemplifies the use of regulatory technical standards in the mortgage context. The article mandated the development by the EBA and, empowered the adoption by the EU Commission, of standards in respect of the minimum quantum of professional indemnity insurance to be held by credit intermediaries.[812]

Implementing technical standards which are the second category of draft technical standards which the EBA may develop are an implementing act pursuant to Article 291 TFEU. Although implementation of binding EU law is primarily an issue for Member States, article 291 provides that where there is a requirement for uniform conditions for the implementation, the Commission may be empowered to adopt an implementing act.[813] Article 15 of Regulation 1093/2010 empowers the EBA to develop draft standards to determine the conditions of application of those acts.[814] The role of the EBA in respect of the foregoing delegated or implementing acts is to develop draft standards for subsequent endorsement by the EU Commission. Their role is in response to a delegation of competence within EU legislation which acknowledges the specialised expertise of the EBA in the subject area.[815] The regulatory and implementing technical standards, developed in draft form by the EBA and subsequently adopted with or without further amendment by the EU Commission, are legally binding and in Lamfalussy terms, are Level 2 measures.[816]

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rules or involve a subsequent amendment to certain aspects of a legislative act. The legislator can thus concentrate on policy direction and objectives without entering into overly detailed and often highly technical debates'. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aai0032

[812] This mandate was given effect through Commission Delegated Regulation (EU) No 1125/2014 of 19 September 2014 supplementing Directive 2014/17/EU of the European Parliament and of the Council with regard to regulatory technical standards on the minimum monetary amount of the professional indemnity insurance or comparable guarantee to be held by credit intermediaries [2014] OJ L305/1.

[813] Although this capacity existed prior to the Lisbon Treaty, the latter strengthened the competence of the EU Commission to adopt implementing acts. Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13 regulates the Commission's exercise of implementing powers.

[814] Art 15.

[815] Recital 22, 'As a body with highly specialised expertise, it is efficient and appropriate to entrust the Authority, in areas defined by Union law, with the elaboration of draft regulatory technical standards, which do not involve policy choices'.

[816] Art 17(3) identifies a breach of the RTS or ITS as a breach of EU law.

The EU legislature is fundamentally the initiator of the foregoing technical standards. However, the EBA itself has the capacity to initiate guidelines and recommendations addressed to competent authorities or financial institutions where this is deemed necessary to establish '…consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law'.[817] The use of guidelines and recommendations presupposes an EU legislative framework upon which to base the measures. Prior to the introduction of the Mortgage Credit Directive (MCD) in 2014, the EU had no conduct of business framework in the field of residential mortgages.[818] However, once the MCD was adopted, it was open to the EBA to develop guidelines or recommendations based on obligations contained in the Directive, where this would promote consistency in the application of EU law. Within the Lamfalussy Framework, guidelines and recommendations are Level 3 measures and impose a 'comply or explain' obligation on addressees.[819] Competent authorities and financial institutions are required to 'make every effort' to comply with the guidelines and recommendations and are under an obligation to inform the EBA, within a two month period of issuance, as to whether they intend to comply and providing reasons in the context of non-compliance.[820] There is an obligation imposed on the EBA to publish details of competent authorities who are non-compliant, and they have discretion in deciding whether or not to publish the reasons given. A financial institution is obliged to report in 'a clear and detailed way' whether they are compliant if this is required by the guideline or recommendation.[821] In its annual report, the EBA notifies the EU Commission, Parliament and Council of the guidelines and recommendations issued, identifies non-compliant competent authorities and how it intends to ensure that the relevant authority follow its guidelines and recommendations in the future. It is clear that guidelines do not have the same status as technical standards so non-compliance

[817] Art 16(1). Art 16(2) provides for open public consultation, cost benefit analysis and the solicitation of advice or opinions from the Banking Stakeholder group, in respect of the guidelines and recommendations, where appropriate.
[818] 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 [2014] OJ L60/34.
[819] Level 4 in Lamfalussy consists of supervision and enforcement, undertaken primarily by competent authorities in Member States. European Union Committee, 'The Post Crisis EU Financial Regulatory Framework: Do the Pieces Fit?' (HL 2014-15 103, Stationery Office 2 February 2015) 34.
[820] Art 16(3).
[821] Art 16(3).

is not a breach of EU law per se. Nonetheless, it is equally clear that they are not comparable to EBA opinions which are of voluntary applicability.[822]

5.4.2.1.3. EBA Enforcement Powers

The EBA undertakes its enforcement activity through investigation and the issuing of recommendations and directions. Article 17 empowers the EBA to investigate an alleged breach of EU law by a national competent authority in respect of the legislative frameworks in which it has competence or binding measures adopted pursuant to these acts.[823] A breach of EU law may arise through the non-application or the misapplication by the competent authority of the acts, or by its failure to ensure compliance by financial institution with the requirements of the acts.[824] Where the EBA establishes a breach of EU law, it is empowered to issue a recommendation to the competent authority setting out the action necessary to remedy the breach.[825]

Pursuant to its founding regulations, the EBA is conferred with competence to issue individual decisions to competent authorities and financial institutions in certain specified circumstances. Where the aforementioned recommendation of the EBA to a national competent authority has not been complied with and an opinion of the EU Commission pursuant to this non-compliance has been issued, the EBA has the capacity to adopt a decision addressed to an individual financial institution requiring the necessary action to comply with EU law. This capacity arises where there is non-compliance by the competent authority with the Opinion of the EU Commission, the breach is in respect of requirements which are directly applicable to the financial institution and 'it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system'.[826] Article 18 identifies the capacity of the EBA to act in 'emergency situations' and it empowers the EBA to address individual decisions to competent authorities, and in the event of non-

[822] Art 29 provides a list of activities that the EBA is required to undertake in promoting a common supervisory culture. Among these is the provision of opinions to competent authorities.
[823] Art 17(2). The investigation may be premised on a request from the EU Institutions, the Banking Stakeholder Group, a competent authority or on the initiative of the EBA itself.
[824] Art 17(1).
[825] Art 17(3).
[826] Art 17(6).The decision must conform with the formal opinion issued by the EU Commission to the competent authority.

compliance to individual credit institutions, 'to respond to adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union'.[827] It has been noted that the direct intervention powers of ESA's, notwithstanding, that they are 'exceptional and subject to numerous conditions…are significant in that they represent a more intervention based model of financial supervision, which rests on a degree of hierarchical control'.[828] Less contentiously, the EBA may address decisions to competent authorities and, subsequently to financial institutions, in its role as arbitrar of disagreements between national competent authorities in a cross border context.[829] Any natural or legal person can appeal against any decision of the EBA where the decision is addressed either to that person or notwithstanding that it is directed to another, is of 'direct and individual concern' to that person.[830] The decision of the Board of Appeals may be the subject of proceedings before the CJEU as provided for in Article 263 TFEU, as may decisions taken by the EBA where there is no right of appeal to the Appeals Board.[831] The EBA may also be subject to an action in accordance with Article 265 TFEU where it has an obligation to act under EU law and it fails to do so.[832]

5.4.2.1.4. EBA Consumer Protection Mandate

A 2014 report by the European Court of Auditors identifies a number of distinctions between the roles undertaken by the European Banking Authority (EBA) as compared with that of its predecessor, the Committee of European Banking Supervisors (CEBS). It notes an enhanced role for the EBA in micro prudential regulation and supervision and contrasts the advisory regulatory function of the

[827] Arts 18(3)-(4). This mandate is premised on the adoption by the Council pursuant to article 18(2) of a decision to the EBA which asserts the existence of an emergency situation.
[828] Heikki Marjosola, 'Bridging the Constitutional Gap in EU Executive Rule Making: The Court of Justice Approves Legislative Conferral of Intervention Powers to European Securities Markets Authority' (2014) 10(3) European Constitutional Law Review 500, 504.
[829] Arts 19(3)-(4).
[830] Art 60. Art 58 provides for a Board of Appeals as a joint body of the ESA's comprised of six member and six alternates 'individuals of a high repute with a proven record of relevant knowledge and professional experience, including supervisory experience, to a sufficiently high level ……. excluding current staff of the competent authorities or other national or Union institutions involved in the activities of the Authority. The Board of Appeal shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority's exercise of its powers'. The decision of the Board of Appeal is binding on the EBA.
[831] Art 61(1).Union institutions, Member States and natural and legal person may institute proceedings against a decision of the EBA.
[832] Art 61(3). Same standing as for art 61(1).

CEBS and its non-binding guidelines and recommendations with the capacity of the EBA to develop technical standards which become an EU regulation binding in Member States. It notes the voluntary participation of the CEBS in a number of supervisory colleges with the right of the EBA to participate in all supervisory colleges, as well as its capacity to put topics on the agenda of the supervisory colleges.[833] In addition, it highlights the mediation role of the EBA in the context of disagreement between the National Supervisory Authorities (NSA's).[834] Notwithstanding the significance of these distinctions generally, the focus of the current analysis is on the capacity of the EBA to play a role in respect of the constitutive and facilitative spheres of residential mortgage regulation in Member States. Accordingly, the contrast of most relevance is the fact that the EBA, unlike its predecessor, is possessed of a consumer protection function.[835] Article 1(5)(f) requires the EBA to contribute to enhanced consumer protection and article 9 identifies tasks to promote 'transparency, simplicity and fairness in the market for consumer financial products or services across the internal market'. These include; collecting and analysing consumer trends, reviewing and co-ordinating financial literacy and education initiatives by competent authorities, developing training standards for industry and contributing to the development of common disclosure rules.[836] The consumer protection and financial activities section also empowers the EBA in cases and under conditions specified in legislation to 'temporarily prohibit or restrict certain financial activities the orderly and functioning and integrity of the whole or part of the financial system in the Union'.[837] Pursuant to the requirement imposed in article 9(4) of its founding regulation, a Standing Committee on Financial Innovation (SCFI) was established by the EBA in May 2011 to assist it in fulfilling its mandate in the areas of financial innovation and consumer protection.[838] Bernard

[833] 'European Banking Supervision Taking Shape – EBA and its Changing Context' (Special Report No 5, European Court of Auditors 2014) 5. 'Colleges of supervisors are coordination structures that bring together the regulatory authorities from different countries involved in the supervision of a cross‐border banking group. They are a mechanism for the exchange of information between home and host supervisors, for the planning and performance of supervisory tasks in a coordinated manner or jointly, and for the preparation for and the handling of emergency situations'.
[834] ibid, 11.
[835] ibid. The EBA has a mandate to promote transparency, simplicity and fairness in the market for consumer financial products or services in the EU.
[836] Art 9(1) (a)-(d).
[837] Art 9(5).
[838] 'Financial Innovation and Consumer Protection: An Overview of the Objectives and Work of the EBA's Standing Committee on Financial Innovation (SCFI) in 2011-2012' (European Banking Authority

Sheridan, the Director of Consumer Protection at the Central Bank of Ireland, was appointed chairman of the SGFI in September 2014.[839]

5.4.2.1.4.1. Consumer Trends Report 2012

The EBA is mandated to collect and analyze consumer trends, and reports pursuant to this requirement have been published from February 2012 onwards. The first report provides an overview of the EBA's objectives and work in the area of consumer protection and financial innovation from 2011-2012, and commits to the to the publication of an annual 'Consumer Trends Report' thereafter; 'identifying areas of concern in both the consumer protection and financial innovation areas of the banking sector, as well as areas where these two intersect'.[840] The report notes that this would include recommendations to the EBA's Board of Supervisors regarding the need for the EBA to do further work or to take corrective or restrictive action, as well as recommendations to national supervisory authorities regarding the need to address an issue locally or to the Commission in respect of the need for regulation.[841]

Among the prominent issues in the 2012 report are financial education and literacy and, indebtedness and responsible credit in respect of mortgages and other credit products.[842] The report cited the multi-faceted nature of indebtedness and responsible credit issue which extended 'beyond actual levels of indebtedness and arrears to include the issues of awareness and suitability of products for some consumers, access to credit for others and in general the increasing complexity of credit

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1 February 2012) 3 and 8. The SCFI subsequently set up the Sub-Group on Consumer Protection (SGCP) and the Sub-Group on Innovative Products (SGIP). 'The role of the SGCP is to identify problematic issues relating to retail banking customers, i.e. issues which raise concerns that some consumer detriment is resulting from certain banking activities or products, especially those of an innovative character…..one particular aspect of the definition of 'financial innovation' relates to the question of whether this covers activities of non-regulated entities that might have an effect on the banking sector. The SCFI has previously noted that this is an area which needs to be kept on the EBA's 'radar' given its high potential for 'risky' innovation'.

[839] At that juncture the EBA had renamed the Standing Committee as the Standing Committee on Consumer Protection and Financial Innovation, i.e. SCConFin.

[840] ibid. The methodological shortcomings of the first report are acknowledged therein 'this report is based on an ad hoc exercise conducted in the early days of the establishment of the SGCP and the SCFI. Therefore, it has not been conducted using a standardized reporting format or using a data collection exercise'.

[841] ibid, 4 (at point 5).

[842] ibid, 9. Other issues identified were complex savings products, bank account fees and charges, unnecessary sales, impact of technology and comparison websites.

products'.[843] In respect of the financial literacy and education aspects, the fragmentation of delivery across Member States in terms of competent authority was a particular challenge identified, as was optimal levels of disclosure in respect of pre-contractual information and consumers understanding of their obligations and rights.[844] The report pointed out that '..the European Commission adopted a communication on financial education in 2007, where it set out best practices in the area of financial education. Since then, it has decided to refocus its activities in this area by primarily relying on the work carried out in this respect by the OECD and the International Network on Financial Education'.[845] The report also notes that as an issue common to all three European Supervisory Authorities (ESAs), it was appropriate to address financial literacy and education at Joint Committee level: noting that, 'the SGCP considers that the solution for financial literacy should not necessarily be found in increasing regulation on disclosure and transparency'.[846]

5.4.2.1.4.2. Consumer Trends Report 2013

The EBA Consumer Trends Report 2013 which covered the period March 2012 to March 2013 observed that 'indebtedness and responsible lending remain the key concern for the majority of member states'.[847] The report noted that during 2012, a number of Member States had introduced further requirements or standards to attempt to address these issues. A related area of concern was the level of fees and charges applied to loan repayments and the introduction of new fees and charges,

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[843] ibid, 10-11 (at 15). 'Households seeking loan restructuring and related complaints about the resulting terms and conditions; consumers opting for floating interest rate loans without taking into account how possible future interest rate increases would affect their monthly instalments. The upward trend in interest rates earlier in 2011 had increased consumer financial obligations; poor underwriting practices coupled with lack of assessment of the borrower's ability to repay; difficulties with creditworthiness assessments for consumers with lower credit ratings, e.g. students who have a low credit rating now but may have significant affordability in future; the financial market crisis has raised the specific risks associated with foreign currency loans; and increasing complexity of mortgage and other credit products was identified as becoming an increasingly common feature'.

[844] ibid, 13 and 14 (at 24- 26).

[845] ibid, 13 and 14 (at 26- 27). 'The European Commission continues to support a dedicated website (www.DOLCETA.eu) which is an on-going online consumer education project involving the 27 countries of the EU, financed by the European Commission. DOLCETA offers online modules which focus on different consumer topics such as consumer rights and financial services. The EC has also developed a pilot project to train non-profit entities that provide general financial advice to consumers. The SCFI recognises the importance of the OECD International Network on Financial Education (INFE) in the development of principles and guidelines on financial education - as has been underlined by the G20 'High Level Principles on Consumer Protection'.

[846] ibid, 13 and 14 (at 28).

[847] 'Report on Consumer Trends: Supervisory Concerns regarding Consumer Protection Issues in 2012/2013' (European Banking Authority 18 March 2013) 4.

particularly for late repayments. 'This adds to the burden of the already indebted consumer. Some member states are currently examining whether regulations are required in this area'.[848] The report noted in respect of indebtedness and responsible lending that 'during 2012 the EBA has been following the progress on two key EU initiatives relevant to these issues: the negotiation of the Mortgage Credit Directive…and the review …of how member states have implemented the CCD which is due for formal review in 2013'.[849] The report contextualised its findings against the backdrop of relevant EU and international work in which the EBA and/or NCA's were involved.[850] In respect of the financial literacy and education issues raised in the 2012 report, it was observed that 'some NCAs have reported action they have taken in 2012 to encourage the banking sector to improve and simplify information provided to consumers and to work with educational and consumer groups to promote greater financial literacy and understanding'.[851] The report underlined the difficulty in addressing the area, as notwithstanding the competence accorded to the EBA, not all national authorities within the remit of the EBA had legal competence in the area.[852] The report states that 'the EBA continues to follow the work of the European Commission….and the OECD in relation to financial literacy and education' and that the Joint Committee of ESAs was going to leverage 'on both the national initiatives for literacy/education already in place, as well as on the high quality OECD work already undertaken'.[853] The report identified the trends

[848] ibid.

[849] ibid, 6. The report envisaged that the MCD 'should provide EU solutions to some other of the issues identified above in relation to indebtedness and responsible lending in the mortgages sector. In particular, it will require lenders to assess creditworthiness before making any loan, ensure that consumers receive an adequate explanation of the mortgage features and risks, and introduce approval requirements for all mortgage credit intermediaries'.

[850] ibid. These included the finalisation by the FSB of its Sound Residential Mortgage Underwriting Principles, work undertaken by the OECD for the G20 on Financial Consumer Protection which included an exercise to test how national authorities have responded to its 2011 Principles on Financial Consumer Protection, a research study contracted by the European Commission (DG SANCO) to map the over-indebtedness of European households in the 27 Member States and to obtain updated information on the nature, causes and effects of over-indebtedness as well as on the initiatives to alleviate its impact. A further initiative was the implementation by EU member states of the October 2011 recommendations by the ESRB in respect of lending in foreign currencies which also covered relevant responsible lending practices.

[851] ibid, 7.

[852] ibid, 7 - 8.

[853] ibid. 'In addition, the Joint Committee will recommend that each ESA adds links on their respective websites to relevant national initiatives, along with a link to the OECD global database on financial education [http://www.financial-education.org/gdofe.html]. The Joint Committee noted that this approach would also help to deliver on the G20 suggestion in its October 2011 principles to 'encourage stakeholders to implement the OECD/INFE principles and guidelines'.

for 2013 which included some replication of and variation on previously identified issues such as indebtedness and responsible credit, although in some cases, the scope of the issue was broadened 'the concern from 2011 regarding the bank account fees and charges was widened in 2012 to transparency and levels of charges in general'.[854]

The Consumer Trends reports serve to highlight the prominence of responsible lending and over indebtedness as a consumer issue in EU Member States. There is little doubt that this provided an impetus for EBA measures, although in advance of the Mortgage Credit Directive, the sole mechanism through which the EBA could provide a normative framework was via an EBA Opinion. In 2013, the EBA provided an Opinion, both in respect of practices which support responsible lending and on the treatment of borrowers in payment difficulties.

5.5. Conclusion

This chapter identifies changes to frameworks within the constitutive and facilitative spheres of residential mortgage regulation in Ireland and Spain, in the period from 2009 to 2012. It highlights parallels and distinctions in the nature, content and scope of changes to national institutional and legislative frameworks and it identifies a divergence between the jurisdictions in terms of the judicial role in the process of national reform. Notwithstanding, the continued absence of an EU legislative framework which regulates conduct of business aspects in respect of loan origination, broader institutional reforms are identified as relevant to the national residential mortgage context through the vesting of competence in the European Banking Authority. Chapter six will identify the evolution and reform of national and EU frameworks in the subsequent two year period.

[854] ibid, 11.

Chapter 6

Post Crisis Profile of Ireland, Spain & the EU 2013 - 2015

6.1. Introduction

Chapter four identified the institutional and legislative frameworks applicable to residential mortgage markets in Ireland and Spain in the pre-crisis context. Chapter five detailed the various reforms to these frameworks in the subsequent four year period. This chapter traces the institutional and legislative developments at national and European level in the period from 2013 to 2015. It highlights the contrast between Ireland and Spain both in the nature and volume of, and the stimulus for, reforms of national frameworks within the constitutive and facilitative spheres. It also identifies the emergence of an EU role in the regulation and supervision of national markets through the adoption of an EU Directive which regulates the engagement of borrowers and lenders in the residential mortgage context.

6.2. Post Crisis Stage Two Reform - Ireland

In Ireland, both stages of the post-crisis period were characterised by evolution and reform of the facilitative sphere of residential mortgage regulation. If a point of distinction were to be drawn between the first and second stages, it may well be in the reversal of the locus of the reform and evolution. In contrast to the previous four year period, 2013 to 2015 was not a period of structural reform in the institutional framework for the supervision of financial services in Ireland. The Central Bank of Ireland (CBI), as established in the CBRA 2010, remained the competent national authority for regulation and supervision of residential mortgage lenders and the institution with the primary mandate for consumer protection in the financial services

context.[855] There was however an evolution in the institutional framework as the Central Bank (Supervision and Enforcement) Act 2013, increased the scope of the powers and enforcement mechanisms through which the CBI could fulfil its statutory functions. In the period 2009 to 2012, the statutory framework within the facilitative sphere had undergone a significant *evolution* through the development of statutory codes of conduct. However from 2013 onwards, although in broad terms the statutory frameworks within the facilitative sphere were relatively static, a notable exception was *reform* of the Code of Conduct on Mortgage Arrears 2011 (CCMA 2011) in a manner which reduced the scope of the protections offered to consumers as compared with its predecessor.

6.2.1. Facilitative Sphere – Institutional Aspects

In 2013, the European Central Bank (ECB) identified the Central Bank (Supervision and Enforcement Act) 2013 (CB(S&E)Act 2013) as the second step in post-crisis 'legislative reform of the Irish central banking and financial regulatory regime'.[856] The first step, the Central Bank Reform Act 2010, was primarily directed towards reform of the institutional framework in terms of the structure of the supervisory authority and the allocation of competence therein. In contrast, the objective of the CB(S&E)Act 2013 was to enhance financial regulation by increasing the supervisory and enforcement powers of the CBI. This was one of the Financial Sector reform actions to which the Irish government had committed under the EU/IMF programme of Financial Support for Ireland.[857] The various sections of the 2013 act address different aspects of the CBI's supervisory functions and enforcement mechanisms. Among the notable provisions are the introduction of a regulatory regime for debt management firms, protections for 'whistleblowers' and expanded powers to compel the provision of information and reports.[858] The maximum monetary penalties under the administrative sanctions regime were increased for both regulated entities and individuals pursuant to the Act.[859] However, of greater significance for current

[855] As noted previously, the role of the NCA (and its successor with effect from 31 October 2014, the Competition and Consumer Protection Commission) in respect of consumers of financial services centred on education and capability functions.
[856] 'Opinion of the European Central Bank of 9 September 2011 on New Measures Strengthening Supervision and Enforcement in Financial Regulation' (CON/2011/69, European Central Bank 2011) 1.
[857] ibid.
[858] Pts 2, 3, 5 and 10.
[859] Pt 11, s 68.

purposes are the provisions contained in parts 6 and 8, which increase the redress options for consumers and confer competence on the CBI to make regulations 'for the proper and effective regulation of regulated financial service providers'.

6.2.1.1. Central Bank (Supervision and Enforcement) Act 2013 – Consumer Protection

Part 6 of the CB(S&E)Act 2013 is titled Consumer Protection and contains just two sections; 43 and 44. These sections provide dual mechanisms of compensatory relief for consumers in the context where a regulated financial service provider fails to comply with obligations imposed by the frameworks within the facilitative sphere. However, a point of distinction between the provisions is the legal nature of the measures and the scope of applicability with reference to residential mortgage consumers.

6.2.1.1.1. Public Law Redress

Pursuant to section 43, the CBI is empowered to direct a regulated financial services provider to provide 'appropriate redress' to customers who 'have suffered, are suffering or will suffer loss or damage' as a result of widespread or regular relevant defaults.[860] The term 'appropriate redress' is defined in the section as 'such monetary or other redress as is specified in the direction and (in the case of redress for pecuniary loss) as does not exceed the amount of the loss suffered or anticipated to be suffered, together (where appropriate) with interest at such rate as is so specified'.[861] The objective of the provision is thus to offer restitution to the customer and the damages are compensatory rather than punitive. [862] The CBI is further empowered to impose its costs in making the direction on the entity to which the direction is given.[863] The applicability of the redress provision to residential mortgage consumers is determined by what constitutes a 'relevant default' for the purposes of the 2013 act. 'A failure of any system or controls of the regulated financial service provider' is identified as constituting a default, as are a number of

[860] S 43(1).
[861] S 43(3).
[862] Notably the penalties imposed pursuant to the administrative sanctions regime in Part IIIC serve a punitive function.
[863] Art 43(4).

customer focused interactions. [864] These include the levying of charges on the customer where the financial service provider was not entitled to impose such charges, the provision of a financial service which the customer had not agreed to receive, the provision of inaccurate information to the customer which influences their decision regarding any financial service and the provision of a financial service which was not suitable for the customer at the time when it was provided.[865] The CCA 1995 and the CPC 2012 impose obligations on the provision of information and restrictions on the imposition of charges, and so could provide a basis for an order for redress. However, there are other substantive requirements upon which post-crisis consumer protection is promoted which are outside the scope of the specified contexts, e.g. the suitability assessment within the CPC. However, any doubt that the entirety of the obligations imposed on lenders pursuant to the codes can be subject to an order for redress is removed by inclusion of 'prescribed contraventions' as a relevant default.[866] The CBA 1942, defines the scope of 'prescribed contravention' as extending to 'any condition or requirement imposed under a provision of a designated enactment, designated statutory instrument, code or direction'.[867]

The regulated service provider is entitled to appeal the decision of the CBI and the fact that redress has been made in compliance with a CBI direction '….shall not, of itself, constitute for any purpose an admission of liability by the regulated financial service provider'.[868] This prevents lenders from being prejudiced by their compliance and removes a potential impediment to the efficacy of the section. The Act also amends the protocol for dealing with consumer complaints where the complaint is within the scope of a direction for redress. It provides that the obligation of the CBI to refer a complaint to the FSO and the duty of the FSO to investigate a complaint does not apply, 'if the Bank has dealt with the complaint by giving a direction under subsection (1) or during any period when the Bank is considering the complaint for the purpose of deciding whether to give such a direction'.[869] The practical impact of this redress provision was evident in July 2015, when the CBI directed a compensation and redress scheme subsequent to an investigation where 'significant

[864] S 43(2)(e).
[865] Ss 43(2)(a) – (d).
[866] S 43(2)(f).
[867] S 33AN CBA 1942 as inserted by s 10, pt IIIC, chpt 1 of the CBFSAI Act 2004.
[868] Ss 43(5) and 43(6).
[869] Ss 43(11) and 43(12).

failures…. by Permanent TSB and its subsidiary company Springboard Mortgages Limited (Springboard)', were identified in respect of tracker mortgage options and rates on 1,372 mortgage accounts.[870]

6.2.1.1.2. Private Law Action for Damages

A significant development under part 6 is the introduction of an action for damages; 'failure by a regulated financial service provider to comply with any obligation under financial services legislation is actionable by any customer of the regulated financial service provider who suffers loss or damage as a result of such failure'.[871] If pre-crisis consumer law or post-crisis codes of conduct were to fall within the scope of 'financial services legislation' for the purposes of this provision, then breach of the obligations contained therein could ground a private law action for damages. Prior to 2013, this was not a recourse available to residential mortgage consumers in the context of the frameworks within the facilitative sphere, save for the limited grounds under the Consumer Protection Act 2007 (CPA 2007).[872] There was no private law right of action specified in the CCA 1995, the UTCC Regs or the CBI Codes of Conduct. As noted in chapter five, in *Zurich Bank v McConnon*[873] there had been judicial rejection of the argument that codes constituted implied contractual terms for the purposes of a contract related action, and in *ICS Building Society v Grant* and *McConnon v President of Ireland & Ors*, it was confirmed that there is no tortious right of action in respect of reckless lending.[874] For residential mortgage consumers in Ireland, the question then, is the scope of applicability of the new action for damages with reference to existing consumer law and financial services frameworks.

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[870] In October 2015, the CBI announced that it would commence 'a broader examination of tracker mortgage-related issues covering, among other things, transparency of communications with and contractual rights of tracker mortgage borrowers'. The scope of the examination was confirmed in December 2015 as extending to 'all lenders which offered tracker mortgages to customers, including both for the family home and investment properties from when the lenders started to offer such mortgages, up to the end of 2015'. See <www.centralbank.ie/press-area/press-releases/Pages/CentralBankofIrelandEnforcementinvestigationresultsinpermanenttsbbeingrequiredtoputinplaceacomprehensiveredress.aspx> and <www.centralbank.ie/press-area/press-releases/Pages/StatementUpdateonExaminationoftrackermortgageissues.aspx> last accessed 25 September 2016.

[871] S 44.

[872] S 74(2) CPA 2007 provided that 'a consumer who is aggrieved by a prohibited act or practice shall have a right of action for relief by way of damages, including exemplary damages'. The scope of this action was restricted to breach of the prohibition on aggressive commercial practices or the commission of a prohibited practice pursuant to ss 52 and 55 respectively, of the 2007 act.

[873] [2011] IEHC 75.

[874] [2010] IEHC 17 and [2012] IEHC 184.

'Financial services legislation' which is used to limit the scope of the action is defined as '..(*a*) the designated enactments, (*b*) the designated statutory instruments, and (*c*) the *Central Bank Acts 1942 to 2013* and statutory instruments made under those Acts'.[875] The designated enactments and instruments referred to include the CCA 1995, the UTCC Regs 1995 and 2000, and the CPA 2007.[876] It also includes the Central Bank Acts and statutory instruments pursuant to these Acts. Notwithstanding that the CPC 2012 and the CCMA 2011 and 2013 are premised on statutes within the scope of this action, they are not in the form of a statutory instrument and thus breach of the obligations imposed therein is not subject to an action for damages under part 6. Nonetheless section 44 represents a significant development in the Irish regulatory framework, offering as it does a private law right of action which is of universal applicability to the dual components of the facilitative sphere, subject to the caveat that these are premised on primary or secondary legislation.

6.2.1.1.3. Distinction between Consumer Redress Mechanisms

It is perhaps relevant to distinguish between the statutory redress options open to residential mortgage consumer subsequent to the CB(S&E)Act 2013. The primary distinctions between the mechanisms relate to the capacity of the consumer to initiate proceedings and the adjudicating public body. The consumer has no direct role in the redress provided for by section 43.[877] The Central Bank is responsible for investigation and adjudication functions and the underlying focus is on collective market standards rather than the individual consumer experience. The fact that a direction for redress is premised on 'widespread' or 'persistent' default highlights that the direction is intended to respond to significant deviation from acceptable market conduct. Notwithstanding that it is compensatory from the consumers perspective, the redress operates to sanction the culpable market participant and have normative third party effects on the market as a whole. The other mechanisms through which a consumer may be offered redress are the statutory FSO scheme and the section 44 action for damages. Fundamentally, the consumer is the party with the right of initiation in these scenarios. In as much as it is an individual rather than a

[875] S 3(1) CB(S&E)Act 2013.
[876] Sch 2 CBA 1942 as substituted by s 5, sch 2, pt 1, item 1(a) CB(S&E)Act 2013.
[877] The role of the consumer is limited to submitting a complaint which could serve as a stimulus for a CBI investigation, either directly or via the FSO.

collective action and that it provides damages, the right of action under section 44 of the CB(S&E)Act 2013, could be seen to provide a judicial equivalent to the redress which is available to consumers through the FSO out of court mechanism. The question is whether there are any significant distinctions in the scope of the regulatory provisions which are subject to the respective mechanisms, the nature of the redress which can be awarded and the issues which it can take into account in determining the matter. As noted previously, the action for damages is currently inapplicable to the obligations contained in the codes of conduct but is otherwise applicable to the frameworks within the facilitative sphere. As noted in chapter four, the issue of whether or not a complaint is within the jurisdiction of the FSO is determined by the FSO itself; however, it is clear, that to the extent that a framework regulates the interaction of borrower and lender, the FSO has the capacity to investigate associated complaints.[878] Redress through the FSO thus has the potential to include obligations which cannot currently be subject to an action for damages, and the FSO in addition, has latitude to substantiate a complaint notwithstanding that the conduct complained of was 'in accordance with a law, an established practice or regulatory standard' where it is '…unreasonable, unjust oppressive or improperly discriminatory in its application to the complainant'.[879] The FSO has the capacity to order compensation for 'any loss, expense or inconvenience sustained' subject to specified thresholds.[880] The private law action similarly provides for loss or damage suffered as a result of the conduct. The thresholds regarding the quantum of damages recoverable would be determined by the jurisdiction of the court. A practical distinction between the mechanisms is the issue of accessibility with reference to costs associated with pursuing a judicial action as compared with a complaint through the extrajudicial forum.

[878] S 57BX(3). Subject to the temporal constraint identified in chpt 4.

[879] Paul Joyce and Stuart Stamp, Redressing the Imbalance: A Study of Legal Protections Available for Consumers of Credit and Other Financial Services in Ireland (Free Legal Advice Centre (FLAC) March 2014)71.

[880] Upper limit is €20,000 for an annuity or €250,000 in other contexts, irrespective of whether or not the loss exceeds this threshold.

6.2.1.2. Central Bank (Supervision and Enforcement) Act 2013 - Regulations

Another aspect of the CB(S&E)Act 2013 which is of particular relevance to the current analysis is the capacity for the Central Bank, pursuant to the mandate contained in Part 8, to make regulations for the proper and effective regulation of regulated financial service providers'.[881] The mandate is subject to a requirement to consult with the relevant Minister and to provide the Minister with a draft of the proposed regulations.[882] Where the regulations relate to credit unions authorised by the Central Bank under the Credit Union Act 1997, there is an additional requirement to consult with the Credit Union Advisory Committee.[883] The scope of matters in respect of which the CBI can make regulations is significant and varied and includes; 'provision about the resources to be maintained, and the procedures, systems and checks to be adopted, by regulated financial service providers for meeting their obligations under financial services legislation, and their obligations to customers, in a manner consistent with complying with their other obligations and for ensuring that their obligations to their customers are discharged by their agents and intermediaries'.[884] It is clear that obligations which are currently imposed in the Consumer Protection Code (CPC 2012), the Code of Conduct on Mortgage Arrears 2013 (CCMA 2013) and which will be imposed by the EU Mortgage Credit Directive (MCD) can be the subject of regulations pursuant to the section. The CBI can make regulations '….specifying the information to be given to customers by regulated financial service providers, including provisions requiring..' and '..restricting the making by regulated financial service providers of unsolicited phone calls or visits to customers'.[885] It is also clear that the 'knowing the consumer' and suitability assessment requirements pursuant to the CPC, which exceed the requirements imposed by the MCD, are within the scope of the mandate provided to the CBI.[886] Regulations can specify '..requirements which are to apply …for the purpose of determining the suitability of the financial services for the customers' and '..requiring regulated financial service providers to seek and (where provided) take

[881] S 48.
[882] Ss 49(1)(a) –(b).
[883] S 49(2)(b)(i).
[884] S 48(2)(d).
[885] Ss 48(2)(f)-(g).
[886] Ss 5.1-5.24 CPC 2012 and art 18 MCD.

account of information from customers for the purposes of assessing—(i) customers' knowledge and understanding of, and experience in relation to, financial services, and (ii) the suitability of financial services for customers (having regard to their requirements, personal circumstances, financial position and other relevant circumstances), and provision about what shall or may be done by regulated financial service providers if information sought from customers is not provided'. [887] The latter could encompass a prohibition on the provision of credit, currently imposed under the CPC 2012 and which will be necessary under the MCD, where consumers fail to provide the information necessary to conduct the suitability assessment in the former context and the creditworthiness assessment in the latter.[888]

Part 8 identifies specific issues relating to the extension of credit which may be the subject of regulations including the linking of services. This provides a basis upon which to elevate the current provisions of the CPC 2012 regarding product tying and bundling or to transpose the lesser obligation contained in the MCD.[889] Notwithstanding the identification of specific matters to illustrate the content of potential measures, the section is not restricted to these aspects and it offers a basis for the imposition of other procedural and substantive requirements in the context of loans; 'provision about the making of loans and making available of other credit facilities or the provision of other financial services to customers by regulated financial service providers, including provision..'.[890] The Act also specifically identifies the capacity of regulations to address the requirements where borrowers are in payment difficulties thereby removing any ambiguity about whether obligations currently contained in the CCMA could be subject to regulations; 'provision about how regulated financial service providers are to deal with customers who are or are likely to be in financial difficulty (including customers who are or are likely to be in arrears) including, ..'.[891]

[887] Ss 48(2)(h)–(i).
[888] S 5.4 CPC 2012 and art 20(4) MCD.
[889] S 48(2)(l)(vii). Notably, s 127 CCA 1995 contains a prohibition on the linking of services in the context of housing loans, although with reference to the lack of enforcement activity by the CBI with respect to the Consumer Law framework, this does not preclude the requirement for a similar provision within the financial services framework.
[890] Ss 48(l) and (m).
[891] Art 48(2)(r).

When making regulations the Central Bank 'shall have regard to the need to ensure that the requirements imposed '…..are *effective and proportionate* having…regard to the nature, scale and complexity of the activities of regulated financial service providers or the class or classes of regulated financial service provider to whom the regulations apply'.[892] A particularly innovative characteristic of the CPC 2012 is its inclusion of the vulnerable consumer concept and the differential threshold which this imposes on lenders in the discharge of their obligations. The 2013 Act reserves the capacity for this differentiation, in that Central Bank can '.. include different provisions in relation to different classes of regulated financial service providers, customers or financial services'.[893] It also stipulates that regulations can '…contain any incidental, supplementary and consequential provisions that appear to the Bank to be necessary or expedient for the purposes of the regulations'.[894] The powers conferred on the CBI to make regulations have been utilised in the mortgage context to impose statutory LTV ratios in response to inflation in the Irish housing market.[895] The regulations introduced in January 2015 were a macro prudential policy intervention rather than a consumer protection measure; however, the synergy between the objectives is apparent. It also highlights awareness of the potent dynamic between access to mortgage credit and inflation in the Irish housing market.

For current purposes, a point of interest which links the enforcement mechanisms of part 6 with the regulatory powers in Part 8 is the capacity for transposition of the MCD to precipitate an increase in the applicability of the action for damages to the residential mortgage context. The enhanced applicability could arise due to the fact that obligations contained in the MCD are currently addressed through the CPC 2012/CCMA 2013. If the legal basis of the codes is insufficient to constitute transposition of the Directive, which would appear to be the case, then this would impute the requirement for an elevation of the relevant obligations onto a superior legislative basis. The CB(S&E)Act 2013 empowers the CBI to make regulations and, a statutory instrument pursuant this mandate would fall within the scope of 'financial services regulation' opening breach of the obligations to a private law action for damages.

[892] S 50.
[893] S 51(1)(c).
[894] S 51(1)(a).
[895] Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Housing Loan Requirements) Regulations 2015, SI 47/2015.

6.2.1.3. National Supervisory Competence – Prudential v Consumer Aspects

There is an interesting juxtaposition in the second post-crisis period between the scope of national supervisory competence in prudential and consumer protection aspects. As one of the three pillars of Banking Union, the Single Supervisory Mechanism (SSM), which is applicable to all Eurozone Member State, designates the ECB as the competent authority for direct micro prudential supervision of Significant Credit Institutions (SCI's) with effect from 4 November 2014.[896] In Member States such as Ireland and Spain, this creates a differential regime for micro prudential supervision dependent on whether the financial institution is a credit or non-credit institution, and whether, in the former context, the credit institution is classified as a SCI. Credit institutions which are not deemed SCI's and non-credit institutions, to the extent that they are subject to prudential regulation and supervision, remain within the remit of the National Competent Authority, i.e. CBI or BDE.[897] The new European framework and the allocation of supervisory competence therein is not directly relevant to the current analysis, since, as previously asserted, with reference to the approach taken prudential regulation is conceptualised as having an indirect impact on primary mortgage markets. It is nonetheless interesting to juxtapose the fragmentation of prudential competence with the consolidation of conduct of business aspects, and in particular, the divergent role of the EU in the respective spheres, i.e. the fragmentation in institutional frameworks for prudential supervision precipitated by SSM in contrast to primary role of the national authority under the MCD and, with reference to the functions and capacity of the EBA.[898]

6.2.2. Mortgage Arrears: 2013 - 2015

A particular consequence of the issues which have arisen with mortgage consumers in Ireland has been the collection and publication of statistical data on mortgage

[896] Council Regulation (EU) No 1024/2013 of 15 October 2013 Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions [2013] OJ L 287/63

[897] See European Central Bank, 'The list of significant supervised entities and the list of less significant institutions- Latest update of the list: 04/09/2014' for details of designated significant credit institutions (SCI's) in Ireland and Spain as of September 2014.

[898] The mandate of the EBA is predicated on the competence of the national authority; a point highlighted by the difficulties which arise where the national authority for consumer protection is not within the supervisory remit of the EBA.

arrears by the Central Bank from 2009 onwards.[899] The data series evolved over time with increasingly detailed information not just on the quantum and duration of arrears but also to the extent of forbearance and the efficacy of loan restructuring arrangements.[900] The availability of data pointed to an issue in the efficacy of the framework which had been developed to address arrears issues. Fundamentally, the objective of the CCMA and the MARP framework therein was to facilitate an assessment by lenders as to the ongoing viability of non-performing or potentially non-performing loans, under a range of loan restructuring scenarios. Where it was assessed by lenders that the loan was viable under a particular restructuring arrangement, this arrangement was offered to borrowers. In the context of a negative assessment of viability and, subsequent to appeals and the expiration of temporal restrictions associated with the MARP process, the lender was entitled to initiative legal proceedings for repossession. The procedural efficiency of lenders and courts, the level of co-operation from borrowers and the scale of arrears prior to the establishment of the MARP process are clearly factors which could be expected to impact the speed of progress in resolving the arrears crisis under the MARP. Nonetheless, a stabilisation and decrease in medium to long term arrears would be expected over time arising from the conclusion of the MARP process and the alternative outcomes of repossession or loan restructuring. However the arrears statistics from 2011 to 2013 highlighted an ongoing deterioration in the level of long term arrears. The Central Bank of Ireland noted in December 2013 that 'the decline in the overall number of mortgage accounts in arrears, masks continuing increases in very long-term arrears'.[901] The significance of these arrears is reflected in the fact that the 33,589 PDH mortgage accounts with arrears of greater than 720 days represented almost 63 per cent of outstanding arrears on PDHs at the end of December 2013.[902] A number of initiatives can be identified in 2013, the purpose of which was to investigate and resolve the various factors contributing to the

[899] The development of statistical data relating to mortgage markets is a post financial crisis trend which is not restricted to Ireland. The MCD is representative of and, reinforces the trend in a Single Market context; article 26 imposes an obligation on Member States to 'ensure an appropriate statistical monitoring of the residential property market..'.

[900] See Jean Goggin, 'Mortgage Arrears in Ireland: Introducing the Enhanced Quarterly Statistics' (Central Bank Quarterly Bulletin 04, Central Bank of Ireland October 2013) for a chronology of the evolution of the statistics data from 2009 to 2013.

[901] 'Residential Mortgage Arrears and Repossessions Statistics: Q4 2012' (Central Bank of Ireland 4 March 2014).

[902] ibid. The CBI cite 136,564 (17.9 per cent) of PDH accounts in arrears at end Q4 2013.

persistence of arrears and what the Troika identified as the 'abnormally low rate of repossessions in Ireland'.[903]

6.2.2.1. Expert Group on Repossessions

In response to a commitment given to the Troika, an Expert Group on Repossessions was established by the Irish government in September 2013.[904] The mandate of the expert group was to analyse the efficacy of the statutory framework for repossession with reference to the length, predictability and cost of proceedings and, on the basis of this analysis, to propose 'appropriate measures to be brought forward quickly to deal with any problems arising'.[905] Although, the Expert Group did not recommend any legislative reforms it did conclude that significant efficiencies could be achieved in the repossession process through more effective case management by lenders, more harmonised documentation standards and a more structured framework for borrowers in repossession proceedings.[906] It also identified specific data deficits in relation to repossession proceedings and considered that more detailed and timely data should be made available.[907]

6.2.2.2. Central Bank of Ireland Measures

The expert group analysis was intended to respond to any issue within the legal framework for repossession which were contributing to the low repossession rate. This addressed the legal context subsequent to the conclusion of the MARP in the CCMA. The other aspect which was contributing to the distortion in arrears and repossessions was the MARP process itself. Whilst it was intended to lead either to loan rehabilitation or repossession, the persistence of long term arrears indicated that this was not occurring. The increased significance of the arrears issue as a policy priority for the Central Bank in this period is manifest in the high level goals contained in the Central Banks strategic plan for 2013 – 2015.[908] Two related Central

[903] 'Report of the Expert Group on Repossessions' (Department of Justice and Equality December 2013) 3.
[904] ibid. The commitment was contained in the 9th review of the Memorandum of Economic and Financial Policies.
[905] ibid.
[906] ibid.
[907] ibid, 59.
[908] 'Central Bank of Ireland: Strategic Plan 2013 – 2015' (Central Bank of Ireland 20 November 2012). High level goal 4; 'resolution of credit difficulties in credit institutions' was centred on arrears both with reference to the impact on consumers and the lending institution.

Bank initiatives to address the issues were the launch of the Mortgage Arrears Resolution Targets in March 2013 and reform of the Code of Conduct on Mortgage Arrears (CCMA) in the same year.

6.2.2.2.1. Mortgage Arrears Resolution Targets

The Mortgage Arrears Resolution Targets (MART) was an initiative to improve the efficacy of the MARP by setting performance targets for the resolution on a 'sustainable basis' of arrears cases. The MART set targets for six Irish credit institutions in respect of distressed mortgage loans; irrespective of whether these related to the consumers primary residence or a buy to let property.[909] The framework set common public targets for the institutions where the arrears were in excess of 90 days and these included quarterly targets in respect of the number of 'sustainable solutions' *proposed* to and *concluded* with consumers. The Central Bank published guidelines[910] to facilitate supervisory assessment of whether the proposed solutions could be deemed 'sustainable', and it was envisaged that targets would be set for the subsequent performance of these solutions.[911] The framework also set institution-specific internal targets for lender concerning handling of early arrears cases.[912] The importance of aligning the quantitative setting of targets with the qualitative assessment of sustainability is highlighted by the feedback for Q2 and Q3 2013. Although the lenders met the targets in terms of the quantum of solutions proposed, there were proposals which would not have satisfied the 'sustainability threshold set by the Central Bank. These included proposals consisting of short-term loan modifications in cases where there was no tangible evidence of a borrower's circumstances improving or no clarity on the ultimate long-term solution, an absence of requisite information such as verification of borrower income or property value

[909] 'Mortgage Arrears Resolution Targets' (Central Bank of Ireland March 2013) 3. The institutions were ACC Bank plc, Allied Irish Bank plc (including AIB Mortgage Bank, EBS Limited and EBS Mortgage Finance), The Governor and Company of the Bank of Ireland (including Bank of Ireland Mortgage Bank and ICS Building Society), KBC Bank Ireland plc, Permanent TSB plc and Ulster Bank Ireland Limited.

[910] 'Internal Guidelines - Sustainable Mortgage Arrears Solutions' (Central Bank of Ireland 24 September 2013) 4. The areas addressed include assessments of affordability, temporary arrangements, term extension and capitalisation solutions, assessment of split mortgage solutions and medium term restructuring arrangements.

[911] 'Mortgage Arrears Resolution Targets' (Central Bank of Ireland March 2013) 3; 'Report of the Expert Group on Repossessions' (Department of Justice and Equality December 2013) 28.

[912] ibid.

and a 'a lack of evidence of legal follow up in cases counted under legal heading'.[913] The expert group report had expressed concerns regarding 'the state of preparedness of the some of the lending institutions to pursue proceedings' and had noted that a very high proportion of adjournments in repossession proceedings were granted at the request of the lenders.[914] Notwithstanding the acknowledgement that the qualitative issues did not result in a failure of lenders to meet the quantitative threshold set, the identification of these sustainability deficits was important to increase the efficacy of the MARP and to create convergence in lender standards in addressing arrears. Aligned with the introduction of the MART was reform of the CCMA. The former can be interpreted as an initiative which focuses on the capacity of lenders to improve the arrears crisis by creating thresholds of accountability in terms of the assessment of loans and the determination of viability. In contrast, reform of the CCMA can be viewed as focusing on the borrower and the issue of whether the scope of the moratorium was such as to contribute to the issue.

6.2.2.2.2. Code of Conduct on Mortgage Arrears 2013

The Code of Conduct on Mortgage Arrears 2011 (CCMA 2011) which had come into effect on 1 January 2011 was replaced by a revised CCMA with effect from 1 July 2013. There was no change the scope of applicability of the CCMA in the 2013 update; it continued to be applicable to regulated lenders other than credit unions in respect of 'the mortgage loan of a borrower which is secured by their primary residence'.[915] The CCMA 2013 retains much of the substance of the previous codes and, to the extent that there are changes they can be viewed as falling into three loose categories with differing import for the borrower. The first may be viewed as enhancements of the existing procedural requirements with benefits for borrowers in that these were a response to procedural deficits identified in the existing CCMA. The second may be viewed as importing a greater obligation on the borrower to

[913] 'Report of the Expert Group on Repossessions' (Department of Justice and Equality December 2013) 28.
[914] ibid, 29.
[915] Chpt 1, 2 and Chpt 2, 3. The borrower is defined as all parties named on the mortgage loan account. Submissions regarding the type of property/loans/personal circumstances to which the code should apply influenced the definition of primary residence and subsequent to the 2011 Code, it was not necessary to be in occupation of the property if it is the sole property owned by the borrower. Where the primary residence of the borrower is not at issue (i.e. BTL or commercial premises) the arrears protocol contained in the CPC applies. The relevant provisions are contained in chapter eight of the CPC 2012; 8.1-8.5 General Provisions, 8.6-8.10 Provision of Information, 8.11-8.12 Revised Repayment Arrangements, 8.13-8.14 Communications.

demonstrate a willingness to engage with the process in order to avail of the protections offered. The third relates to a reduction, as compared with previous incarnations of the CCMA, in the duration of the moratorium on commencement of legal action for repossession. This latter change may be contextualised against the foregoing observations regarding the escalation of arrears, the low rate of repossession and the interest of the Troika in the issue.

Among the notable changes which may be seen to benefit borrowers are those addressing communications related aspects, and those which clarify significant processes and consequences. The CCMA 2013 requires lenders to ensure that all information provided by the borrower is to hand prior to initiating communication, and to ensure that any incentives provided to staff dealing with arrears or pre-arrears cases, does not impair the quality of communication, the treatment of the borrower or the obligations under the code.[916] It further obliges lenders to write to all borrowers on an annual basis to encourage engagement with the lender in the event that payment difficulties arise.[917] The CCMA 2011 had imposed quantitative restrictions on the number of communications which a lender could initiate with borrowers outside of those required by the CCMA or other regulations. In practice, the limit was circumvented and the objective of preventing harassment of borrowers was thwarted. The new CCMA replaced these provisions with a substantive requirement that lenders implement a communications policy which ensures that communications are 'proportionate and not excessive, taking into account the circumstances of the borrowers, including that unnecessarily frequent communications are not made' and that communications are not aggressive, intimidating or harassing and that borrowers are given sufficient time to complete an action they have committed to before follow up communication is attempted'.[918] The new CCMA also introduced new provisions which regulate the circumstances under which unsolicited personal visits may be made to the borrower's primary residence.[919] The reforms also attempt to create an increased awareness on the part of lenders to the issues raised by consumers through a requirement to maintain records of all appeals to the lender appeals board and to analyse this information to ascertain 'whether appeals indicate an isolated issue or a

[916] Chpt 3, ss 2 and 6.
[917] Chpt 3, s 10.
[918] Chpt 3, s 22.
[919] Chpt 3, s 26.

more widespread issue'.[920] Notably, the scope of the appeals which may be taken within the MARP process was reduced to decisions regarding the offer and acceptance of an alternative repayment arrangement, and the classification of the borrower as non-co-operating.[921] Previously, issues of lender compliance with the code or treatment of borrowers' case under the CCMA were within the remit of the appeals which could be taken by the borrower; however, these now are subject to the procedures contained in the CPC 2012.[922] In the context of submissions to the Department of Finance in September 2014 regarding protections for borrowers in the context of sale of loan books to unregulated entities, FLAC cited deficiencies of the appeals process in the CCMA 2013. It noted that there is only the capacity to appeal for non-compliance with the process as opposed to against an adverse decision and that appeals units are 'rubber stamping' the MARP outcome. The absence of an external appeals mechanism was also criticised and the scope of internal review was assessed as process rather than substance.

The CCMA 2013 adopts a different approach to tracker mortgages holders as compared with its 2011 predecessor. Previously lenders were prohibited from requiring borrowers to change from a tracker mortgage to another type of mortgage as part of an alternative arrangement.[923] In the CCMA 2013, where none of the alternative repayment options are viable where the borrower retains his tracker interest rate, 'the lender may offer the borrower an alternative repayment arrangement which requires the borrower to change from an existing tracker mortgage to another mortgage type, if that alternative repayment arrangement: a) is affordable for the borrower, and b) is a long-term sustainable solution which is consistent with Central Bank of Ireland policy on sustainability'.[924]

[920] Chpt 3, s 53.
[921] Chpt 3, s 49.
[922] Chpt 3, s 55.
[923] Chpt 3, ss 12 and 33. S 36 stipulated that 'For MARP cases on an existing tracker mortgage, where an alternative repayment arrangement that is put in place includes a fixed interest period, the borrower must be permitted to revert to an interest rate that corresponds to the margin over the prevailing ECB rate or other tracked rate as specified in the original mortgage contract, at the end of the fixed interest period'. Notably this obligation was breached by PTSB and resulted in a direction for a redress scheme in 2015.
[924] Chpt 3, s 46.

The reforms can also be seen to increase borrowers' awareness of their obligations. The MARP booklet must now identify the circumstances under which a borrower can be classified as non-co-operating and the implication of this classification.[925] This is aligned with a change in the definition of non-co-operation to one which increases the emphasis on the engagement of borrowers with the process, i.e. failure to provide information 'within the timeline specified by the lender in accordance with Provision 34'; 'a three month period elapses during which the borrower……has not engaged in such a way that enables the lender to complete an assessment of the borrower's circumstances'. The CCMA 2013 acknowledges the insolvency framework established under Personal Insolvency Act 2012 (PIA 2012), and in addition to foregoing the protections of the MARP, i.e. moratorium on commencement of repossession proceedings and the restrictions on charges which prevent an escalation of indebtedness,[926] non-co-operating borrowers are also potentially ineligible for a personal insolvency arrangement under the PIA 2012.[927] The procedural requirements imposed on lenders also manifest an emphasis on creating increased awareness among borrowers regarding the issue of non-co-operation. The CCMA 2013 stipulates that prior to classifying a borrower as non-co-operating a letter must be sent by the lender advising the borrower of the intention to classify them as non-co-operating, the effect of this classification, and the remedial action which can be taken to avoid this progression.[928] A further communication is required when the borrower has been formally classified as non-co-operating, advising them of their exposure to legal action and related issues.[929]

Perhaps the most significant and substantive change from the previous CCMA is the temporal scope of the moratorium offered to co-operating borrowers. The CCMA 2011, had provided a minimum 12 month moratorium from the time that a borrower was classified as a MARP case before legal action could commence; the 12 month period excluded time periods where the borrower was adhering to an alternative

[925] Chpt 3, s 14(f).
[926] Chpt 3, s 11.
[927] PIA 2012. S 91(1)(g). Pursuant to s 2 LCLRA 2013, when determining whether to adjourn possession proceedings to allow the borrower to pursue a PIA, among the factors taken into consideration is the issue of 'whether the mortgagor has participated in any process relating to mortgage arrears operated by the mortgagee concerned which has been approved or required by the Central Bank of Ireland and which process relates to the land the subject of the mortgage'.
[928] Chpt 3, s 28.
[929] Chpt 3, s 29.

repayment arrangement or appealing an ASU decision etc.[930] However, the moratorium contained in the CCMA 2013 is significantly more restricted. Where a borrower is co-operating but an alternative arrangement cannot be put in place, either because a lender is unwilling to offer or the borrower is unwilling to accept, 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, whichever is later.[931] In the case of non-co-operating borrowers, legal action can commenced three months from when the arrears first arose once a notification has been sent to the borrower and they have been given 20 days to comply with actions contained therein.[932] As in the previous incarnations of the CCMA, an obligation is imposed on the lender to attempt to maintain contact with the borrower and, if 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.[933]

An issue related to the scope of applicability of the statutory codes of conduct which came to the fore in Ireland in the period 2013-2015, was the inapplicability of the protections offered by the CCMA in the context where the loans were sold to entities which were outside the supervisory remit of the national authority, i.e. CBI. The issue arose due to the sale of mortgage loans to 'vulture funds'. In this context, the statutory codes of conduct issued by the Central Bank of Ireland were of voluntary rather than mandatory applicability, and thus differential regulatory obligations arose with reference to whether the mortgage loan was held by a regulated or non-regulated entity. To remedy this lacuna and to ensure the applicability of the codes of conduct to all mortgage loans, credit servicing firms were designated as a regulated entity pursuant to the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015.[934] An addendum to the CCMA 2013 was issued in 2015 which provided that '..this Code applies to the mortgage lending activities and credit servicing activities in respect of mortgage loans of all regulated entities, except credit unions, operating in the State'.

[930] The 12 month period was inapplicable where the borrower was not co-operating.
[931] Chpt 3, s 56.
[932] Chpt 3, s 27 and 28.
[933] Chpt 3, s 59.
[934] The initial proposal had been to impose obligations on 'owners of credit' but ultimately the Irish legislation was comparable to the UK equivalent in regulating credit servicing.

The Central Bank of Ireland has emerged, in comparative EU terms, as a proactive authority in terms of its consumer protection awareness and activity.[935] In February 2015, the Central Bank published its first Consumer Protection Outlook which noted that 'International organisations such as the World Bank and OECD ……have also adopted a greater focus on consumer protection. The Central Bank has positioned its role firmly as influencing these developments in order to retain the consumer protections we have in Ireland, to enhance and develop them where possible, and to share learning and best practice on regulatory approaches'.[936] As noted in chapter five, the Director of Consumer Protection at the Central Bank of Ireland, Bernard Sheridan was appointed as the chairperson of the EBA's Standing Committee on Consumer Protection and Financial Innovation (SCConFin) in 2015. In the period from November 2013 to November 2013, he was chairperson of the governing council of FinCoNet, an international organisation of supervisory authorities with responsibility for consumer protection. The primary objective of FinCoNet is to promote 'sound market conduct and enhance consumer protection through efficient and effective financial market conduct supervision', and the organisation has identified retail banking and consumer credit as a focus of its activities.[937] In 2014, FinCoNet published a report on responsible lending which 'identifies practices and initiatives that promote responsible lending in the consumer credit market…..FinCoNet intends that the report will provide a platform for relevant authorities to exchange views regarding notable and effective approaches to address the issue of responsible lending. Consistent with FinCoNet's mandate, this report also has a strong emphasis on supervisory and enforcement capabilities'.[938]

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[935] From April 2014 – March 2015, the CBI was engaged in a reciprocal peer review of consumer protection functions with the Netherlands Authority for Financial Markets (AFM). According to Bernard Sheridan, Director of Consumer Protection at the Central Bank of Ireland, the choice of the Netherlands was premised on its reputation as a standard setter.

[936] 'Consumer Protection Outlook Report' (Central Bank of Ireland 6 February 2015) 4.

[937] FinCoNet was originally established in 2003 as a network of competent regulators and supervisors to discuss consumer protection issues of common interest. In 2013, its legal status was changed and it was 'formalised as a new international organisation of financial consumer protection supervisory authorities' recognised by both the FSB and the G20.
See <www.finconet.org> for a list of members and publications. Last accessed 25 September 2016.

[938] 'Report on Responsible Lending: Review of Supervisory Tools for Suitable Consumer Lending Practices' (FinCoNet July 2014) 7. The report 'aims to be consistent with and build on the work already undertaken in this area. It is informed by and draws on a range of existing work on consumer credit and responsible lending, including the work of international standard-setting bodies, regulatory authorities in different jurisdictions, consumer bodies, scholarly literature and empirical research'.

6.2.3. Judicial Role 2013 - 2015

In the period from 2013 to 2015, the Irish judiciary clarified the boundaries between the private and public law frameworks of residential mortgage regulation and enforcement through case law on the CCMA, and on the scope of the FSO jurisdiction in addressing disputes between mortgage consumer and lenders.

6.2.3.1. CCMA Case law 2013 - 2015

Chapter five details judicial assessment of the capacity for the protocols of the CCMA to impact the substantive enforcement rights of the lender, in the period up to 2012. The *Stepstone* judgement highlights the difficulty faced by the judiciary in reconciling the mechanism through which the CCMA gives effect to its objective, i.e. the imposition of procedural pre-requisites on the commencement of legal proceedings for repossession, with the inference as to substantive legal effect which results from its application.[939] In 2014, the report of the expert group on repossessions was to observe of the 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'.[940]

The increased impetus towards repossession in the 2013-2015 period meant that the issue would inevitably be the subject of further consideration by the Irish superior courts.[941] In *Irish Life and Permanent PLC v Duff & Anor*,[942] Hogan J. averted to the 'somewhat troublesome issue of the precise legal status of the Code of Conduct' and the 'cross currents of judicial opinion' in relevant case law.[943] He noted that 'the argument advanced by Birmingham J .in *McConnon* regarding the absence of any statutory indication that failure to comply with the Code would affect the ability of

[939] Stepstone Mortgage Funding v Fitzell [2012] IEHC 142.
[940] 'Report of the Expert Group on Repossessions' (Department of Justice and Equality December 2013) 17.
[941] The impetus towards increased enforcement had both legal and economic stimuli; the lacuna created by the LCLRA 2009 which was identified in the *Dunne* judgement was resolved with the Land and Conveyancing Law Reform Act 2013 (LCLRA 2013), there was a recovery in house prices and pursuant to reform of the CCMA and other CBI measures, a manifest emphasis on determining the sustainability or otherwise of mortgage loans in arrears.
[942] [2013] IEHC 43.
[943] [2013] IEHC 43 at 54 and 69 respectively.

the lender to secure relief may be thought to be a forceful one'.[944] He also expressed concerns that if '… non-compliance with the Code resulted in the courts declining to make orders for possession to which (as here) the lenders were otherwise apparently justified in seeking and obtaining, there would be a risk that by promulgating the Code and giving it a status that it did not otherwise legally merit, the courts would, in effect, be permitting the Central Bank unconstitutionally to change the law in this fashion'.[945] He also noted that '…the question, for example, of what constitutes a 'reasonable effort' on the part of the lender does not easily lend itself to judicial analysis by readily cognisable legal criteria. How, for example, are 'reasonable efforts' to be measured and ascertained?'.[946] Ultimately he concluded 'I feel that I must nonetheless follow the most recent pronouncement of this Court in *Fitzell*, given that this is the most recent and authoritative analysis of this question where the judicial comments formed part of the ratio of the decision…… proceeding from that standpoint, therefore, in the present case ……I find myself coerced to the conclusion that the Bank did not comply (or, at least, comply fully) with the requirements of Clause 6 of the 2009 Code prior to the effective commencement of the proceedings in that it cannot be said that 'every reasonable effort' had been made to agree an alternative repayment schedule …..Nor can it be said that at that stage…..that the Duffs were non-cooperating borrowers.'[947] Notably Hogan opined '…in my view this case raises several important points of law which, on reflection, might usefully have been finally determined by the Supreme Court on a case stated from this Court……I have no such jurisdiction to state a case for the purposes of s. 38 of the Courts of Justice Act 1936, as the power so to state a case is expressly made contingent on a request in that behalf by one of the parties to the appeal'.[948] However, Hogan did subsequently have the opportunity to make two referrals on a case stated basis thus providing the opportunity for Supreme Court analysis of the legal impact of the Codes.

In *Irish Life & Permanent plc v Dunne and Dunphy*, a judgment delivered on 15th May 2015, the Supreme Court appear to have stemmed the incursion of the CCMA

[944] [2013] IEHC 43 at 68.
[945] [2013] IEHC 43 at 68.
[946] [2013] IEHC 43 at 68.
[947] [2013] IEHC 43 at 68-71.
[948] [2013] IEHC 43 at 4.

into the constitutive sphere of residential mortgage regulation by limiting the scope of the judicial role in assessing compliance with the provisions of the Code.[949] Clarke J reasserted the boundaries of the legislative and judicial functions by asserting 'It is hardly surprising that important legal questions relating to the entitlement or otherwise of financial institutions to obtain possession of mortgaged property have arisen in recent times…..it is only the legal aspects of such questions with which the courts are concerned. …… not to imply that judges are unmindful of the great personal difficulties which have arisen from both the collapse in property prices and the general financial crisis. Whether, and if so to what extent, those difficulties should lead to a change in the law and a shift in the balance of legal rights between, on the one hand, those who have lent money on the security of premises and, on the other hand, borrowers in financial difficulty, is a matter for legislators and regulators. The courts must interpret the law as it is and apply it to the facts and circumstances of each individual case'.[950] The questions posed in respect of the CCMA were whether, 'in the absence of any statutory indication ….does non-compliance of the Code affect, as a matter of law, the lender's entitlement to obtain an order for possession' and 'If non-compliance …..affects the entitlement of the lender to secure an order for possession, must the Court refuse to make such an order in the event of any breach with the Code, or does the lender's entitlement to an order depend on the nature or the circumstances of the breach or on the possibility of addressing any prejudice resulting from such breach by an order for adjournment of the proceedings or the granting of a stay (subject to conditions or otherwise) or any order for possession'.[951]

Clarke noted that '…it is clear that the statutory aim of the Code and its enabling legislation is to seek to regulate the way in which financial institutions seek to repossess properties in cases of mortgage arrears. It could not be said that requiring compliance with the Code as a precondition to obtaining an order of repossession would, necessarily, be in any way counterproductive to that aim….. So far as one limited aspect of the Code is concerned, it might well be said that a court making an order for possession might be facilitating the carrying out of "the very act" which the

[949] [2015] IESC 46.
[950] [2015] IESC 46 at 1.1.
[951] [2015] IESC 46 at 2.4.

Code is designed to prevent'.[952] Clarke then distinguished between the moratorium and the other aspects of the code noting 'in respect of the other provisions of the Code, different considerations apply. There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution,…can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the *Oireachtas* had intended to give the courts such a role then it would surely have required detailed and express legislation which would have established the criteria by reference to which the Court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law'.[953] 'It must be recalled that these issues only arise at all in circumstances where, as a matter of law, the relevant financial institution is entitled to possession. If it is regarded, as a matter of policy, that the law governing the circumstances in which financial institutions may be entitled to possession is too heavily weighted in favour of those financial institutions then it is, in accordance with the separation of powers, a matter for the Oireachtas to recalibrate those laws. No such formal recalibration has yet taken place'.[954] He concluded '…I am satisfied that, in the limited cases of a breach of the moratorium, but in no other cases unless and until appropriate legislation is passed, a court should decline to make an order for possession'.[955] The decision contrasts with the earlier cases pursuant to which a more general assessment of compliance with the Code was undertaken by the courts.

6.2.3.2. Financial Services Ombudsman (FSO) Case law

The other aspect of the public law framework which came under judicial scrutiny in the second post-crisis period was the role of the Financial Services Ombudsman (FSO), and in particular, the role of the High Court in appeals against adjudications of the FSO. It was an established principle that that to succeed in an appeal '… the plaintiff must establish as a matter of probability that, taking the adjudicative process

[952] [2015] IESC at 5.17 – 5.18.
[953] [2015] IESC at 5.20.
[954] [2015] IESC 46 at 5.21.
[955] [2015] IESC 46 at 5.27.

as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant'.[956] It was this latter aspect, the curial deference which the High Court will show to the specialist skill and expertise of the FSO which became a focus of scrutiny in *Millar & Anor v Financial Services Ombudsman*.[957] The proximate issue in the case was the lenders contractual capacity to increase interest rates. However, Hogan J identified the case as raising '… once again the fundamental question: what is the true role and functions of the Ombudsman? Specifically, where the Ombudsman deals with a contractual dispute by applying principles of contract law, what attitude, then, should the court take where a disappointed party seeks to appeal to this court? Should it defer to the Ombudsman on question of contract law or should the Ombudsman's decision be scrutinised as if it were, in effect, a decision of a lower court dealing with a contract issue'.[958] This issue is significant for consumers who chose to pursue a complaint via the FSO. It is open to either party to appeal the decision of the FSO to the High Court and with reference to the costs involved; the issue of whether it is the substantive merits of the case or the procedural aspects of the process which are the focus of scrutiny is of importance.

In *Millar*, the High Court decision to set aside the adjudication of the Financial Services Ombudsman (FSO) was subsequently overturned by the Court of Appeal. However, there was consensus in the judgements of the respective courts as to the extent of curial deference which should be shown to the FSO. The Court looked at the legislation upon which the FSO is founded to identify the objective of the office and the statutory powers given to pursue that objective. It was observed that 'The Ombudsman's task, therefore, runs well beyond that of the resolution of contract disputes in the manner traditionally performed by the courts'.[959] 'It is clear from the terms of section 57BK(4) that the Ombudsman must, utilising his or her specialist skill and expertise, resolve such complaints according to wider conceptions of et aequo et bono which go beyond the traditional limitations of the law of contract. This is underscored by the provisions of s. 57CI(2) which, in effect, enables the

[956] Ulster Bank v. Financial Services Ombudsman and Others [2006] IEHC 323.
[957] [2014] IEHC 434 at 1.
[958] [2014] IEHC 434 at 10.
[959] [2014] IEHC 434 at 15.

Ombudsman to measure the general fairness of a contractual provision or action taken pursuant thereto by reference to general principles ("improper motive", "unjust", "unreasonable", "discriminatory" and so forth) which have been clearly transposed from the realm of public law and which would not ordinarily apply to a purely private contract. The powers which are conferred by both section 57BK(4) and section 57CI(2) of the 1942 Act are accordingly those which go far beyond the traditional boundaries of the law of contract. It is these particular novel powers which call for the application of the specialist skill and judgment of the Ombudsman so far as financial dealing is concerned and it is in this respect that the courts should show appropriate deference to that specialist skill and judgment in the application of these wider principles to the facts of a given case. This principle does not apply, however, so far as the ordinary application of the law of contract is concerned. It was never the intention of the *Oireachtas* that a complainant should be disadvantaged by electing to make a complaint to the Ombudsman rather than by proceeding in the ordinary courts. Within the judicial system no appellate court would hesitate to correct what it considered to be legal error on the part of the first instance court. The Supreme Court would not hesitate, for example, to reverse what it considered to be an erroneous decision of this Court on a point of contract law, no matter how experienced or expert the trial judge was in matters of contract or commercial law. In these circumstances, it could not be correct that this Court should defer to the Ombudsman on matters of pure contract law, not least given that the Ombudsman's decision would create a res judicata on that very contractual point which would bar the re-litigation of the issue before the ordinary courts'.[960] In the Court of Appeal, Geoghegan stated 'I am of the view that the trial judge was correct in his conclusion that no curial deference is to be shown to the Ombudsman on what he described as "purely legal questions". That is so not merely for the reasons which were relied upon by the trial judge, but also because such an approach is entirely consistent with the statutory scheme underpinning the jurisdiction of the Ombudsman'.[961]

[960] [2014] IEHC 434 at 15 – 17.
[961] [2015] IECA 127 at 34.

6.3. Reform - Spain

Parallels may be drawn between Ireland and Spain in the period up to 2012 in terms of the affordability crisis among existing residential mortgagors and the responsive measures to address this issue. However, there is a notable distinction in the stimulus for, and trajectory of, national reform thereafter. Central to this distinction is the role of the judiciary as a conduit for reform. The previous chapter identified case law which has been referred to as 'Robinhoodian' by Aznar; the term intended to convey the extent to which the provision of relief to mortgagors was through 'an improper distortion of contract and property laws'.[962] In the period from 2013 onwards, the EU preliminary reference procedure was a catalyst for significant reform of Spanish mortgage law. This reform was premised in its first stage, on the incompatibility of existing Spanish law with the UCTD, a statute which had been comparatively dormant in the residential mortgage context up to that point.

6.3.1. Judicial Role: 2013 - 2015 – *Aziz v CaixaCatalunya*

The UCTD appeared to be of tangential relevance to residential mortgage consumers in Ireland and Spain in the period up to 2013. Notably, this is an observation which is not restricted to the subject matter or jurisdictions under review in the current work, as from the date of implementation of the Directive in 1994 to the emergence of the US subprime crisis in 2007; only 6 cases were decided by the CJEU pursuant to its provisions.[963] However in 2013, the significance of the Directive increased in Spain due to the ruling of the ECJ in *Aziz v CaixaCatalunya.*[964] The court held that the restricted scope of the defenses permitted against an action for enforcement under Spanish law was inconsistent with the Directive. Under then Spanish law, a challenge to enforcement proceedings was permissible 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

[962] Sergio Nasarre-Aznar,'Robinhoodian Courts Decisions on Mortgage Law in Spain' (2015)7(2) International Journal of Law in the Built Environment 127, 129.

[963] Hans W Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD) (2014) 51(3) Common Market Law Review 771, 771. In contrast, the authors cite 21 cases referred to and decided by the ECJ in the period from 2008 to 2014; identifying the new Member States and Spain as significant in this regard.

[964] Case C-415/11 *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] Judgment of the Court (First Chamber) 14 March 2013.

registered before the security subject to the proceedings.[965] If the grounds for the challenge fell outside the scope of the foregoing, as for example where it was alleged there was an unfair or abusive term in the contract, this could only be addressed in subsequent proceedings without having the effect of staying or terminating the judicial enforcement proceedings.[966] The ECJ held that payment of damages was insufficient in the circumstances to compensate for the loss of a home and that Spanish enforcement law was incompatible with EU law. This ruling imposed an obligation on Spain to introduce reform to ensure consistency between the national framework and EU law.

6.3.2. Ley 1/2013

One observation of the present author is the propensity for Spanish legislation to be of significant magnitude in both the volume and scope of content; a point exemplified by *Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social* (Ley 1/2013).[967] Ley 1/2013 was used as a vehicle for a broad spectrum of post-crisis reforms and amendments to existing Spanish frameworks of residential mortgage regulation.[968] Some of the provisions may be viewed as a continuation of policy initiatives commenced in the first pre-crisis period; albeit that an additional stimulus was provided by judicial activism and social protest.[969] Other reforms, in contrast are directly referable to issues which came to the fore in the period from 2012 onwards; as for example the reforms to mortgage law necessitated by the *Aziz* ruling. Notwithstanding this distinction, the numerous provisions contained in Law 1/2013 have a common stated objective of 'improving and strengthening the framework for the protection of mortgage consumers'.[970] Accordingly, the law contains emergency measures to prevent evictions, and changes to frameworks of mortgage enforcement

[965] Art 695 LEC.
[966] Art 698 LEC.
[967] Law 1/2013 of 14 May on measures to strengthen protection for mortgage borrowers, debt restructuring and rented social housing.
[968] Banco De España, 'Economic Bulletin: Financial Regulation July August 2013' 84. Law 1/2013 came into force on 15 May 2013. It was subsequently amended by Law 8/2013 of 26th June 2013 on urban renewal, regeneration and rehabilitation, which came into force on 28th June.
[969] *La Plataforma de Afectados por la Hipoteca* (PAH) (i.e. Platform for those affected by Mortgages) is a citizen run protest movement which was established in 2009 and has become a nationwide anti eviction movement and a significant political actor in the campaign for reform.
[970] Ley 1/2013 Preamble.

and to frameworks which address the pre-enforcement context with the objective of protecting the primary residence of economically vulnerable consumers.

6.3.2.1. Moratorium on Evictions

Ley 1/2013 provides for an immediate two year moratorium on the execution of eviction orders arising from judicial or extrajudicial proceedings initiated prior to the commencement of the act.[971] The two year moratorium established in RDL 27/2012 was still in effect at this time and, given the temporal proximity of the measures the question which follows is whether any additional benefit is gained by the moratorium in Ley 1/2013. Notwithstanding the comparability of the moratoriums in effect and duration, Ley 1/2013 increases the applicability of the moratorium in two respects. The first relates to the increased temporal scope of actions which may fall within the scope of the moratorium. Ley 1/2013 extended the applicability to proceedings initiated in the period from the commencement of RDL 27/2012, to the commencement of Ley 1/2013, i.e. from 16/12/2012 to 15/5/2013. Law 1/2013 also marginally increases the scope of applicability to debtors through a change to the economic eligibility criteria. In common with previous mortgagor reliefs and in particular the previous moratorium, the moratorium in Ley 1/2013 as an 'exceptional' measure is limited to economically vulnerable mortgagors facing the loss of their home. The definition of 'vulnerable' contained in RDL 27/2012 is replicated without any variation and is thus determined with reference to the size and composition of the household, the employment and income status of the debtor and the capacity household members to work etc.[972] However, the economic criteria which the 'vulnerable' debtor must satisfy has been altered in one respect. RDL 27/2012 imposed a universal income ceiling on the household of three times the

[971] Art 1. This moratorium was subsequently extended from two to four years via an amendment to Ley 1/2013 undertaken by *Real Decreto-ley 1/2015, de 27 de febrero, de mecanismo de segunda oportunidad, reducción de carga financiera y otras medidas de orden social* (i.e. Royal Decree Law 1/2015 of 27 February on second chance mechanisms, reduced financial burden and other measures of social order). As a result, the moratorium which was due to end on 15 May 2015 was extended to 15 May 2017.
[972] Art 1(a) – (g).

public multipurpose income indicator (IPREM).[973] In contrast, Ley 1/2013 creates differential thresholds with reference to the capacity of members of the household.[974]

Notwithstanding the marginal increase in the scope of applicability with reference to the economic criteria and the commencement date, the consistency between the applicability of the statutory frameworks highlights the targeted policy focus in offering relief only to a discrete niche of mortgagor. The 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. However, it could be observed that notwithstanding the short term efficacy of such provisions in preventing the loss of a home, the benefit of moratorium based measures for consumers is fundamentally determined by what precipitated default.[975] This is an observation which is also relevant to the pre-enforcement moratorium in the CCMA. Where a change in employment status is the primary driver then this would impute that the longer term benefit is dependent on an improvement in macroeconomic conditions and a resumption of employment. In contrast, where default is less driven by unemployment and more by an inherent lack of affordability, i.e. where the loan is unsustainable in the medium to long term even without a loss of employment, then any improvement would depend on the restructuring of the existing loan or some reduction in the overall debt.

6.3.2.2. Mortgage Law & Civil Procedure

The moratorium contained in article one was a measure of temporary applicability to address a particular social crisis. However, Ley 1/2013 also contained provisions with ongoing relevance as exemplified by reforms to the constitutive framework of Spanish mortgage law [976]

[973] The IPREM is an income indicator similar to the minimum wage. In 2013, it was € 532.51 per month and it has remained at that level to year end 2015.

[974] Art 1(3)(a). The upper threshold on income may be three, four or five times the IPREM depending on the composition of the household and their capacity to work.

[975] Noting that the Spanish moratorium relates to the execution of the possession order, as compared to the Irish moratorium which is in respect of the legal proceedings leading to the granting of the possession order.

[976] *Decreto de 8 de febrero de 1946 por el que se aprueba la nueva redacción oficial de la Ley Hipotecaria. (LH) and Ley 2/1981, de 25 de marzo, de regulación del mercado hipotecario* (i.e. Law 2/1981 of 25 March Regulating the Mortgage Market); the latter as amended by *Ley 41/2007, de 7 de diciembre* (i.e. Law 41/2007 of 7 December).

6.3.2.2.1. Risk Warnings and Arrears Interest

A notable feature of Ley 1/2013 is that it represents the emergence in the Spanish framework of a differential regime for mortgages in respect of the borrowers' primary residence. Chapter four identifies this as an aspect of Irish mortgage law pursuant to the LCLRA 2009; however, there was no significant distinction in the Spanish framework prior to Law 1/2013. However, from 15 May 2013 onwards, mortgage deeds are required to indicate whether or not the property subject to the mortgage is the principal residence of the debtor. This creates a rebuttable presumption that the property is still the mortgagors' home at the time of enforcement.[977] Ley 1/2013 also requires a hand written statement signed by the borrower, attesting to the fact that he/she has been adequately warned of the potential risks associated with certain housing loans.[978] This requirement is to respond to mortgage products which are characterized by increased complexity or risk for the consumer, i.e. contracts which contain floor or ceiling clauses relating to interest rate variability, instruments for hedging interest rate or foreign currency mortgage loans.[979] The law also imposes a cap on the arrears interest payable where the mortgage relates to the primary residence of the debtor.[980] This is comparable to developments in Irish and EU law. The CCMA 2013 imposes restrictions on the imposition of default charges where loans are within the MARP process and pursuant to the Mortgage Credit Directive, there is a requirement to impose a ceiling on such charges in Member State frameworks where default charges are not restricted to recovery of the financial loss incurred by the lender.[981] In the context of borrower default and subsequent disposal of the property by the lender, if the proceeds are

[977] Art 3(1) amending art 21(3) LH.

[978] The term 'housing loan' as used with reference to art 6 is broadly comparable to s 2(1) CCA 1995 in Ireland in that it comprises mortgage loans on the primary residence or loans to a consumer in respect of land on which there is or will be a building, although the Irish statute specifies this must be a house whereas the Spanish statute as translated refers to buildings. The content of the statement warning consumers of the risks of certain mortgage product features are determined by the BDE.

[979] Art 6 Ley 1/2013.

[980] Art 3(2) amending art 114 LH. The maximum interest payable is three times the legal interest rate and this is restricted to the outstanding principal. There is a prohibition on the capitalization of default interest. In Spain, the legal interest rate has been set at 4% since 2009. 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. The prohibition on the capitalisation of default interest does not apply in the context of Art 579(2)(a) LEC.

[981] Chpt 3, s 11 CCMA 2013 and art 28(3) MCD.

insufficient to discharge the entire debt, Law 1/2013 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.[982]

6.3.2.2.2. Unfair Contract Terms

Ley 1/2013 also reforms the judicial and extra judicial enforcement procedures to implement the changes required consequent to the *Aziz* ruling. Article 695 LEC which identifies the grounds upon which a challenge may be raised to enforcement proceedings has been amended to include the existence of unfair terms in the loan contract.[983] Where an unfair term is contained in a loan contract, the impact on repossession proceedings vary according to the nature of the term. In a judicial enforcement context, the judge is required to dismiss proceedings which are premised on the unfair term, but otherwise to allow enforcement but without the application of the unfair term.[984] In the extrajudicial procedure, an out of court auction carried out by a notary public, the notary is required to suspend the procedure where the debtor claims that the contract contains an unfair term and can certify that he/she has requested a competent court to issue a declaration of invalidity in respect of these clauses.[985] A duty is also imposed on notaries to advise the parties of the existence of an unfair term which determines the amount payable or which constitutes the basis for the sale. This will allow the debtor can seek judicial annulment of the clause.[986]

6.3.2.2.3. Financial Aspects of Enforcement

Chapter five identified reform of Spanish Civil Procedure Law, i.e. LEC, in the period up to 2012. These reforms were intended to streamline and reduce the costs associated with the enforcement process, and the underlying objective was to minimize the residual debt obligation of the mortgagor in the post enforcement context. Law 1/2013 continues this theme with reforms which are intended to ensure 'that foreclosure proceedings are speedier and more flexible' and that 'the rights and

[982] Art 7(7) inserting art 654(3) LEC.
[983] Art 7(14) inserts art 695 (1)(d) 'the unfairness of a contractual term that constitutes the basis for implementation or had determined the amount due'.
[984] Art 7(14) amending art 695(3). A grace period of 1 month was provided for existing proceedings pursuant to which an application could be on the basis of unfair terms.
[985] Art 3(3) inserting art 129(2)(f) LH. Art 684 LEC determines the jurisdiction of courts in respect of enforcement.
[986] Art 3(3) inserting Art 129(2)(f) LH.

interests of the mortgagor are protected'.[987] Ley 1/2013 streamlines the process for extrajudicial sales, requiring the process to be undertaken through a single electronic auction.[988] It also requires the minimum threshold of the auction price to be the same as for judicial enforcement, i.e. the value specified in the mortgage deed, and in any event be no less than 75% of the appraised value of the property used in the granting of the loan.[989] In the context of judicial enforcement, the deposit required by potential bidders is reduced from 20% to 5% of the appraised value of the property.[990] The provisions impose differential obligations in terms of the value threshold at which the property can be adjudicated to the creditor where there are no bidders at auction. Where the mortgage relates to the primary residence of the borrower, this value is set at 70% of the auction price or 60% where the outstanding debt is less than this amount, as compared with 50% in a non-principal residence context.[991] Similarly, where the costs of judicial enforcement are awarded to the creditor, the liability of the debtor is capped at 5% of the amount claimed in the context of proceedings in respect of the primary residence.[992]

Ley 1/2013 also amends article 579 LEC to alter the statutory liability of the mortgagor for loans secured against their primary dwelling where enforcement of the security does not discharge the entire liability. Pursuant to Ley 1/2013, where the debtor pays 65% of the outstanding amount within a 5 year period from the date of enforcement, or 80% within a corresponding 10 year period, he is relieved of further liability.[993] Ostensibly this introduces into the statutory framework a measure of debt forgiveness in the post enforcement context; although it must be noted that in practical terms there may be limited capacity to avail of the provision due to the extent of payment required on the part of the debtor. Notwithstanding the foregoing, the provision is significant as it represents a universal mandatory framework applicable to mortgages on the primary residence.[994] With reference to the post

[987] Ley 1/2013 preamble.
[988] Art 3(3) amending art 129 LH.
[989] Art 3(3) amending art 129 LH.
[990] Art 7(6) amending art 647(1)(iii) LEC. In addition, the purchaser now has 40 days to provide the balance of the purchase price; previously this was 20 days.
[991] Art 7(10) amending art 670(1) LEC.
[992] Art 7(4) inserting art 575(1)(a) LEC.
[993] Art 7(5) inserting art 579(2)(a) LEC.
[994] Pursuant to the reforms to RDL 6/2012 under Law 1/2013, although the pre-enforcement debt forgiveness option via surrender of the property was theoretically mandatory, applicability was

enforcement context and the ongoing liability of borrowers, Ley 1/2013 contains provisions which can be viewed as preventing the unjust enrichment of the creditor. Where the property is adjudicated to the creditor and is disposed of within a 10 year period for a value in excess of that for which it was adjudicated, the debtors outstanding liability will be reduced by an amount equivalent to 50% of the excess between the adjudicated value and the sale value less enforcement costs.[995]

6.3.2.2.4. Statutory 'Default'

Ley 1/2013 also increases the statutory threshold for 'default' for the purposes of enforcement proceedings relating to non-payment of agreed monthly installments. It provides that with effect from the commencement of the act, the creditor can initiate enforcement proceedings where the debtor has missed the equivalent of three monthly payments and this is provided for in the mortgage contract.[996] Notably, the three month period is also used to varying degrees as a threshold in delineating the capacity of the lender to initiative proceedings in both the constitutive and facilitative frameworks in Ireland.[997] Notwithstanding that the increased threshold appears to be of benefit, the capacity for contractual variation of this provision reduces its efficacy as a protection. Ley 1/2013 also establishes a statutory right to redeem mortgages on the primary residence at any point prior to the auction of the property in enforcement proceedings.[998] Previously, this would have necessitated the agreement of the creditor. There are certain restrictions on the exercise of the statutory right of redemption; it is limited to 3 yearly intervals whereas previously with the consent of the creditor this limitation was once every 5 years.[999] A financial incentive is also offered to debtors for co-operating with the auction process. Where a debtor allows viewings of the property, he can obtain a debt reduction of up to 2% of the auction value.[1000]

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limited by differential economic criteria as compared with those relevant to other reliefs under the law.

[995] Art 7(5) inserting art 579(2)(b) LEC. All reference to adjudication to the creditor in Law 1/2013 also encompasses adjudication to a third party nominated by the creditor.

[996] Art 7(13) amending art 693(1) and (2) LEC. Art 693 LEC had previously conferred this capacity on the creditor once any schedule payment was missed.

[997] S 100(1)(a) LCLRA 2009 and s 56(b)(i) CCMA 2013.

[998] Art 7(13) amending art 693(3) LEC.

[999] Art 7(13) amending art 693(3) LEC.

[1000] Art 7(12) amending art 691(2) LEC.

6.3.2.3. Reform of RDL 6/2012

The third aspect of the reform introduced in Ley 1/2013 which is relevant to the current analysis is changes to the existing framework for distressed mortgagors. As detailed in Chapter five, RDL 6/2012 was introduced to facilitate debt restructuring and other measures to address the plight of mortgagors, who due to unemployment, were struggling to sustain mortgage payments in respect of their principal residence.[1001] However, the cumulative criteria to access relief and in particular the value thresholds placed on the purchase price of the property, reduced the scope of applicability such that it became nugatory. Ley 1/2013 amends those aspects of RDL 6/2012 which were subject to criticism. However, this does not significantly enhance the applicability of the provisions but rather provides slightly more scope within the same niche.[1002] An exception to this assertion is the inclusion of mortgage guarantors within the scope of applicability.[1003]

Ley 1/2013 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 RDL 27/2012 and Ley 1/2013; thereby creating statutory consistency regarding the addressee of the various pre and post enforcement frameworks. The new provisions impose a threshold on aggregate household income with differential levels depending on the composition of the household and the capacity of the members to work.[1004] In addition there is a requirement that in the four years preceding the application there has been a change in the economic position of the household which has adversely impacted the debt servicing capacity and also

[1001] RDL 6/2012 requires the mortgage loan to be secured by the debtors' sole property and that the loan was advanced to purchase it. The framework is applicable to credit institutions only.

[1002] 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 and 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.

[1003] 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'.

[1004] Art 8(2) amending art 3(1)(a) of RDL6/2012. In the absence of any illness, incapacity or disability of the members of the family unit the aggregate income must not exceed three times the Public Indicator of Multiple Effect Income (IPREM). Where there is a family member with an illness or disability which renders them unable to work the threshold increases to four times the IPREM. Where the debtor has cerebral palsy, a physical disability (greater than 33%), an intellectual disability, a mental illness or an illness which prevents either the debtor or his/her caretaker from working the threshold is five times the IPREM.

in that period, the composition of the family has led to a 'situation of special vulnerability'.[1005] The requirement in RDL 6/2012 that the mortgage payment must constitute 60% of the net income of the household has been amended and the new requirement is that it must over 50% of the net monthly family income in the absence of incapacitation and 40% where there is incapacitation.[1006] The cap on default interest where a debtor satisfies the requirements to be considered within the threshold of exclusion has been reduced from 2.5% to 2%.[1007] 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.[1008] As provided originally in RDL 6/2012, where a debtor satisfies the cumulative requirements they may apply for debt restructuring or where this is not viable, a reduction in the debt or surrender of the property in satisfaction of the debt.[1009] However, in order to be eligible for the latter two alternatives there are additional eligibility criteria that a debtor must satisfy and the purchase price thresholds are reduced. This operates to reduce the scope of applicability to that contained originally in RDL 6/2012; thereby negating the extension in scope under Ley 1/2013.[1010] There is a new obligation on credit institutions to apply the code, to

[1005] Art 8(2) amending art 3(1)(b) RDL 6/2012. This requires a significant adverse change in the relationship between the mortgage payment and income, i.e. 1.5 times. The situation of vulnerability is satisfied where the family has three or more children, two or more in a single parent family, a child of three years or under or a family member with a disability (in excess of 33%) or an illness which prevents them from working.

[1006] Art 8(2) amending art 3(1)(c) RDL 6/2012.

[1007] Art 8(4) amending art 4(1) RDL 6/2012.

[1008] 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).

[1009] As previously, the viability of restructuring arrangements is determined by the proportion of net monthly income required for mortgage repayments. Art 8(8) amends 2(a) of the annex to provide for non-viability at a level of 50%; previously it had been 60%. There are minor changes to the restructuring and *dacion* as well. In the former context the capital deferred option is for a 5 rather than the previous 4 year period. In respect of *dacion* where the debtor remains as a tenant, interest on rent arrears has been reduced from 20% to 10%.

[1010] The additional criteria were within the 'at risk of social exclusion' requirements in the framework law as originally devised and the original value thresholds are reinstated.

inform customers of its existence and the introduction of sanctions for non-compliance.[1011] Ley 1/2013 requires entities to 'inform customers in writing of its existence, giving a detailed description of its contents and its applicability to mortgagors in payment difficulties. Chapter II of Ley 1/2013 amends provisions of *Ley 2/1981 de 25 de marzo, de regulación del mercado hipotecario* which although ostensibly relating to secondary market activity, are of relevance for aspects of loan origination.[1012] Where appraisal companies provide services to credit institutions, the revenue threshold at which conflicts of interest arrangements are necessitated have been reduced from 25% to 10%.[1013] It has also altered the maximum loan to value ratio for 'housing loans' subject to the imposition of a maximum duration. Loans for the construction or acquisition of, or improvements to residential property can have an 80% LTV provided that the term of the loan does not exceed 30 years.[1014]

The framework contained in RDL 6/2012 was subject to further reform in *Real Decreto-ley 1/2015, de 27 de febrero, de mecanismo de segunda oportunidad, reducción de carga financiera y otras medidas de orden social* (RDL 1/2015).[1015] In terms of existing parameters of eligibility, the relevant provisions increase the maximum threshold of aggregate household income,[1016] and outline a new basis upon which to establish the value of the property for the purposes of the Code.[1017] It also introduces a new category of vulnerable debtor, i.e. where the primary debtor is over 60 but the requirements to be classified as a household are not otherwise

[1011] Art 5(9) as inserted by art 8(5) Ley 1/2013. Art 8(7) inserts a new chapter VI Penalties, i.e. 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'. The provisions referred to relate to (i) the obligation of the credit institution to apply the code where it subscribes to the code and the debtor is located with the exclusion threshold, (ii) the obligation of the credit institution to inform the debtor about the existence and potential applicability of the code and (iii) the obligation to provide the (monthly) information requested by the Banco de España which is required by the oversight committee responsible for supervising and ensuring compliance with the code.

[1012] Law 2/1981 of 25 March regulating the mortgage market as subsequently amended by *Ley 41/2007, de 7 de diciembre and Real Decreto 716/2009, de 24 de abril*.

[1013] Art 4 RDL 1/2013 amending art 3(2) Law 2/1981.

[1014] For other mortgage loans the LTV ratio remains 60%.

[1015] Royal Decree Law 1/2015 of 27 February on second chance mechanisms, reduction of financial burden and other social measures.

[1016] Art 2(2) RDL 1/2015 amending art 3(1) RDL 6/2012. The use of a multiple of the IPREM is now calculated with reference to 14 monthly payments.

[1017] Art 2(2) RDL 1/2015 amending arts 5(2) and 5(3) RDL 6/2012.

satisfied. In addition, it renders floor clauses in loan contracts inapplicable where they related to a household at the threshold of exclusion under RDL 6/2012.[1018]

6.3.3. Post *Aziz* Case Law

The *Aziz* judgement was significant as it highlighted the inherent potential of EU Consumer Law as a mechanism through which to stimulate reform of national frameworks. It thus marked the starting point for a succession of preliminary references from Spanish courts querying the compatibility of the national legal framework, and in particular aspects of the framework of enforcement, with EU law.[1019] The underlying objective was to precipitate a substantive alteration of the existing balance of rights and obligations between mortgage consumers and lenders within the national legal framework. It is somewhat ironic that Ley 1/2013 which introduced reforms necessitated by the *Aziz* ruling has been a central focus of activity, its provisions being subject to multiple preliminary references.[1020] This is exemplified by the joined cases of *Unicaja Banco SA v José Hidalgo Rueda and Others and Caixabank SA v Manuel María Rueda Ledesma and Others.*[1021] The central question posed by the preliminary reference was 'under Directive 93/13/EEC, and in particular Article 6(1) thereof and, in order to ensure the protection of consumers and users in accordance with the principles of equivalence and effectiveness, must a national court, when it finds there to be an unfair default-interest clause in mortgage loans, declare the clause void and not binding or, on the contrary, must it moderate the interest clause, referring the matter back to the party seeking enforcement, or to the lender, for adjustment of the interest'.[1022] In respect of Ley 1/2013, the query was whether the second transitional provision[1023] was 'nothing more than a clear limitation on the protection of consumer interests, in that it implicitly imposes upon the court the obligation to moderate a default-interest clause

[1018] Art 2(3) RDL 1/2015 inserting 1(b)(iv) in the annex of RDL 6/2012.
[1019] Although it was not a trend which emerged in Ireland, the utilization of the UCTD in this manner was a development was not restricted to Spain, with some Eastern European Member States such as Hungary and Romania notable in this regard.
[1020] Sergio Nasarre Aznar, 'Robinhoodian Courts Decision on Mortgage Law in Spain, (2015) 7(2) International Journal of Law in the Built Environment 127, 133. Aznar points out that Law 1/2013 was 'perceived as a weak or palliative response given the magnitude of the problem'.
[1021] Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 Unicaja Banco SA v José Hidalgo Rueda and Others and Caixabank SA v Manuel María Rueda Ledesma and Others (ECJ, 21 January 2015).
[1022] ibid, para 23.
[1023] This provided that in respect of mortgages granted before the entry into force of the maximum default interest rate via Law 1/2013, i.e. three times the legal interest rate, lenders were permitted to recalculate the rate to accord with the new limit.

that could be considered to be unfair, adjusting the interest stipulated and maintaining in force a stipulation which was unfair, instead of declaring the clause to be void and not binding upon the consumer' and does it contravene article 6(1) in avoiding the 'application of the penalty of nullity and lack of binding force in respect of default-interest clauses tainted by unfairness and stipulated in mortgage loans entered into before the entry into force of Law No 1/2013'.[1024] The Court held that article 6 did not preclude a provision, pursuant to which the national court when hearing mortgage enforcement proceeding, was required to adjust the amount due under the loan contract so as to ensure the default interest rate did not exceed statutory thresholds. However, this was subject to the caveat that the 'the application of that national provision; is without prejudice to the assessment by that national court of the unfairness of such a term and does not prevent that court removing that term if it were to find the latter to be 'unfair', within the meaning of Article 3(1) of that Directive'.[1025] Aznar notes that the ruling has created a degree of legal uncertainty, which paradoxically, the contested national provision was enacted to resolve. This point reflects the increased latitude of the national courts in dealing with default interest rates in that they have the capacity to assess the term as being unfair irrespective of whether the statutory limit on default interest rates is surpassed.[1026]

Although the initial post Aziz preliminary references were premised solely on the UCTD, there was subsequently a merging of consumer law with fundamental rights contained in the EU Charter of Fundamental Rights. This is exemplified by *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* in which article 695(4) LEC was challenged with reference to its compatibility with article 7(1) and article 47 of the UCTD and the CFR respectively.[1027] The provision in question was 'applicable to appeals against a decision determining the outcome of an objection to enforcement proceedings in

[1024] Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 Unicaja Banco SA v José Hidalgo Rueda and Others and Caixabank SA v Manuel María Rueda Ledesma and Others (ECJ, 21 January 2015) para 23.
[1025] ibid, para 43.
[1026] Sergio Nasarre Aznar, 'Robinhoodian Courts Decision on Mortgage Law in Spain, (2015) 7(2) International Journal of Law in the Built Environment 127, 133.
[1027] C169-14 - Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA (ECJ, 17 July 2014).

relation to mortgaged or pledged goods'. It allowed an 'appeal to be brought only against an order staying the proceedings or dis-applying an unfair term and to exclude appeals in other cases, the immediate consequence of which is that whilst the party seeking enforcement may appeal when an objection to enforcement is upheld and the proceedings are brought to an end or an unfair term is dis-applied, the consumer against whom enforcement is sought may not appeal if his objection is dismissed'.[1028] The question was whether this provision was compatible with the requirement in article 7(1) UCTD which imposes an obligation on Member States 'to ensure that, in the interests of consumers, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers' or 'within the ambit of EU legislation on the protection of consumers contained in Directive 93/13/EEC, is it compatible with the principle of the right to an effective remedy and a fair trial in accordance with the principle of equality of arms, affirmed in Article 47 of the Charter of Fundamental Rights of the European Union'.[1029] The court held that 'article 7(1) of Directive 93/13/EEC, read in conjunction with article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding a system of enforcement, such as that at issue in the main proceedings, which provides that mortgage enforcement proceedings may not be stayed by the court of first instance, which, in its final decision, may at most award compensation in respect of the damage suffered by the consumer, in as much as the latter, the debtor against whom mortgage enforcement proceedings are brought, may not appeal against a decision dismissing his objection to that enforcement, whereas the seller or supplier, the creditor seeking enforcement, may bring an appeal against a decision terminating the proceedings or ordering an unfair term to be dis-applied'.[1030] Aznar observes of case law challenging existing legal frameworks using EU Fundamental Rights or national constitutional provisions that it amounts to a reinterpretation of private law rights through the lens of human and fundamental rights.[1031]

[1028] C169-14 - Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA (ECJ, 17 July 2014) para 19.
[1029] ibid.
[1030] ibid, para 52.
[1031] Sergio Nasarre Aznar, 'Robinhoodian Courts Decision on Mortgage Law in Spain, (2015) 7(2) International Journal of Law in the Built Environment 127, 136-137. Aznar notes in respect of a decision of the Spanish criminal courts and the European Court of Human Rights, i.e. Order of Criminal Court No 4 (Sabadell 8 May 2013) and *Ceesay Ceesay and Others v Spain*, that the 'decisions

6.4. Role of the EU: 2013-2015

In the period from 2008 to 2010, there were various mortgage related reports and studies undertaken by the EU Commission, the bulk of which were pursuant to commitments given in the 2007 White Paper on EU Mortgage Policy.[1032] In 2011, an EU Commission proposal for a Mortgage Credit Directive was a significant development in the conversion of policy aspirations to an EU regulatory role.[1033] There were significant amendments undertaken to the draft Directive in the period prior to its final adoption in 2014, although the extent to which these can be interpreted as having changed the Directive, in terms of where it rests on the continuum from consumer protection to economic consumerism, is a matter of opinion.[1034] However, irrespective of viewpoints regarding the appropriateness of the balance of policy interests, or the likely efficacy of its provisions, the adoption of the Directive is a watershed moment in EU mortgage policy. It represents the first direct and binding EU regulation of the primary residential mortgage markets of Member States from a conduct of business perspective. This development is particularly significant when juxtaposed with the pre-crisis preference for a market based

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common factor is that civil law rules are not sufficient in guaranteeing fundamental rights' of the weaker parties under the contract and that the application of these civil law rules 'must be subjected to the test of human rights provisions for them to ensure justice'. He notes with respect to the provisions of the Spanish Constitution, that 'judges have started to erode the strength of Article 33.1CE (private ownership) using Article 33.2 CE (social function of ownership) and Article 47 (right to housing), particularly when private homeownership is not intended for housing individuals'.

[1032] 'Study on the Role and Regulation of Non-Credit Institutions in EU Mortgage Markets' (London Economics for the Directorate General of Internal Market and Services, 2 September 2008); 'Report of the Expert Group on Credit Histories' (DG Internal Market and Services May 2009); Udo Reifner, Sebastien Clerc Renaud, Elena F Pérez Carrillo, Achim Tiffe and Michael Knobloch, 'Study on Equity Release Schemes in the EU:Part I - General Report' (Project No. MARKT/2007/23/H, European Commission January 2009) and Udo Reifner, Sebastien Clerc Renaud, Elena F Pérez Carrillo, Achim Tiffe and Michael Knobloch, 'Study on Equity Release Schemes in the EU Part II: Country Reports' (Project No. MARKT/2007/23/H, European Commission January 2009); 'Tying and Other Potentially Unfair Commercial Practices in the Retail Financial Services Sector: Final Report (Centre for European Policy Studies and Van Dijk Management Consultants for DG Internal Market and Services ETD/2008/IM/H3/78, 24 November 2009).

[1033] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Credit Agreements relating to Residential Property' COM (2011) 142 final.

[1034] The draft Directive did not include any arrears related provisions. However, it contained a clear prohibition on the provision of credit in the context of a negative assessment of creditworthiness per art 14(2) and it was prescriptive regarding the use of administrative sanctions for non-compliance per art 24(1). Interestingly, that section also required penalisation of consumers who 'knowingly provide incomplete or incorrect information in order to obtain a positive creditworthiness assessment where the complete and correct information would have resulted in a negative creditworthiness assessment, and are subsequently unable to fulfil the conditions of the agreement'.

approach and the consequent lack of support for a directive as a suitable mechanism for intervention.[1035]

6.4.1. Directive 2014/17/EU

Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property was adopted on 4 February 2014, and transposition of its provisions into Member States law is required by 21st March 2016.[1036] Although the Directive is referred to as the 'Mortgage Credit Directive' (MCD), its scope does not extend to the entire range of mortgage credit as the term is used in pre-crisis EU mortgage policy discourse. Notwithstanding the inclusion of what would be deemed 'mortgage loans' and 'housing loans', equity release agreements are among those credit agreements expressly excluded from its remit.[1037] The exclusion of equity release and other 'niche' agreements is justified with reference to the specialised nature and specific characteristics of such products as compared with standard mortgage products and, the potential requirement for a tailored approach to respond to the varying risks and features.[1038] This perspective is consistent with a differentiation in the information requirements and risk warnings provided for such products in the pre-MCD frameworks in the jurisdictions under review.[1039] Of course, Member States have the latitude, if they choose, to extend the applicability of the Mortgage Credit Directive both to those agreements which are formally outside the scope of the Directive as well as those in respect of which discretionary applicability is provided for under article 3(2). Ireland has signalled its intention to apply the Directive to equity release agreements which fall into the former category and buy to let mortgages, credit union loans and bridging loans which fall within the latter.[1040] The focus of the Mortgage Credit Directive is on credit agreements entered into by consumers from the date of transposition, where 'consumer' is defined in the

[1035] Although the White Paper (at 4.1) stated 'the Commission considers that it would be premature to decide on whether a Directive would deliver the necessary value added', the analysis within the MCI up to that point appeared to be leaning against the use of a directive.
[1036] 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 [2011] OJ L60/34.
[1037] Art 2(a)-(f) for a complete list of excluded credits agreements and art 3(a)-(e) for agreements where there is discretionary applicability.
[1038] Recitals 16 and 17.
[1039] See for example ss 4.44 and 4.45 CPC 2012 in Ireland and art 32 of Order EHA 2899/2011 in Spain.
[1040] 'Directive on Credit Agreements Relating to Residential Immoveable Property - Proposed Course of Action Following Public Consultation' (Department of Finance July 2015) 8.

traditional statutory manner of a natural person acting for purposes which are outside their trade, business or profession.[1041] The creditor, credit intermediary or appointed representative acting in the course of their trade, business or profession who is subject to the obligations of the Directive may be either a natural or legal person.[1042] Previous consumer related EU Directives were either minimum, e.g. Directive 93/13/EEC, or maximum harmonisation, e.g. Directive 2008/48/EC, in character, the distinction turning on whether the Directive sets a regulatory floor or ceiling. However, the MCD is a Directive of 'targeted harmonisation' containing both thresholds of obligations and, although Member States are not permitted to exceed the maximum harmonisation provisions, they are otherwise offered the latitude 'to maintain or introduce more stringent provisions', provided that these are not contrary to EU law.[1043]

6.4.1.1. Provisions

The Directive contains 50 articles divided into 14 chapters; however these could be distilled into a number of key aspects. Of central importance from an internal market and a consumer protection perspective is the imposition of universal supervisory and regulatory requirements on all supply side market participants.[1044] This ensures that the obligations imposed on the lender and the protections conferred on the consumer are not of differential applicability. Within this universal framework there is the imposition of various requirements which address the systemic and internal market objectives. These include a mandatory creditworthiness assessment for borrowers, pre-contractual conduct of business requirements and provisions which address the context of arrears and foreclosure.[1045] The maximum harmonisation measures from which Member States cannot deviate are contained in Arts 14(2) and 17. The former mandates the ESIS as the template for the content and format of personalised pre-contractual information provided to the consumer.[1046] Article 17 stipulates the components and calculation of the APRC.[1047] The standardisation of these aspects across EU Member States is consistent with the Single Market objective in that it

[1041] Art 4(1).
[1042] Arts 4(2) 4(5) and 4(8).
[1043] Recital 7 and art 2.
[1044] Chpts 11 and 12.
[1045] Chpts 3, 4, 6 and 10.
[1046] See Annex II for ESIS template.
[1047] See Annex I for APRC formula.

enhances the comparability and transparency of product offerings both within and across jurisdictions. Consumer mobility is promoted not just through these information based provisions but also through the imposition of restrictions on charges. In the pre-contractual context this is manifest in article 8 which prohibits charges for the provision of information required pursuant to the Directive. The Directive also promotes mobility through a legal right to early repayment which necessitates a reduction in cost commensurate with such redemption.[1048] The capacity of lenders to sanction borrowers through charges and thereby dis-incentivise redemption is addressed by limiting charges to those which correspond to the financial loss borne by the lender.[1049]

Financial education is a feature of the MCD, as it was of pre-crisis policy and it retains its role as a component of consumer empowerment whereby increased financial literacy aligned with the provision of pre-contractual information through the ESIS facilitates informed decision making by the consumer.[1050] This is further supported by the introduction in the MCD of a mandatory seven day reflection period for borrowers which Member States have the discretion to incorporate as a right of withdrawal.[1051] Access to credit database and the issue of accurate property valuations are relevant to assessments regarding the credit risk and the quality of the collateral. Pre-crisis, particular emphasis was placed on these aspects with reference to their relevance for funding instruments and the capacity for market entry by supply side participants. Ostensibly, within the MCD, the focus is with reference to sound underwriting standards which alongside the creditworthiness assessment support the objective of responsible lending with attendant consumer and systemic benefits. New conduct of business requirements inevitably reflect the exposure of crisis related deficits and these include the competence and knowledge of staff who engage with consumers,[1052] risk transfer in the context of foreign currency credit

[1048] Art 25(1).
[1049] Art 25(3).
[1050] 'Financial Literacy & Consumer Protection: Overlooked Aspects of the Crisis' (Recommendations on Good Practices on Financial Education and Awareness Relating to Credit, OECD June 2009) 3. The OECD noted the role of financial literacy as a key pillar of financial stability.
[1051] Art 14(6).
[1052] Art 9.

agreements, and transparency in respect of the indices and reference rates used for variable rate mortgages.[1053]

The Mortgage Credit Directive requires creditors, credit intermediaries or appointed representatives to act 'fairly, honestly and professionally taking account of the rights and interests' of consumers.[1054] It also specifies that activities shall be based on 'information about the consumers' circumstances and any specific requirement made known by a consumer and, on reasonable assumptions about risk to the consumers' situation over the term of the credit agreement'.[1055] The emphasis placed on the capacity for remuneration policies to undermine both the prudential well-being of the creditor, and consumer confidence in the financial sector via underwriting standards and product provision, is linked to insights from the crisis. Member States are required to ensure that remuneration policies do not impede the foregoing consumer obligations and, that in respect of the creditworthiness assessment, remuneration policy 'is consistent with and promotes sound and effective risk management' and is 'in line with the business strategy, objectives, values and long term interests of the creditor and incorporates measures to avoid conflicts of interest, in particular by providing that remuneration is not contingent on the number of applications accepted'.[1056] In support of the stated transparency objective, product related transparency requirements which are primarily given effect through the ESIS are aligned with transparency obligations in respect of credit intermediaries including the commercial basis of the relationship between the credit intermediaries and creditors.[1057]

6.4.1.1.1. Responsible Lending

In the Member States under review, the issue of consumer indebtedness and default have been a sustained focus of political and public attention. The MCD addresses

[1053] Arts 23 and 24.
[1054] Art 7 MCD, echoing requirements of other frameworks, e.g. s 2(2) of the Irish CPC and art 19(1) of the MIFID Directive; i.e. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L145/1.
[1055] Art 7(1).
[1056] Art 7(3).
[1057] Art 15.

this issue in the ex-ante context through an obligation to assess creditworthiness[1058] as a component of responsible lending and, in the ex poste context through provisions on arrears and foreclosure.[1059] Responsible lending provisions were the first inclusion linked to the financial crisis and, notwithstanding that references to responsible lending appeared in the White Paper in 2007, this was directly attributable to the then unfolding US subprime crisis, as no reference or consideration of this aspect had been a feature of the Mortgage Credit Initiative up to that juncture.[1060] The MCD requires Member States to ensure that 'before concluding a credit agreement the creditor makes a thorough assessment of the consumers' creditworthiness'; the latter term signifying 'the evaluation of the prospect for the debt obligation resulting from the credit arrangement to be met'.[1061] A feature of pre-crisis lending in inflationary housing markets had been over reliance on a continuing increase in asset values rather than the borrowers' repayment capacity as the basis for the decision to lend. The MCD asserts that creditworthiness 'shall not rely predominantly' either on an increase in the value of the residential immoveable property or on the assumption that it will increase in value 'unless the purpose of the credit agreement is to construct or renovate' the property.[1062] There is an implied prohibition in the assertion that 'Member States shall ensure that the creditor *only makes the credit available* to the consumer *where the results of the creditworthiness assessment indicates that the obligations* resulting from the credit agreement *are likely to be met in the manner required under that agreement'*.[1063] The sustainability of the financial obligations of the consumer is addressed in the context of further advances of credit by requiring a re-assessment of creditworthiness prior to 'any

[1058] Art 4(17).
[1059] Evidently other aspects which are intended to support prudent underwriting, e.g. accurate valuations of collateral, access to credit databases etc., also contribute to responsible lending which minimises the incidence of over indebtedness; whilst from a demand side perspective, increased financial literacy and product information and transparency are intended to support sustainable financial obligations through informed and responsible borrowing.
[1060] The recent nature of the responsible lending issue to the analysis is manifest by the fact that in contrast to other aspects which were a feature of the analysis up to that point, there is no specific task or activity in respect of the issue announced in the annex to the White Paper. The EU Commission undertook a public consultation on responsible lending and borrowing in Brussels on 15 June 2009 which led to the publication of a Commission Services Working Document in July 2010.
[1061] Art 18(2) requires on-going documentation by lenders of the procedures and information upon which creditworthiness assessments are based. Article 20 imposes verification requirements on information used for the assessment.
[1062] Art 18(3).
[1063] Art 18(5).

significant increase in the total amount of credit is granted'.[1064] Notably there section does not provide any parameters as to what constitutes a 'significant increase' in this context. Where a creditworthiness assessment was incorrectly conducted and credit was granted to the consumer, the creditor is precluded from cancelling or altering the credit agreement other than in the context where the consumer knowingly withheld or falsified relevant information.[1065]

Notwithstanding that chapter six explicitly addresses the issue of creditworthiness, it is clear that there is a synergistic relationship between the various provisions of the Directive and that they cumulatively support prudent underwriting. From a supply side perspective, the objective will be furthered as the requirement for accurate valuations of collateral, unimpeded access to credit databases, increased knowledge and competence of staff and reform of remuneration policies, theoretically at least, will lead to responsible lending which minimises the incidence of over indebtedness. On the demand side, increased financial literacy and product information and transparency are intended to support sustainable financial obligations through informed and responsible borrowing. With reference to the consumer law and policy literature contained in chapter two, a point of academic interest is the extent to which the responsible lending regimes can be assessed as placing the onus for assessment of suitability and/or affordability on one or the other of the parties to the credit agreement. In the Irish CPC 2012, the onus for assessing product suitability and, affordability as a component of this suitability, is placed firmly on the lender. In Spain, it is the responsibility of the lender to undertake the creditworthiness or solvency; however, pursuant to article 29(1) SEL 2/2011, it would appear that the determination of product suitability is an issue for the borrower. The MCD similarly imposes an obligation on the lender in terms of the assessment of creditworthiness but article 16 which identifies the scope of the lenders obligation to provide explanations, imputes that ultimately the determination of suitability is a matter for the consumer, 'Member States shall ensure that creditors, and where applicable credit intermediaries or appointed representatives provide adequate explanations to the consumer….*in order to place the consumer in a position* <u>*enabling him to assess*</u>

[1064] Art 18(6). This contrasts with the Irish CPC whereby any further extension of credit requires a further affordability and suitability assessment pursuant to s 5.15.
[1065] Art 18(4).

whether the proposed credit agreement and ancillary services are adapted to his needs and financial situation'.

6.4.1.1.2. Default

There are two distinct provisions in the Mortgage Credit Directive which address the context of default, although from different policy perspectives. The provisions entitled arrears and foreclosure are primarily addressing default with reference to the economic and social implications for the consumer. They require 'Member States to encourage creditors to exercise reasonable forbearance before foreclosure procedures are initiated'.[1066] In an effort to address an escalation of consumer indebtedness in the default context, the MCD delegates to Member States discretion regarding the imposition and maximum quantum of default related charges.[1067] As noted in the previous and current chapter, the issue of the quantum and extent of permissible default charges is one which is addressed in both Irish and Spanish frameworks prior to the adoption of the MCD. The Directive prohibits any national measure which would prevent 'datio in solutum'.[1068] This creates the scope for the introduction of a 'non-recourse' mortgage in that the liability of the consumer is limited to the secured asset and, fundamentally, the obligation requires Member States to ensure that the existing national framework does not prevent the parties from concluding a valid agreement to this effect. It is apparent that a credit agreement with restricted personal liability could be attractive to consumers and would also create an incentive for lenders to engage in prudent valuation of collateral and underwriting standards. Where consumers remain responsible for residual debt, the Directive imposes a requirement that Member States 'shall have procedures or measures to enable the best efforts price' to be obtained for the property, thereby minimising the residual consumer debt. There is also an obligation for the imposition of 'measures to facilitate repayment' of any residual debt in a manner which protects consumers.[1069] Further to the frameworks detailed in the current and previous chapter, it is clear that a focus of reform of the LEC in Spain was the threshold for attachment of income in the post enforcement context.[1070]

[1066] Art 28(1).
[1067] Arts 28(2) and (3).
[1068] Art 28(4).
[1069] Art 28(5).
[1070] In Ireland, a new insolvency regime was adopted in the Personal Insolvency Act 2012.

The second section relevant to the default context but perhaps less evident in its titling is 'flexible and reliable markets'.[1071] This provision requires Member States to 'have appropriate mechanisms in place to ensure that the claim against the security is enforceable by or on behalf of creditors'. Although the provision does not explicitly identify what the policy objective is in respect of this provision, the concern appears to be in terms of the value and enforceability of the security to the lender and the issue of documentation and information upon which enforceability is premised.[1072] Notwithstanding a degree of ambiguity, it is clear that this provision has a supply side and economic orientation, and it is thus aligned with Single Market and systemic stability imperatives, rather than being of direct relevance to consumers. It is also noteworthy that one of the aspects which will be reviewed by the EU Commission as a potential area for further development including legislative proposals is 'the possibility for the development of more flexible and reliable markets'.[1073]

6.4.1.2. Sanctions and Enforcement

Cherednychenko has noted the distinction in EU financial services regulation between those Directives in which the institutional framework of enforcement is prescribed and those in which discretion is given to Member States. The Mortgage Credit Directive is consistent with the latter model. The Directive provides discretion to Member States to designate a 'National Competent Authority' (NCA) for the application and enforcement of the Directive. However, that discretion is qualified by the requirement that the NCA should be a 'public authority or body' and that in respect of certain provisions, the NCA should be the body within the competence of the European Banking Authority (EBA), i.e. CBI / BDE, or if not, should be required to co-operate with the former for the purposes of the Directive. This requirement is consistent with the fact that the provisions are in substance related to the supervisory regime for financial services, e.g. knowledge and competence requirements for staff, the establishment of credit intermediaries and the admission of non-credit

[1071] Art 26.
[1072] Art 26(1)requires creditors to keep appropriate records of the types of immoveable property accepted as security and the related mortgage underwriting policies and, art 26(2) requires 'appropriate statistical monitoring of the residential property market, including for market surveillance purposes, where appropriate…..specific price indexes….'.
[1073] Art 45.

institutions.[1074] In addition, the EBA is allocated competence for the resolution of disputes between NCA and this competence is independent of whether the NCA is otherwise within the supervisory remit of the EBA. Although the determination of sanctions for non-compliance with the Directive is left to the discretion of Member States, a provision regarding the scope for disclosure of administrative sanctions to the public could be taken to infer that administrative sanctions are anticipated. However, the only obligation imposed is that relevant measures are 'effective, proportionate and dissuasive'.[1075] The Directive does require the provision of out of courts dispute resolution mechanism; thereby promoting the development of public law frameworks in this regard.

6.4.1.3. MCD and Pre Crisis Policy

The objective of the Mortgage Credit Directive as cited in recital 6 is 'to develop a more transparent, efficient and competitive internal market through consistent, flexible and fair credit agreements relating to immovable property, while promoting sustainable lending and borrowing and financial inclusion, and hence providing a high level of consumer protection.[1076] A matter of interest is the extent to which the objectives of the MCD represent a new departure or a continuation of the pre-crisis policy orientation. Certainly the objective of market integration which was the raison d'etre of the Mortgage Credit Initiative re-emerges strongly in the Directive, having been dormant in policy discourse in the immediate post-crisis period. However, there is a new dimension to the single market objective which reflects the insights gleaned from the crisis. It is clear that transparency, efficiency and competitiveness as inherent characteristics of the Single Market are consistent objectives of pre and post-crisis proposals, as is financial inclusion. However, the contextualisation of these objectives with reference to sustainable lending and borrowing is a distinctive post-crisis characteristic. The recitals acknowledge the capacity for conduct of business aspects to have a detrimental impact on financial stability and, the provisions correspondingly manifest a systemic imperative absent in pre-crisis proposals.[1077] The conceptualisation of consumer benefit and detriment also incorporates a post-crisis perspective in that the pre-crisis 'efficiency of the

[1074] Art 5(3).
[1075] Art 38(1).
[1076] Recital 6.
[1077] Recital 3 and art 7(3).

collateral' regulatory perspective, e.g. exemplified by pre-crisis initiative to reduce the duration of enforcement proceedings, is tempered by an acknowledgement that repossession has a significant social and economic impact on the individual mortgagor, e.g. measures to encourage reasonable lender forbearance. Consumer protection is cited as an objective, and in as much as the information and education are pillars of the model of consumer protection within the Mortgage Credit Directive then it is broadly consistent with the consumer empowerment model of the pre-crisis era. To the extent that there is an identifiable post-crisis aspect to consumer protection, it is notable that any capacity for consumer benefit is paralleled by benefits for lenders, and by extension, the financial system. This dovetailing of interests and policy objectives is particularly apparent in provisions which address underwriting practices and remuneration policies.[1078] Ironically, whilst convergence of Member State regimes had consistently been advocated in pre–crisis policy as a means of furthering the Single Market; in the post-crisis financial stability casting, convergence of regulatory standards serves as a hedge against financial stability. Accordingly, the twin objectives are achieved through the same mechanism and the content of the MCD may be understood as a merging of pre and post-crisis perspective, i.e. the internal market objective overlaid with a financial stability imperative. The MCD commits to a review of the effectiveness and appropriateness of the regime three years post transposition. The aspects scheduled for review highlight the primacy of the Single Market objective; in particular issues such as the cross border supply side activity, the evolution of relevant lending activity by non-credit institutions and an assessment of the availability and comparability of data on price trends in housing markets.[1079] An interesting inclusion is 'an examination of the need to introduce additional rights and obligations to the post contractual stage of credit agreements'. There is no elaboration in the article or the recitals as to what may be the focus of such measures.[1080] The MCD also envisages further legislative activity in the area of responsible lending and borrowing arising from 'a comprehensive report assessing the wide challenges of private over indebtedness

[1078] Arts 7, 18 and 20.
[1079] Arts 44(c)-(d) and 44(i).
[1080] Art 44(f). The author queried this point with the Central Bank of Ireland but representatives' who were party to the discussions on the MCD could not offer an elaboration on the target.

directly linked to credit activity…the need for the supervision of credit registers and the possibility for the development of more flexible and reliable markets'.[1081]

6.4.1.4. MCD and National Regimes

The extent to which the MCD will necessitate reform of existing Member States regimes will vary according to whether the obligations contained in the MCD are already a component the existing national frameworks. It is clear for example, that the current differential regime applicable to credit and non-credit institutions in Spain, and in particular, the lack of any responsible lending requirement for the latter will require reform pursuant to the Directive. In Ireland, non-credit institutions were included in the remit of supervisory and regulatory frameworks from 2008 onwards, and as a result, the Irish regime is already consistent with the Directive in this regard. However, a particular issue arises in the Irish context due to the focus of post-crisis consumer protection within the new tier of public law regulation, i.e. supervisory authority codes of conduct. To the extent that the domestic provisions addressed by the Directive are contained in either the CPC 2012 or the CCMA 2013, then the issue would appear to be less whether the domestic provisions satisfy the requirements of the MCD in substantive content but rather whether the legal basis of the codes is sufficient to ground the transposition. With the exception of the implied prohibition on the extension of credit in the context of a negative creditworthiness assessment, the suitability and affordability provisions of the CPC 2012 exceed the requirements of article 18 of the Directive. Similarly the MCD provisions on tying and bundling are less restrictive than the current provisions of the CPC 2012. However, if the legal basis of the codes is insufficient to constitute national transposition, which appears to be the case, then this imputes a requirement to elevate the status of the Codes or relevant provisions thereof which may be feasible pursuant to the CB(S&E)Act 2013. An alternative would be the introduction of alternate legislation to transpose the MCD. The latter option would then create a new trajectory in terms of the development of post-crisis public law frameworks in Ireland, and a scenario where the CPC/CCMA could be withdrawn or could continue to exist as a parallel regime. The use of primary or secondary legislation in the Spanish facilitative sphere circumvents this issue, and thus the focus is on the consistency of existing frameworks with the requirements of the Directive.

[1081] Art 45. As with the review clauses this must be completed by 21st March 2019.

6.4.2. Role of European Banking Authority (EBA): 2013-2015

A noted point of distinction between the EBA and its predecessor the CEBS, is the inclusion of a consumer protection mandate within the founding regulations of the former. Broadly speaking this created scope for activity by the EBA in the field of consumer protection relating to financial products, including mortgages. A 2014 report by the European Court of Auditors, identified a dearth of consumer protection activity by the EBA in the period up to 2013 which it attributed to regulatory priorities and limited resources. 'Consumer protection was not given a high priority; throughout 2011 and 2012 (the) EBA focused its efforts on addressing systemic risk , which was the priority of nearly all national and international regulators….at the end of February 2013 the consumer protection unit consisted of only two staff members. The Head of Unit position had been vacant for several months. During 2011, there was no discussion on consumer protection issues on the Board of Supervisors; the Chair merely noted the need to move consumer issues up in the EBA's list of priorities'.[1082]

6.4.2.1. EBA Consumer Protection Activity pre MCD – Opinions

The persistent identification of consumer indebtedness and responsible lending in the EBA consumer trends reports from 2011 onwards, created an impetus to some EBA initiative in this area. However, activity using the EBA's quasi regulatory capacity was limited to non-binding Opinions in the absence of a legislative mandate, and this was the situation in respect of residential mortgages prior to the adoption of the Mortgage Credit Directive. In June 2013, it adopted two opinions addressed to competent authorities regarding conduct of business practices by lenders in their engagement with mortgage consumers. The first was the EBA Opinion on Good Practices for Responsible Mortgage Lending and the second was the EBA Opinion on Good Practices for the Treatment of Mortgage Borrowers in Arrears.[1083] In common with national measures and the Mortgage Credit Directive, the guidelines on responsible lending are based on the international benchmarks established by the

[1082] 'European Banking Supervision Taking Shape – EBA and its Changing Context' (Special Report No 5, European Court of Auditors 2014) 32.

[1083] 'Opinion of the European Banking Authority on Good Practices for Responsible Mortgage Lending' (EBA-Op-2013-02, European Banking Authority 13 June 2013) and 'Opinion of the European Banking Authority on Good Practices for the Treatment of Borrowers in Mortgage Payment Difficulties' (EBA-Op-2013-03, European Banking Authority 13 June 2013).

FSB guidelines and address both supervisory and market practices.[1084] The opinion notes that good practices 'focus on the credit granting decision from a consumer protection point of view rather the wider issue of credit risk management'. The good practices are considered under the headings; verification of income,[1085] reasonable debt service coverage,[1086] appropriate loan to value ratios,[1087] and lending and supervisory processes.[1088] The opinion asserts that 'robust and effective assessment of individual affordability must underpin any sustainable lending model' and twelve of the seventeen practices outline focus on this aspect.[1089] The opinion on the treatment of borrowers in payment difficulties identifies that in default, as in responsible lending, there is in a sense a convergence of interests between the borrower and the lender; 'financial difficulties can cause great stress to the borrower, and early proactive engagement is crucial to identifying a viable solution to the situation and, consequently, reaching a positive outcome for that borrower. Such a solution is usually also preferable for the creditor, as the proceeds from a forced sale will usually result in a lower return'.[1090] The good practices are classified under the headings; general principles,[1091] policies and procedures,[1092] provision of information and assistance to the borrower[1093] and resolution process.[1094] As a non-binding instrument, the practices contained in the opinions were of voluntary rather than mandatory applicability, to the national competent authorities. Even if there had been an obligation to comply, as in the case of guidelines, the scope of mandatory applicability would have been limited to those national authorities within the remit of EBA supervisory competence. The impact of the measures would thus be reduced in

[1084] 'Opinion of the European Banking Authority on Good Practices for Responsible Mortgage Lending' (EBA-Op-2013-02, European Banking Authority 13 June 2013) 4.
[1085] Good practices 1 to 5.
[1086] Good practices 6 to 12.
[1087] Opinion notes that 'Where LTV ratios are used, their purpose might be macro- or micro-prudential, as well as (or instead of) consumer protection. LTVs, and other lending thresholds, can add some consumer protection value. However, by their nature, they cannot replace the individual assessment of loan affordability that should be at the heart of the consumer protection objective of ensuring responsible lending. This should be borne in mind when considering the good practices that follow in this section'.
[1088] Good practices 15 to 17.
[1089] 'Opinion of the European Banking Authority on Good Practices for Responsible Mortgage Lending' (EBA-Op-2013-02, European Banking Authority 13 June 2013) 6.
[1090] ibid, 3.
[1091] ibid, 6. 'The interaction between creditor and mortgage borrower should be governed by general principles related to honesty, fairness, information, and privacy'.
[1092] Good practices 2 to 12.
[1093] Good practices 13 to 16.
[1094] Good practices 17 to 18.

Member States where the supervisory authority for financial markets was not possessed of relevant competence or where the lender was not subject to supervision by the national authority. The adoption of the MCD is significant for the foregoing limitations. In as much as the MCD imposes binding obligations on Member States it legitimates the use of EBA guidelines and recommendations to promote convergence in the implementation of relevant obligations by national supervisory authorities. In addition, the obligation for all lenders and intermediaries to be subject to the obligations contained in the Directive means that where Member States comply with this requirement by bringing non-credit institutions within the remit of the existing supervisory authority, this will simultaneously bring these institutions within the remit of the EBA. The major remaining deficit in the scope of EBA competence from a mortgage perspective is the extent to which the National Supervisory Authorities is itself possessed of a consumer protection mandate at national level. In 2014, the European Court of Auditors identified the majority of Member States as having a shared allocation of institutional competence with the national supervisory authority having the sole mandate in only six EU Member States; Ireland, Spain, Denmark, Estonia, Malta and Portugal.[1095]

6.4.2.2. EBA Consumer Protection Activity based on the MCD: Guidelines

In December 2014, pursuant to the mandate created by the adoption of the Mortgage Credit Directive, the EBA issued consultation papers on draft guidelines for the implementation of two of the substantive obligations contained therein; the creditworthiness assessment contained in chapter six and the arrears and foreclosure provisions contained in chapter ten.[1096] The draft guidelines were based on the provisions of the foregoing EBA opinions on good practices, to the extent that the practices were within the scope of the MCD. This ensured consistency between the

[1095] 'European Banking Supervision Taking Shape – EBA and its Changing Context' (Special Report No 5, European Court of Auditors 2014) 33. The report notes that it has no information as to the allocation of competence in Hungary and Romania. In Belgium and Latvia the National Supervisory Authority (ESA) has no consumer protection mandate, and in all other EU Member States, the NSA has a shared mandate with another national authority.

[1096] 'Consultation Paper on Draft Guidelines on Creditworthiness Assessment' (EBA/CP/2014/43, European Banking Authority 12 December 2014) and 'Consultation Paper on Draft Guidelines on Arrears and Foreclosure' (EBA/CP/2014/42, European Banking Authority 12 December 2014).

various tiers of EBA guidance.[1097] The Consultation period in respect of the draft guidelines ran until mid-February 2015 and the final guidelines were issued on 1 June 2015, with only two changes from the guidelines contained in the consultation paper.[1098]

6.4.2.2.1. Guidelines for Creditworthiness Assessments under the Mortgage Credit Directive

The function of the Guidelines as identified therein is 'to provide greater detail on how effect should be given to the relevant MCD provisions in Articles 18 and 20(1) and thus contribute to the EBA's objective of achieving a convergence of supervisory practices for the Directives that fall into the EBA's scope of action'.[1099] Article 18 is the obligation to assess the creditworthiness of consumers and article 20(1) addressed the information on which the creditworthiness assessment is undertaken. The guidelines are addressed both to national competent authorities and to financial institutions.[1100] With reference to the capacity for a fragmentation in institutional competence at national level, the extent of the obligation imposed on the national supervisory authority depends on whether they are the designated competent authority for the application and supervision of the provisions to which the guidelines relate. If there are not, their obligations are limited to informing the relevant national authority of the existence of the guidelines and, providing a written request that they consider applying the guidelines and inform the EBA, either directly or through the body making the written request as to their intentions within a

[1097] The EBA expressed its intention to update its opinion on good practices at a future date to ensure that those practices which were not within the scope of the guidelines would not be lost. This was undertaken via the 'Opinion of the European Banking Authority on Good Practices for Mortgage Creditworthiness Assessments and Arears and Foreclosure, Including Expected Mortgage Payment Difficulties' (EBA/Op/2015/09, European Banking Authority 1 June 2015).

[1098] The contents of draft guideline 1.2 on the verification of the consumers income was omitted thereby removing the reference to using 'necessary, sufficient and proportionate' information that is evidenced from sources independent of the consumer. A seventh heading contained in the draft guidelines, 'identification of groups of loans with higher risk profile' was omitted The heading had contained a single provision 7.1 which stated 'the creditor should identify groups of loans with a higher risk profile, and should take this into account when assessing consumers' creditworthiness'.

[1099] 'Guidelines on Creditworthiness Assessment: Final Report' (EBA/CP/2015/11, European Banking Authority 1 June 2015) 3.

[1100] 'The scope of the terms 'competent authority' and 'creditor' are pursuant to arts 4(22) and 4(2) respectively of the MCD.

two month period of receipt of the request.[1101] In the jurisdictions under review the Central Bank of Ireland and the Banco De Espana are the relevant competent authority. The guidelines are applicable co-incident with the deadline for transposition of the Mortgage Credit Directive, i.e. 21 March 2016.[1102]

Section four of the Guidelines identifies the requirements in respect of the creditworthiness assessment under six headings; verification of customers income, documentation and retention of information, identification and prevention of misrepresented information, assessment of consumers ability to meet his/her obligations under the credit agreement, allowance for consumers committed and other non-discretionary expenditures and allowance for potential future negative scenarios.[1103] The creditor is required to 'make reasonable enquiries and take reasonable steps to verify the consumer's underlying income capacity, the consumer's income history and any variability over time'.[1104] The guidelines acknowledge the context of self-employed persons or those with irregular income in noting that such reasonable inquiries should extend to other issues which may impact 'the consumer's ability to meet his/her obligations under the credit agreement, including profit capacity and third-party verification documenting such income'.[1105] The creditor is required to maintain for the duration of the credit agreement, documentation which substantiates the information upon which the credit was approved, and provide an 'adequate explanation' of the steps taken to verify income.[1106] The guidelines provide that the design of loan documentation should enhance the capacity to identify or prevent misrepresentation by consumers, credit intermediaries or creditors.[1107] Broadly speaking, these requirements are comparable to the good practices in the EBA opinion; albeit with minor differences in terminology, e.g. 'authoritative sources' is replaced by 'independent' in respect of income verification etc. A notable exception is the issue of fraud as the guidelines do not include any reference to consideration of the appropriateness of recourse to the

[1101] 'Guidelines on Creditworthiness Assessment: Final Report' (EBA/CP/2015/11, European Banking Authority 1 June 2015) 8-9.
[1102] ibid, 9. '..except that the information requirements referred to in paragraph 2 apply from [publication date in the official languages + 1 day]'.
[1103] ibid, 10 - 11.
[1104] ibid, s 1.1.
[1105] ibid, s 1.2.
[1106] ibid, s 2.1 and 2.2.
[1107] ibid, s 3.1.

national legal system where fraud is detected. The guidelines suggest that the assessment of repayment capacity should be realistic in that it takes into account all relevant factors and should not lead to undue hardship and over indebtedness on the part of the consumer.[1108] In particular, the guidelines address the prospect of loan duration which exceeds the working life of the borrower. In this context, the variation in income arising from retirement must be factored into the assessment. In contrast, it is proposed that future significant increases in income should only be included in the assessment where there is reasonable documentary evidence regarding the certainty of this occurrence.[1109]

Notwithstanding the broad comparability in content, the guidelines are somewhat less detailed than the good practices in identifying the information and policies included in the assessment of creditworthiness, thus allowing greater flexibility to national authorities and financial institutions. The guideline requires creditors to 'establish sound processes to assess the consumer's ability to meet obligations under the credit agreement and review these processes at regular intervals'. The creditor must also 'maintain up-to-date records of those procedures'.[1110] The good practices in the EBA opinion were more prescriptive, e.g. suggesting that creditors 'should also include risk limits in their internal loan policies, such as specifying minimum levels of residual net income after meeting obligations or fixed ratios of repayment to some measure of gross or net income'; 'specify, or require creditors to specify, aspects of the income verification process, such as the information required, or the means of verifying income information, such as seeking documentary evidence of salary'; 'to require creditors to specify their approach to income verification, and the records to be kept, as part of a policy on responsible lending'; '(i) specify aspects of the detailed assessment (such as the information to be gathered about the consumer's personal circumstances and financial situation) or assumptions to be used in the assessment (such as the maximum loan term); (ii) specify, or require creditors to specify, lending thresholds that might act as a backstop to any individual assessment of affordability; and (iii) clarify that the collateral value should be taken account of solely for prudential reasons and not for the assessment of affordability (unless there

[1108] ibid, 10 - 11, s 4.1.
[1109] ibid, 11, ss 4.3 and 4.4.
[1110] ibid, s 4.2.

is a clear and credible reason for treating it differently)'.[1111] Aside from the distinction arising from a variation in the extent to which process are prescribed, there is a further distinction in terms of practices which are omitted from the guidelines. There is no direct reference in the guidelines to the good practice which proposed '…the assessment of the consumer's ability to repay should neither be based on the assumption that the property will appreciate in value (unless the purpose of the loan is to construct or renovate the immovable residential property)'… However, this is unsurprising given that the practice is, to an extent, in conflict with the article 18(3) of the MCD which provides that 'assessment of creditworthiness *shall not rely* <u>*predominantly*</u> on the value ….'.

6.4.2.2.2. Guidelines for the Treatment of Borrowers in Arrears

The guidelines on the treatment of borrowers in arrears are intended 'to provide further detail on requirements set out in Article 28 of Directive 2014/17/EU' and they have the same applicability and addressees as the guidelines on creditworthiness assessments.[1112] The guidelines address the treatment of borrowers in arrears under four headings; the establishment of policies and procedures, engagement with the consumer, provision of information and assistance to the consumer, resolution process.[1113] This is largely consistent with the structure of the prior EBA opinion on good practices, although the latter also had a general principles section and these provisions, to the extent that they are retained, are now dispersed within the other categories. A general principles which is not retained in the guidelines is the requirement for creditors to 'act honestly, fairly and professionally' in engaging with the borrower, however, that undoubtedly reflects it inclusion in the MCD.[1114] Also omitted is the proposal that creditors 'only impose permitted charges and those

[1111] 'Opinion of the European Banking Authority on Good Practices for the Treatment of Borrowers in Mortgage Payment Difficulties' (EBA-Op-2013-03, European Banking Authority 13 June 2013) 8 and 10.
[1112] 'Guidelines on Arrears and Foreclosure – Final Report' (EBA/CP/2015/12, European Banking Authority 1 June 2015) 10. The annex to the guidelines contains information regarding the extent to which the guidelines would already be satisfied by Member States and includes a reference to the benefit to consumers not just in terms of increased protection but of the increased market integration.
[1113] ibid, 13 and 14.
[1114] Art 7 MCD.

charges should not be greater than is necessary to compensate the creditor for costs incurred as a result of the payment difficulties'. This reflects the inconsistency of the latter practice with the provisions of the MCD, pursuant to which discretion is accorded to Member States to restrict the charges to loss incurred, or to allow additional charges subject to a cap on the quantum permissible.[1115]

The draft guidelines require creditors to establish procedures which detect early indications of borrowers going into payment difficulty, and policies and procedures 'for the effective handling of and engagement with borrowers in payment difficulties'.[1116] These policies and procedures must be reviewed on a regular basis and creditors must provide staff with adequate training to deal with borrowers in payment difficulties.[1117] The engagement with the consumer section of the guidelines includes the requirement for 'the creditor to work with the borrower to establish why the difficulties have arisen' and, for creditors and their agents 'to maintain a level of contact and communication with a consumer in payment difficulties that is proportionate to the information requirements, and not excessive'.[1118] It also requires that 'interaction by the creditor with the consumer in relation to their payment difficulties should respect the consumer's privacy'.[1119] The EBA opinion had included additional requirements which are not a feature of the guidelines, i.e. creditor would inform the borrower of third party involvement, 'creditors avoid putting excessive pressure on borrowers in relation to their payment difficulties and contact should only be made at times which are reasonable to the individual borrower, including contact made by an agent of the creditor'.[1120] Pursuant to the opinion, creditors were also required to maintain records of its dealings with the borrower.[1121]

[1115] Arts 28(2) and (3) MCD.

[1116] 'Guidelines on Arrears and Foreclosure – Final Report' (EBA/CP/2015/12, European Banking Authority 1 June 2015) 13, ss 1.1 and 1.2. The requirement in the EBA Opinion to 'pro-actively encourage the borrower to engage with them about the financial difficulties' is not replicated although the ss 1.1 and 1.2 could arguably incorporate this requirement.

[1117] ibid, 13 ss 1.2 and 1.3.

[1118] ibid, 13, ss 2.1 and 2.3.

[1119] ibid, 13, s 2.2.

[1120] 'Opinion of the European Banking Authority on Good Practices for the Treatment of Borrowers in Mortgage Payment Difficulties' (EBA-Op-2013-03, European Banking Authority 13 June 2013) 7 - 8, good practice 8 and 9.

[1121] ibid, 8, good practice 11.

There is less deviation between the opinion and the guidelines in respect of the provisions under the heading provision of information and assistance to consumers. Creditors are required to communicate 'clearly and in plain language' and the guideline specifies the minimum information which must be provided to the consumer and the information requirements where the payment difficulties persist.[1122] In contrast to the practices contained in the EBA opinion, the provision of information in the guidelines is staggered. The information which is required initially relates to the deviation from contract, e.g. number of payments missed, total charges, and the importance of co-operating with lender to resolve the issue. However, it does not mandate the provision of information regarding possible consequences in terms of legal action or the availability of supports unless the difficulties persist.[1123] The provisions addressing the resolution process identify potential forbearance options for the lender in addressing the payment issues. The options identified include modifying the contract terms include; extending duration, deferred payment, change of interest, change of mortgage type.[1124] Consolidation of credit and capitalisation of the shortfall which had been included in the opinion are not options under the guidelines. However, the option of a payment holiday is introduced as is total or partial refinancing (the latter potentially equating to the aforementioned consolidation option).[1125] Notably, there is a change in the wording from the opinion to the guidelines in terms of the lenders consideration of the options. Whereas the guidelines refer to the 'consumers rights and interests' the opinion had used the term 'consumers best interests'; the latter was more consistent with the general principle contained in the MCD. Ultimately, the creditor is required to maintain records of its dealings with the borrower 'for a reasonable period' and document the reason why the chosen forbearance option was consider suitable for the borrower.[1126]

The EBA guidelines serve to provide minimum thresholds in the implementation of the relevant obligations of the Mortgage Credit Directive and in the exercise of the supervisory function by national authorities. As with the MCD, an assessment of the

[1122] 'Guidelines on Arrears and Foreclosure – Final Report' (EBA/CP/2015/12, European Banking Authority 1 June 2015) 13 – 14, ss 3.1 – 3.3.
[1123] ibid, 13 – 14, ss 3.1 – 3.3.
[1124] ibid, s 4.1.
[1125] ibid, 14, s 4.1.
[1126] ibid, 14, s 5.1.

efficacy of the frameworks in promoting national convergence cannot be undertaken until the deadline for transposition of the Directive and implementation of the guidelines has passed.

6.5. Conclusion

This chapter profiles the evolution of national and European frameworks of residential mortgage regulation in the period from 2013 to 2015. It identifies the divergence between the jurisdictions in the locus of reforms and the judicial role as a stimulus thereto. In Ireland, activity was centred on the facilitative sphere both in terms of institutional and statutory aspects, and in the *Dunne* case the Irish Supreme Court stemmed the incursion of the new tier of financial services regulation into the constitutive framework of property law. In contrast the judiciary were a conduit to reform of the Spanish constitutive sphere, using EU consumer law from the facilitative sphere to precipitate reform of existing frameworks for enforcement of the security. The chapter also highlights the emergence of an EU regulatory role thought the adoption of the Mortgage Credit Directive in 2014, and the introduction in 2015 of guidelines by the European Banking Authority to enhance convergence in the implementation of the Directive.

Chapter 7

Overview & Analysis

7.1. Introduction

Chapters' four to six trace the evolution of the constitutive and facilitative spheres of residential mortgage regulation in Ireland and Spain, in the period from 2008 to 2015. These profiles facilitate comparative analysis of the nature and content of regulatory reform in these jurisdictions over that period, and the respective national and EU role in the process. Sections 7.2 to 7.5 of this chapter provide an overview of the pre-crisis regulatory frameworks and their evolution in the post-crisis context, using the same temporal phases as chapters' four to six. This synthesis of regulatory development from 2008 to 2015 is a precursor to the analysis in section 7.5 of the impact that the financial crisis has had on the regulation of residential mortgages in Ireland and Spain. This analysis will address the crisis related impact under the headings; strands of crisis related reform, prudential function of the facilitative sphere, dynamic between regulatory spheres, rationale for lack of substantive impact, judicial response to crisis reforms, rationale for distinction in national approach to distressed mortgage loans, the national/EU dynamic and, the paradigm of consumer protection.

7.2. Pre-Residential Mortgage Regulation – Ireland and Spain

Chapter four profiles the legislative and institutional frameworks which regulate the interaction of borrowers and lenders in the residential mortgage context of Ireland and Spain in the pre-2008 period. This establishes a benchmark from which to identify the locus of subsequent reform, and the extent to which any reforms impact the orientation of, or the dynamic between the dual spheres of residential mortgage regulation.

7.2.1. Private Law 'Constitutive' Sphere

Chapter three identifies national private law frameworks as being constitutive of residential mortgage transactions through the provision of legally enforceable contract and property law rights to the borrower and lender. However, pursuant to the profile in chapter four of the constitutive frameworks of Ireland and Spain, it is clear that notwithstanding the common function, there is the capacity for a variance in the balancing of competing policy interests and objectives within the national frameworks. In the jurisdictions under review, it would appear that the framework of mortgage law pursuant to the Land and Conveyancing Law Reform Act 2009 (LCLRA 2009) balances the interests of the parties in a manner which is more protective of the 'housing loan mortgagor' than its Spanish counterpart. As noted in chapter four, the objective of the relevant provisions of the LCLRA 2009, was to align Irish mortgage law with the contemporary role of a mortgage, i.e. as security for a loan. Recognising the particular social significance of this role in a residential mortgage context, the law created a differential base of mandatory provisions which define the scope of the mortgagor's right to possession and the conditions for the exercise of the mortgagee's right to enforce the security thereby restricting contractual autonomy in the context of 'housing loan mortgages'. The Irish framework can be juxtaposed with its Spanish counterpart to the extent that post-crisis reform of Spanish mortgage law using the Unfair Contract Terms Directive (UCTD) highlights the extent to which the pre-crisis framework was concerned with protection of the efficiency of the mortgage as financial collateral. This is manifest in the prioritisation of the enforceability of the security by the lender, a point implicit in *Aziz* and subsequent case law which establish an inequality in the position of the mortgagor and mortgagee within the national enforcement framework. It could be suggested that the policy imperative towards ensuring the enforceability of the collateral is linked to the dominance of securitisation based funding mechanisms for loan origination in Spain, and as such the divergence in legal frameworks is a function of economic rather than legal factors.

7.2.2. Public Law 'Facilitative' Sphere

Whilst the private law sphere is conceptualised as being constitutive of residential mortgage transactions, in the current analysis the public law sphere is conceptualised as being 'facilitative'. It operates by imposing 'conduct of business' frameworks

which regulate the ex-ante and ex poste contractual engagement of the borrower and lender for the purpose of advancing market related policy objectives. Chapter four identifies consumer law and financial services regulation as the dual mechanisms of 'facilitative' intervention in the pre-crisis period, and it highlights a degree of variance in the extent and content of the respective mechanisms in the jurisdictions under review.

7.2.2.1. Pre-Crisis Consumer Law and Financial Services Regulation in Ireland and Spain

Although the Consumer Protection Code 2006 (CPC 2006) introduced a financial services component in the immediate pre-crisis period, consumer law was the primary mechanism for pre-crisis regulatory intervention in the Irish facilitative sphere. Notwithstanding the applicability of the EC (Unfair Terms in Consumer Contracts) Regulations (UTCC Regs) and the Consumer Protection Act 2007 (CPA 2007), it was the Consumer Credit Act 1995 (CCA 1995) which was of most relevance to the residential mortgage context. This assertion reflects the contrast highlighted in chapter four, between the limited applicability and relevance of the former statutes, and the imposition in Part IX of the CCA 1995 of a framework of obligations and requirements for housing loan mortgages. The pre-crisis balance of consumer law and financial services regulation within the facilitative sphere was noticeably different in Spain. Chapter four identifies the limited applicability of the general framework of consumer protections contained in *Real Decreto Legislativo 1/2007* (RDL 1/2007). It also identifies the longstanding nature of financial services regulation within the Spanish facilitative sphere. Pursuant to the mandate contained in Article 48.2 of *Ley 26/1988* on the Discipline and Intervention of Credit Institutions, secondary legislation had been utilised to implement a transparency regimes of general applicability, i.e. *Orden de 12 de diciembre de 1989*, and one which specifically addressed the mortgage loan context, i.e. *Orden de 5 de mayo de 1994* on the transparency of the financial conditions of mortgage loans.

At this juncture, there was a parallel between the jurisdictions in terms of the differential applicability of Consumer Law and Financial Services Regulation to

mortgage lenders who were non-credit institutions.[1127] In Spain, the transparency regime contained in *Orden de 5 de mayo 1994* was inapplicable to non-credit institutions prior to 2009; however, the unfair contract terms provisions of RDL 1/2007 were applicable, irrespective of the status of the lender. Similarly in Ireland, the UTCC Regs were universally applicable and an extension in the applicability of the CCA 1995 to non-credit institutions was undertaken as these providers became active in the Irish market. However, the CPC 2006 only became applicable to non-credit institutions in 2008, when there was an expansion in the competence of the Central Bank and Financial Services Authority of Ireland (CBFSAI) to include such lenders.

In terms of the nature of the obligations imposed within the facilitative sphere, again, there are both similarities and distinctions between the jurisdictions. As the title of the Spanish provisions suggest, the focus was on disclosure and enhanced transparency regarding the nature and extent of the obligations being undertaken. Chapter four identifies the extent to which Consumer Law in Ireland served broadly the same function as this financial services regulation in Spain; the CCA 1995 containing information and disclosure based obligations which were intended to enhance transparency. However, the latter act also contained more substantive provisions which imposed restrictions on permissible practices and charges and these are not replicated in Spanish legislation. Thus for example, *Orden de 5 de mayo de 1994*, whilst mandating transparency as to charges and fees associated with ancillary services, does not restrict the capacity of credit institutions to pass charges onto the customer in the manner of the CCA. However, the CCA framework did not address in any sense the qualitative aspects of loan origination or impose any substantive obligations in respect of the process and this is a point of distinction between the Consumer Law and Financial Services components of the Irish facilitative sphere. The CPC 2006 merges information based obligations with more substantive provisions; albeit that consistent with the pre-crisis trend, it is more principles based than prescriptive. Nonetheless, it does introduce a requirement to know the consumer, the objective of which is to promote the provision of 'suitable' financial

[1127] Notwithstanding the validity of observations regarding the differential applicability of national frameworks to credit and non-credit institutions; as noted in chapter four the scope of lenders classified as credit institution differs in Spain and encompasses EFC's which are non-deposit taking institutions.

products. Notwithstanding the potential limitations arising with respect to the assessment of compliance, it is nevertheless significant as it represents the first responsible lending themed obligation imposed in the jurisdictions under review and, it pre-dates any reference to the issue in EU mortgage policy.

7.2.2.2. New Tier of Financial Services Regulation via Statutory Codes of Conduct

It is clear that in both Ireland and Spain, the public law 'facilitative sphere' contained 'conduct of business' obligations imposed on the lender via financial services regulation. However, the legal nature of the regulation provided in Ireland via the CPC 2006 is distinct from the Spanish equivalent, and it represents the emergence of a new regulatory tier within the facilitative sphere of the jurisdictions under review. In Spain, the relevant financial services regime is in the form of secondary legislation via Ministerial Order based on the mandate contained in Article 48.2 of Law 26/1988. Any standard setting role for the BDE is premised on the provision of a mandate in the respective Orders for a Circular of the Banco De Espana (BDE), a point manifest in Circular 5/1994 and Circular 8/1990 which stem from Orden de 5 de mayo de 1994 and Orden de 12 de diciembre de 1989 respectively. With reference to the forgoing, the scope of the Circulars are restricted to measures necessary to implement the requirements of the Order . In Ireland, the financial services regime in the CPC was based on a broad mandate given to the CBFSAI to establish Codes of Conduct via the Central Bank Act 1989 (CBA 1989) and product specific mandates in sectoral legislation including the CCA 1995. The CBFSAI thus had longstanding and ongoing mandates for standard setting in the form of conduct of business regimes for those entities within its remit. However, it is significant that the legal status of Codes of Conduct pursuant to this mandate is different from other financial services regulation in either jurisdiction. As identified in Chapter four, secondary legislation in Ireland is via statutory instrument or Ministerial Order. The CPC 2006 is neither of the foregoing. It is a statutory code and it appears to fall somewhere below secondary legislation but above the non-binding frameworks which would be considered 'soft law', i.e. voluntary code of conducts. Accordingly, the CPC 2006 is a point of distinction between the pre-crisis frameworks in Ireland and Spain. It leads to a dual tier in the Irish regulatory framework, in the sense that the consumer law framework and the financial services framework are not at the same level in the legal

hierarchy; whereas the equivalent consumer law and financial services regulation in Spain are within the same tier, i.e. legislation, notwithstanding the primary and secondary distinction.

A structural characteristic of pre-crisis regimes implemented via consumer law is the separation of the standard setting from the monitoring and enforcement functions. The norms were established by the legislature and enforced either by the supervisory authority for financial markets and services or by the statutory consumer body. In contrast, the Irish CPC unified these functions in a single authority and thus involved a delegation of both standard setting and enforcement as opposed to just enforcement. Within the context of the jurisdictions under review, and the spheres of mortgage regulation, the CPC establishes a pattern of regulation emerging from the supervisory authority. The inherent limitations on the efficacy of the Consumer Protection Code 2006 due to its restricted temporal and differential lender applicability, and its principles based content have already been raised. Nonetheless, it is significant that the emergence of this regulatory tier in Ireland pre-empts comparable developments in the EU context, i.e. European Banking Authority (EBA) Guidelines.

7.2.2.3. Enforcement Aspects

The legal rights acquired under the national constitutive framework are enforceable in a judicial context at the suit of either contractual party. The nature of enforcement in the facilitative sphere in terms of the locus of institutional competence and the mechanisms of enforcement are central to the distinction between the dual regulatory spheres, i.e. constitutive and facilitative, and potentially to the parameters between the components within the facilitative sphere, i.e. consumer law and financial services regulation.

Prior to the establishment of the CBFSAI in 2003, there was convergence between Ireland and Spain in the institutional allocation of supervision and enforcement function with respect to the consumer protection frameworks. In Ireland, these functions were vested in the Office of the Director of Consumer Affairs (ODCA) under the auspices of the Irish Department of Enterprise, Trade and Employment. In Spain, the Instituto Nacional del Consumo (INC) under the auspices of the Spanish

Department of Health and Social Policy was the designated state level body for enforcement of the Spanish framework. The BDE was responsible for enforcement of relevant Spanish financial services regulation, as was the Financial Regulator when the equivalent Irish financial services regulation, the CPC, was introduced in 2006.

The allocation of institutional competence raises the issue of the nature of the distinction between Consumer Law and Financial Services Regulation. The dynamic between the consumer and market objectives as a component of this query is addressed elsewhere in this analysis. From an enforcement perspective, the pre-2003 allocation of functions was suggestive of a distinction due to the difference in the statutory function of the respective agencies. At that juncture, the relevant public body for consumer affairs was responsible for enforcing consumer law obligations, and the supervisory authority for financial markets was charged with enforcing financial services regulation. The allocation of competence changed in Ireland with the establishment of the CBFSAI in 2003. The legislation which established the entity required the supervisory authority 'to promote the best interests of the users of financial services' as a component of its market related objectives. The dual prudential and consumer protection competence vested in the Financial Regulator is distinguishable from the lack of a consumer role in the legislation which identified the primary functions of the BDE. In common with other national distinctions, the variation is not attributable to issues of legal culture but rather market context. The enhanced mandate of the Financial Regulator is clearly linked to prior scandals in the Irish banking sector and the deficits in consumer protection exposed therein. Consequent to this reform, mortgage related supervisory and enforcement functions under the CCA 1995 were transferred from the ODCA to the Financial Regulator. The supervisory authority for financial markets and services thus became the public agency responsible for enforcement of the primary framework of consumer law which regulated residential mortgages, notwithstanding the continued existence of a statutory office, i.e. ODCA, and from 2007 onwards, a statutory consumer agency, i.e. the National Consumer Agency (NCA) with a relevant mandate. From this juncture onwards in Ireland, there is a ceding of supervision and enforcement functions from the statutory consumer body to the supervisory authority in respect of consumers of financial services, thereby distinguishing consumers of financial

services from the larger consumer body. The ceding of competence is evidenced by the memorandum of understanding which accords primacy to the Central Bank in respect of enforcement functions under the CPA 2007 and the UTCC Regs. It is interesting to note that in the period from 2003 to 2010, the Central Bank was also endowed with information and education functions and that these particular functions were transferred back to the statutory consumer agency under the Central Bank Reform Act 2010 (CBRA 2010). The paradigm of consumer protection implicit in the role accorded to the statutory consumer agency is one premised on financial education and information, and consumer protection is otherwise a function of market conduct which is the remit of the supervisory authority for financial markets. The centralisation of competence in the Central Bank is somewhat analogous to the recognition by the Spanish legislature that consumer protection in financial markets should not be within the general framework of consumer protections but rather within a specific regime 'in consideration of its specific effect on the financial environment'.[1128] However, the Spanish approach was to recognise the distinction by creating a framework in a different component within the facilitative sphere, i.e. financial services regulation, thereby retaining a formal distinction between the aspects. In contrast, the Irish approach was to make the supervisory authority for financial markets and services the competent authority for enforcement of consumer legislation. Although at that juncture there was no relevant financial services regime in Ireland, when one subsequently came into existence, there was a merging of enforcement functions for the facilitative sphere in a single public body.

It is clear that enforcement within the constitutive 'private law' sphere is undertaken by the contractual parties within a judicial forum. In the facilitative 'public law' sphere, enforcement is undertaken by the competent public body which raises the question of the nature and extent of the consumer role in the process. Fundamentally, the Consumer Agency and Supervisory Authority pursue their statutory functions at a collective rather than an individual level. Accordingly, the role of individual consumer complaints is primarily as an indicator of potential breaches of relevant provisions and the consumer has no participative role in the process and no role in determining whether enforcement action will be taken. A realm within the facilitative

[1128] Preamble to RDL 1/2007 regarding the non-inclusion of consumer credit legislation Law 7/1995 in the revised text of the consolidated law.

sphere in which the consumer enforcement role is less passive is the context of mechanisms of dispute resolution. Both jurisdictions provide extrajudicial forums for the resolution of disputes between the parties to an individual bilateral contract. In Ireland, this is via the statutory Financial Services Ombudsman (FSO) established in 2004, whilst in Spain it is via the network of Consumer Arbitration Boards, contemporary regulation of which was undertaken in 2006.[1129] Notwithstanding the potential offered by the statutory FSO framework in Ireland, a 2014 report by the Free Legal Advice Centre (FLAC) has highlighted issues arising with the manner in which the FSO functions are carried out, which it asserts, lessen its efficacy from a consumer protection standpoint. Nonetheless, it is a dedicated forum for complaints relating to financial services. In contrast, the Spanish arbitration board is a general forum and anecdotal evidence suggests that it is not utilised in the context of financial services complaints. As a result, the individual consumer does not have a proactive role in enforcement and complaints by Spanish consumers are primarily to their financial service provider,[1130] which is a pre-cursor to an FSO complaint in the Irish context. It is worth noting that in Spain, the national consumer agency has the capacity to pursue collective action on behalf of 'unidentified classes of consumer'.[1131]

7.2.3. Legal Dynamic between the Regulatory Spheres

The legal dynamic between the constitutive and facilitative spheres of pre-crisis residential mortgage regulation is one which may be gauged with reference to the prescribed enforcement mechanism for the public law framework, and the impact, if any, on the private law rights of the parties. Fundamentally the question is whether the regimes are interfacing or parallel, that is, do the 'conduct of business' obligations embedded in consumer law and financial services regulation impact in any substantive manner, the legal rights acquired under the constitutive framework of contract and property law. With one exception, it can be asserted that validity or enforceability of the residential mortgage loan contract is formally unaffected by

[1129] Law 44/2006 of 29 December 2006.
[1130] Pursuant to OrdeN ECO/734/2004 DE 11 marzo, all institutions supervised by Banco de España are obliged to have a Customer Care Department and, optionally, a Customer's Ombudsman.
[1131] Hans Schulte Nölke, Christian Twigg Flesner and Martin Ebers (eds), 'EC Consumer Law Compendium Comparative Analysis' (Report prepared for the European Commission under Service Contract No. 17.020100 / 04 / 389299, Universita(umhalt)t Bielefeld April 2007) 429.

breach of the provisions of national frameworks of consumer law and financial services regulation. Neither the CCA 1995, nor the CPC 2006 in Ireland nor the transparency regime pursuant to *Orden de 5 de mayo de 1994* or *Orden de 12 de diciembre de 1989* in Spain, provide for private law impacts vis a vis the loan contract. This is in contrast to the impact of the CCA 1995 in respect of other credit agreements, whereby the enforceability of the contract may be affected. The frameworks provide for public law enforcement via the designated competent authority, (i.e. either the statutory consumer body or supervisory authority for financial markets and services) and provide administrative sanctions for relevant breaches. The frameworks do not, in the pre-crisis context, provide consumers with an ancillary private law right of action, e.g. for damages, in the context of breach.

The exception to the foregoing assertion are national provisions stemming from the Unfair Contract Terms Directive (UCTD), which combine public and private law enforcement mechanisms. In both Ireland and Spain, public bodies with competence for consumer protection and organisations which represent consumer interests are granted standing to pursue both preventive and responsive enforcement activity via injunctions. In addition, borrowers are permitted to rely on the provisions as a defence to an enforcement action by lenders in respect of the contractual term. It is significant, that this mechanism of 'private law enforcement' is defensive in nature and that nothing in the frameworks suggests that borrowers have the capacity to litigate on the basis of the breach. Notably in Spain, the INC or its regional counterpart can order redress where loss or damage is incurred by the consumer. This is an option which perhaps reflects the incorporation of the unfair contract terms provisions into the general consumer protection framework contained in RDL 1/2007. In Ireland, the provisions were transposed as a standalone regulation and, as noted in chapter four, there are no prescribed sanctions other than in the context of obstruction of the supervisory function.

7.2.4. Pre-Crisis EU Role

One of the features to emerge from the profile contained in chapter four was the limited nature of the EU role in residential mortgage regulation. This is manifest by the lack of a supranational body with competence for the supervision of mortgage lenders and intermediaries, and also by the limited applicability and impact of EU legislation on the national 'facilitative' sphere of public law regulation. The Unfair

Terms in Consumer Contracts (UCTD and the Unfair Commercial Practices Directives (UCPD) were the only pieces of EU legislation with applicability to the residential mortgage context and, as noted in chapter four, at that juncture the impact of this legislation in Ireland and Spain was negligible. The lack of an EU role may appear surprising in an era in which there were significant ambitions for a single market in financial services, and an emphasis on mortgage markets as a retail component of that objective. However, the limited nature of the EU regulatory and supervisory role must be contextualised with reference to pre-crisis conceptions of the respective roles of prudential and conduct of business regulation, the appropriate allocation of supervisory competence and the orientation of pre-crisis EU mortgage policy.

Within the pre-crisis regulatory paradigm, prudential regulation and supervision was the mechanism through which financial stability was promoted and thus it was the regulatory arena of systemic relevance. The EU did have a significant role in prudential regulation through its implementation of the BASEL Accords in the Capital Requirements Directive. However, this legislation did not impact in any direct legal sense the engagement of lenders and borrowers and thus it is not a feature of the current analysis. Notwithstanding the existence of a Committee of European Banking Supervisors (CEBS), supervision of the adherence of banking sector participants to the prudential framework was a matter for national supervisory authorities and the EU did not have any direct micro prudential supervisory role. Notably, even if the CEBS had a pre-crisis supervisory role, it is unlikely that it would have comprised a consumer protection dimension as it was the crisis itself which brought the conduct of business/financial stability dynamic to the fore. From a political and economic perspective, the primacy of national supervisory competence is consistent with the fiscal backstop being then located at national level and the lesser significance attributed to macro prudential supervision of the EU sector as a whole.[1132]

Whilst systemic risk was addressed through prudential regulation, conduct of business regulation was used to promote policy objectives in the functioning of

[1132] See 'Financial Supervision and Crisis Management in the EU- IP/A/ECON/IC/2007-069' (Study for the Committee on Economic and Monetary Affairs PE 400.992, European Parliament December 2007).

markets. Pre-crisis EU conduct of business regulation in the form of consumer law was directed towards securing the Single Market and related consumer protection objectives. The fact that EU mortgage policy was focused on the creation of a single EU mortgage credit market might increase the expectation of an EU regulatory role in respect of loan origination. However, as noted in the foregoing paragraph, at this juncture the link between conduct of business and financial stability had not been exposed and accordingly, there was no manifest systemic imperative for intervention. As a result, the extent of the EU regulatory role was a function of the perceived capacity of regulatory intervention to advance the objective of market integration. Chapter four identifies the strategy for integration which was devised within the Mortgage Credit Initiative and it highlights the distinction which emerged between the *feasibility* and *desirability* of EU legislation in the dual legal aspects of the residential mortgage product, i.e. *rights in rem* and *rights in personam*. The stronger legal mandate for intervention existed in the sphere in which there was the least support from market participants for intervention, i.e. consumer related conduct of business aspects. This contrasts with the desire for intervention but the lack of legal capacity in property law related aspects which regulate the constitution and enforcement of the security right. The lack of formal regulatory intervention by the EU must thus be contextualised with reference to a supply driven integration strategy and, the manifest preference of supply side market participants for a market based approach to conduct of business aspects.

7.3. Evolution of Residential Mortgage Regulation: 2009-2012

The statistics on arrears and repossession profiled in chapter five support assertions of an affordability crisis among Irish and Spanish mortgage consumers who transacted in the pre-crisis context. The incidence of default in mortgage loan obligations can be contextualised with reference to the pre-crisis lending profiled in chapter two and the warning issued by the OECD in 2006, that increased leverage in an inflationary housing market, whilst ostensibly benign, would render households vulnerable to negative macroeconomic developments and related income shocks.[1133] These were events which were realised as the bursting of the housing bubble and the

[1133] Nathalie Girouard, Mike Kennedy, Paul van den Noord and Christophe Andre, 'Recent House Price Developments; The Role of Fundamentals' (Economics Department Working Paper No 475, OECD 2006) 8 and 9.

subsequent economic downturn led to increased unemployment in both Ireland and Spain. The affordability crisis brought into sharp focus the inherent tension between the social and the economic dimensions of the mortgage product and the dilemma for the national executive in responding to the various policy imperatives. Chapter five traces the evolution of national frameworks in response to the deterioration in affordability among mortgage consumers. As in the pre-crisis context, institutional aspects are a point of distinction between the jurisdictions, as responsive reform of the supervisory authority in Ireland, contrasts with the lack of such reform in Spain. In contrast to the divergence of the national response in institutional aspects, there are parallels between the jurisdictions in regulatory aspects; both with reference to the issues to be addressed and the legal mechanisms used.

7.3.1. Distressed Mortgagors

There are parallels between Ireland and Spain in terms of the source, nature and response to regulatory issues associated with pre-crisis residential mortgage lending. The most proximate issue for the national executive and legislature was how to respond to the affordability crisis afflicting over indebted residential mortgagors. The first response in both jurisdictions was to implement moratoria on the exercise of the private law rights of the lender. However, there are distinctions in the nature of the measures used and, in particular, on the scope of applicability.

In Spain, RD 1975/2008 provided a temporary moratorium on a portion of the borrowers scheduled repayments and, in Ireland, the CCMA 2009 imposed a temporary moratorium on the commencement of enforcement action by the lender. These statutory interventions varied in terms of their legal basis. The Irish moratorium was a statutory code of conduct and thus it extended the new tier of financial services regulation emanating from the national supervisory authority. In contrast, RD 1975/2008 was primary legislation enacted by the Spanish legislature. The national moratoriums also diverged significantly in the scope of their applicability, both from a temporal and socio-economic perspective. The Irish CCMA was broadly applicable to existing and future mortgagors where default was a threat to their primary residence; whereas in Spain, the primary residence requirement was co-existent with temporal and socio economic criteria as a means of restricting eligibility for relief to a target niche of low income pre-crisis debtors. The utilisation of significant and extensive socio economic criteria in Spain in the

moratorium, and subsequently in the Code of Conduct contained in RDL 6/2012, could be interpreted as reflecting a distinction in the balancing of economic and social policy interests in the respective jurisdictions, thus echoing the distinction observed in respect of pre-crisis constitutive frameworks. The contrast between the universal Irish and the niched Spanish approach to relief is a recurrent theme in the national legal frameworks for addressing distressed mortgage loans. The universal nature of the Irish CCMA could be perceived as overly inclusive, in that it makes no attempt to restrict the scope of applicability to residential mortgagors other than by imposing a primary dwelling house requirement. However, in contrast the Spanish approach is so restrictive that in some cases, the existence of the framework was effectively negated by the inability of mortgagors to satisfy the pre-requisites, e.g. RDL 6/2012. The restrictive Spanish approach was clearly a stimulus to some of the judicial activism which subsequently occurred due to what was viewed as an insufficient legislative response in providing relief to indebted mortgagors.

Notwithstanding the various distinctions between the form and scope of the national moratoria, the impact on the core private law rights is consistent. The measures may impose temporal and procedural requirements as a pre-requisite to the exercise of the right, as occurred with the various incarnations of the Irish CCMA from 2009 to 2012. Alternatively, as per the Spanish measures, they may create non mandatory statutory frameworks for the variation of the contract terms, e.g. duration as per RD 1975/2008, or debt restructuring, e.g. per RDL 6/2012. However, none of these national measures diminished or impacted in a substantive manner, the enforceability of the lenders security right or diminished the quantum of the contracted financial obligation. Aside from the issue of whether ex poste intervention having substantive legal impact was feasible in the given context, it would certainly have altered the pre-existing dynamic between the spheres of residential mortgage regulation. It would have represented a move from parallel to interfacing regimes with reference to the impact of the facilitative framework on the private law rights of the contractual parties under the constitutive framework.

Whilst the utilisation of temporary moratoria as the primary response to the issue of over indebted mortgagors was a parallel between the jurisdictions, there is a subsequent divergence in the focus of relevant national measures. As noted in chapter five, there was a significant variation in the propensity for enforcement by

lenders in Ireland and Spain, and this distinction is consistent with the prioritisation of post enforcement issues in Spain, and in particular, changes to existing procedural law under RDL 8/2011 and RDL 6/2012 to address the financial implications of enforcement for the debtor. In contrast, the evolution of the Irish CCMA placed the focus squarely on pre-enforcement with the presumed objective of preventing, where possible, the requirement for enforcement via rehabilitation of distressed loans and thereby maintaining the status quo in a turbulent economic and political context.[1134]

7.3.2. Frameworks for Loan Origination

Notwithstanding the inevitable reversion to more conservative underwriting standards in the first stage of the post-crisis context, the existence and extent of affordability issues among pre-crisis mortgage consumers, and the exposition of the potential for systemic impact implied the need for some level of reform in the frameworks relating to mortgage loan origination. Chapter five identifies the changes to frameworks in Ireland and Spain in the period from 2009-2012, and consistent with the variation observed in the response to distressed mortgagors, there was a distinction in the legal basis and applicability of national initiatives.

Theoretically, reform in Ireland could have been undertaken via the national Consumer Law framework as notwithstanding the introduction of the CPC in 2006, the CCA 1995 had provided the primary mechanism for conduct of business regulation from 1995 onwards. However, the Irish response was to develop the nascent CPC, thereby extending the regulatory framework emanating from the national supervisory authority. Chapter five identifies the obligations imposed on lenders pursuant to the new CPC, and in particular, the product suitability requirements as the primary bulwark against 'irresponsible lending'. A particular innovation within the Irish framework which is not paralleled in the equivalent EU or Spanish framework is the 'vulnerable consumer'; the scope of the concept extending to encompass vulnerability arising from economic circumstances.[1135] The introduction of the concept is interesting as it merges the issue of differential financial capacity with personal vulnerability in a manner which creates parallels

[1134] A new insolvency framework was adopted via the Personal Insolvency Act 2012 (PIA 2012), although this was of general applicability rather than specifically a mortgage directed measure.
[1135] Although as noted in chapter four, the UCPD does contain an analogous approach in terms of differential obligation with reference to consumer vulnerability.

with the equitable jurisdiction of the Common Law courts. The concept has the potential to impose differential thresholds with reference to the status of the consumer in the discharge of the lenders statutory obligations under the Code.

In contrast to the Irish focus on the new sphere of regulation emanating from the supervisory authority, Spanish reforms were via primary or secondary legislation which altered existing frameworks of consumer law and financial services regulation. Ley 2/2009 contained the conduct of business regime for mortgage lenders who were non-credit institutions and Orden EHA 2899/2011 contained the obligations applicable to credit institutions. The transparency regime in the latter order was to varying degrees applicable to both credit and non-credit institutions; however, the imposition of a responsible lending obligations was only in respect of credit institutions. Chapter five juxtaposes the universal applicability of origination related obligations to all mortgage lenders in Ireland with the persistent differential obligations based on classification of lender in Spain; in particular with reference to the lack of a responsible lending obligation in the context of non-credit institutions in the post-crisis context. Differential regulatory treatment has been a characteristic of prudential frameworks where the variance in the market function and risk of different classes of lender is regarded as justifying differential obligations. However, it must be noted that whilst from a prudential perspective there is a distinction between the potential for credit and non-credit institutions to be a source of consumer detriment via loss of deposits, in terms of the capacity for consumer detriment relating to loan origination via over indebtedness or the provision of an unsuitable product, there is no such distinction. Although responsible lending obligations were not included in the Spanish frameworks for non-credit institutions, the framework manifests a more punitive approach to enforcement of applicable provisions by linking breach of the pre-contractual information obligations with the enforceability of the contract.

A particularly interesting aspect of Ley 2/2009 is that it represents a point of distinction in terms of the locus of national post-crisis reform in the facilitative sphere of mortgage regulation. Ley 2/2009 regulates mortgage lending of non-credit institutions as a component of the consumer law framework. This assertion is premised on the designation of the INC as the competent authority for enforcement functions and the sanctions for non-compliance being regulated pursuant to RDL 1/2007. In practical terms, the significance of the framework contained in Law

2/2009 for residential mortgages is linked to the extent of non-credit institution participation in the market; nonetheless it represents in abstract terms, an expansion in the relevance of Consumer Law for mortgage consumers. In contrast, Orden EHA 2899/2011 which updated the transparency regime applicable to mortgage loans and introduced a responsible lending obligation for credit institutions is within the sphere of financial services regulation. The BDE is the competent authority for enforcement and the administrative sanctions regime is prescribed by Ley 26/1988. The sense of a conceptual distinction between consumer law and financial services regulation is maintained in Spain via the retention of a differential allocation of institutional competence for the respective consumer law and financial services regulations. There was no expansion in the Consumer Law framework in Ireland in the post-crisis context and the locus of all reform in the facilitative sphere was through the mechanism of financial services regulation. In addition, the conceptual boundaries between the regimes within the facilitative sphere are less clearly drawn due to a merging of institutional competence which commenced with the CBFSAI Acts in the pre-crisis context, and continued in the CBRA 2010. This led to a ceding of the supervisory and enforcement role of the consumer agency, i.e. the NCA, and from 31 October 2014 onwards the Competition and Consumer Protection Commission, in respect of consumer law applicable to residential mortgages.

7.3.3. Supranational / International Role in Residential Mortgage Regulation

Ostensibly the EU continues to have a tangential regulatory role in the period from 2009 to 2012. However, it is evident from chapter five that there is institutional reform relevant to the residential mortgage context in the establishment of the European System of Financial Supervision (ESFS) and the associated conferral of prudential and consumer protection competence for the EU banking sector in the European Banking Authority (EBA). In addition, there is ongoing legislative activity to agree a Mortgage Credit Directive. Accordingly, it is perhaps more accurate to observe that relevant EU developments are in the shadow of national reforms. The primacy of national over supranational measures in this period reflects the fact that national reforms are of direct and immediate relevance and that the primary focus is on the issue of distressed mortgagors; an issue in respect of which in legal terms, the EU has no competence or role. The focus of relevant EU legislative measures is on a

framework for future lending and, as the draft Directive had not yet come to legislative fruition, the capacity of the European Banking Authority (EBA) to play a regulatory role is limited to the provision of a non-binding opinion.

Whilst the EU role remains somewhat tangential, a notable characteristic of the first stage of the post-crisis period identified in chapter five is the emergence of an international regulatory focus on the qualitative aspects of loan origination. The publications of the Financial Stability Board (FSB) constitute a principles based international benchmark for the national and European regimes which followed. The normative influence of these standards is acknowledged in national and European frameworks and a degree of convergence is both the objective and the inevitable consequence. In the pre-crisis context, the dominant focus of international regulatory attention was the consumer education initiatives of the OECD which were consistent with the economic consumerist approach manifest in the 'empowered consumer' of EU single market policy.[1136] In addition, the World Bank through its 'Doing Business' initiative placed a spotlight on the capacity for frameworks within the regulatory spheres to promote economic growth and prosperity.[1137] There was however, an absence of international benchmarks or principles pertaining to loan origination. This trend was reversed in the first phase of the post-crisis period, a development wholly attributable to the causal link between conduct of business and financial stability which was exposed by the crisis.

7.4. Evolution of Residential Mortgage Regulation: 2013-2015

Chapter six identifies the period from 2013 to 2015, as one characterised by a divergence in the trajectory of national reforms and the emergence of a formal EU role in national mortgage markets. It is also a period in which there is a manifest judicial stimulus to reform of the Spanish constitutive framework using existing EU consumer law. The instrumental use of the facilitative sphere to alter the balance of rights within the constitutive sphere is an interesting and noteworthy development.

[1136] The OECD began to focus on financial education as a discrete policy issue in 2003 and in 2005, it published its first study and policy guidance; 'Improving Financial Literacy: Analysis of Issues and Policies' (OECD December 2005) and 'Recommendation on Principles and Good Practices for Financial Awareness and Education' (OECD July 2005) . The work of the OECD in the area was formally acknowledged by the G8 finance ministers in 2006.

[1137] The research listed on the World Bank Website is divided into different categories, e.g. research on registering property, research on getting credit, research on enforcing contract.

7.4.1. Developments in the Public Law 'Facilitative' Sphere – Ireland

Irish reform initiatives during the period from 2013 to 2015 had both institutional and legislative dimensions, and it is clear that there was an external institutional stimulus to both these strands of reform, i.e. IMF/Troika. The powers and remedies available to the CBI pursuant to the CB(S&E)Act 2013 represent an evolution of its standard setting and enforcement capacity under the public law 'facilitative' sphere of residential mortgage regulation. A point of particular note is the extent to which there is an expansion in the mechanisms of sanction which offers a direct financial benefit to consumers. Prior to the 2013 Act, the administrative sanctioning of lenders had been a bilateral process between the lender and the supervisory authority (CBI). However the introduction of customer redress for 'prescribed contraventions' introduces a new consumer compensatory dimension to the enforcement process. It is clear from the profile of the statute in chapter six that the provision is not targeting individual or isolated contraventions, and it is thus working on a macro rather than a micro level. It could therefore be suggested that section 43 provides the collective equivalent of the individual redress available to consumer via the FSO; albeit that the consumer does not have an active role in the process. In a continuation of the compensatory theme, the legislation also introduces an action for damages on the part of the consumer for non-compliance by the lender with obligations contained in financial services legislation. This is an interesting development, providing as it does an ancillary private law right of action to the consumer for breaches of provisions in the public law framework; to the extent that they fall within the scope of the term 'financial services legislation'. In respect of residential mortgage consumers, the relevance of the action is limited at present as the Codes of Conduct are outside the remit due to their inferior legal basis. However, chapter six identifies the capacity for the CBI to elevate obligations contained in the Codes to a secondary legislative basis, and in this context, the relevant obligations would fall within the scope of the action. This highlights the potential for a change in the legal status of the obligations contained in the codes which would have implications for the existing framework of substantive private law rights. Although the dynamic between the regulatory spheres would remain unaltered per se, i.e. the contractual and property law rights acquired

under the constitutive framework are unaffected; this would provide an ancillary private law right of action to the consumer, which creates a new private law enforcement dimension to the public law framework. In Spain, the INC has the capacity to seek collective redress on behalf of consumers for breaches of consumer law; although as noted, the applicability of the framework is limited in the context of residential mortgages.

As noted in chapter five, the relief provided by the evolved CCMA 2011 was of universal applicability to all residential mortgagors and had the potential to impose a significant temporal restriction on the exercise of the lenders enforcement rights. Chapter six identifies the extent to which the 2013 reform of the CCMA significantly reduced the quantum of the moratorium period. It is clear that there was an economic stimulus to this reform as arrears were viewed as an impediment to economic growth. The changes to the CCMA undertaken in the CCMA 2013 highlight the responsive nature of the new tier of Irish financial services regulation, in contrast to its legislative counterpart. Such a reduction in the protections would have been harder to achieve in legislature, assuming that the expansive framework of the CCMA 2011 was given legislative approval initially. The second post-crisis phase highlighted a particular limitation which may arise with supervisory authority conduct of business regimes. The scope of applicability of such regimes is determined by the competence of the authority itself. Where a lender does not fall within the remit of the supervisory authority at national level, or where the relevant supervisory authority is not possessed of competence for the purposes of measures emanating from the EU supervisory authority, then there is the potential for differential applicability of obligations. In Ireland, the acquisition of residential mortgage loans by vulture funds that were not within the supervisory remit of the CBI meant that the CCMA was not mandatory in respect of these loans. Although this lacuna was ultimately remedied by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015, there was a period during which there was differential legal applicability of the CCMA to residential mortgage loans. In Ireland, the limitation arose only in the context of non-retention of mortgage loans as all originators fell within the scope of the Central Bank mandate from 2008 onwards. However it is clear that in the European context, if the national authority within the remit of the EBA is not the national competent authority for consumer protection,

then relevant EBA measures are of voluntary rather than mandatory applicability. This is not of direct relevance to the jurisdictions under review because the CBI and the BDE are the relevant authorities in Ireland and Spain. However, in Member States such as Belgium and Latvia where the supervisory authority currently has no consumer protection mandate, the EBA guidelines do not impose a 'comply or explain' obligation.

7.4.2. National Divergence in the Judicial Role in Reform

It is evident from chapter six that the social and economic distress associated with residential mortgage indebtedness, led to both the Irish and Spanish judiciary having to address the boundaries between the legislative and judicial functions in the context of enforcement activity by lenders. In Ireland this dilemma was manifest in the case law regarding the substantive legal impacts, if any, of one component of the new tier of regulation; the Code of Conduct on Mortgage Arrears (CCMA). Although the Irish judiciary 'suggested' that the legislature might wish to review the legal framework for residential mortgages to assess whether they wish to change the judicial role or legal effects, a small section of the Spanish judiciary could be assessed as having forced such reform. Chapters five and six profile two 'activist' phases in the judicial response to the perceived inadequacy of the efforts by the Spanish legislature to provide relief to distressed mortgagors. The first phase, identified in the 'Robinhoodian' case law in chapter five, provided relief for individual mortgagors; however, the mechanism used was incapable of grounding broader structural reform given the inherent conflict with fundamental precepts of Spanish civil law. However, the second phase approach detailed in chapter six, which commenced with the seminal Aziz case, was capable of precipitating this type of structural reform, using as it did, the UCTD as a mechanism for challenging procedural aspects of mortgage law which appeared to prioritise the efficiency of the collateral, through an enforcement process weighted in favour of the lenders right to realise the security. This is an interesting development, since as previously asserted; the public law 'facilitative sphere' did not impact in a substantive manner the legal rights acquired under the constitutive framework. As conceptualised in this work the spheres have distinct functions, and it is therefore particularly striking, to observe a component of the public law framework used in an instrumental manner to precipitate reform of the private law framework.

7.4.3. Niched Spanish Reliefs

Pistor's Legal Theory of Finance conceptualises the enforceability of contractual obligations in times of crisis as a 'relief valve' which can prevent market implosion. The relaxation of contractual enforceability would amount to an opening of the valve to release pressure and the re-assertion of contractual enforceability would be a tightening of the valve to prevent uncertainty having a destabilising effect on the willingness to transact. If the Irish and Spanish moratoria could be conceptualised as relief valves they could be viewed as having taken reverse temporal trajectories. At the outset, an expansive approach was used in Ireland and it was only from 2013 onwards, that the relief valve was tightened via a reduction in the temporal scope of the moratoria and the establishment of a more enforcement orientated regime. Phase two in Ireland is thus characterised by a narrowing of the temporal restraints on the lenders right to possession. A distinction can be made in the extent to which the Spanish approach was very narrow from the outset, providing a very limited relaxation of contractual obligations. The narrow scope of initial reliefs and high level of enforcement activity were a manifest stimulus to judicial activism and social protest which resulted in the second post-crisis period in Spain, being characterised by an expansion of relief based measures. This is manifest in the introduction of an emergency post enforcement moratorium on eviction per RDL 27/2012, and reform of the framework for addressing distressed mortgagors, i.e. framework in RDL 6/2012 as amended via Ley 1/2013. The introduction of a moratorium to prevent the execution of evictions orders was in response to incidents of suicide among mortgagors facing eviction, and it is perhaps indicative of the escalation of social crisis due to inability of initial mortgagor reliefs to prevent the loss of homes. Notably, it mirrors the Irish CCMA, both in terms of its focus on the enforcement process and in the sense that it amounts to a preservation of the status quo to address social crisis, but it does not resolve the longer term issue of the affordability of the mortgage loan for the borrower. Although, the reforms undertaken to the framework for addressing distressed mortgage loans pursuant to Ley 1/2013 constitute an expansion in the scope of applicability of the framework, the approach is still niched. There is, for example, no expansion in the temporal scope of loans falling within the framework, and the increase in the scope of the economic criteria, comes from a base where the thresholds were such as to negate the existence of the framework.

Accordingly, from a practical perspective, save for the moratorium on eviction, the efficacy of Spanish reforms in providing relief to distressed mortgagors is open to question.

7.4.4. EU Regulatory Role

It was in the second post-crisis phase that there was the emergence of a formal EU regulatory and supervisory role in the residential mortgage markets of Member States. The adoption of the Mortgage Credit Directive in 2014, created a role for the EBA in promoting convergence in the implementation of responsible lending and arrears provisions contained in the Directive. Chapter six highlights the significant provisions of the Mortgage Credit Directive (MCD), and in particular, its capacity to promote a minimum threshold of convergence between the Irish and Spanish regimes, with reference to the existing differential obligations related to responsible lending in the Spanish frameworks. It also identifies the financial stability imperative underpinning market related provisions, e.g. valuation, price indices etc., as well as the internal market focus identifiable in the sunset and review clauses. Member States are obliged to transpose the provisions of the Directive into national law by 21 March 2016. The points of interest with respect to this requirement are manifestly different in Ireland and in Spain. In terms of the reforms linked to responsible lending and arrears, the new tier of financial services regulation in the Irish facilitative sphere, i.e. CPC 2012 and CCMA 2013, exceed the threshold of the obligations contained in the Directive in terms of substantive content. However, as the Codes would not appear to constitute a sufficient legal basis for transposition, this necessitates the introduction of new measures, raising the issue of which component in the facilitative sphere will contain the measures, whether the transposition will involve an elevation of provisions in the code or whether the transposition will be achieved via the habitual ‘cut and paste approach’ with the obligations contained in the Codes continuing to exist as ancillary measures in a parallel regime. In contrast, the issue which arises in Spain is whether the substantive content and institutional framework of the existing facilitative sphere is sufficient to satisfy the obligations contained in the MCD.

7.5. Analysis of Crisis Related Reform: 2008 – 2015

The question which this thesis posed is: What impact has the financial crisis had on the legal frameworks which regulate the interaction of lender and borrower in the residential mortgage context? The exploration of the constitutive and facilitative spheres of regulation contained in Chapters' four to six, and the synthesis of regulatory developments in this chapter, are intended to facilitate a response to this question by juxtaposing the pre and post-crisis frameworks to identify changes pursuant to the crisis. This permits an assessment of the dominant focus of post-crisis regulatory frameworks and the alteration, if any, in the paradigm of consumer protection inherent in post-crisis regimes. It also facilitates an evaluation of the balance between the national and supranational role and the relative import of law and economics as causal factors in the process and content of reform

7.5.1. Strands of Crisis Related Reform

In as much as a crisis related impetus for reform has impacted national residential mortgage regulation, it may be perceived as having two strands which permeate the developments identified in the preceding chapters. The first is that the crisis prompted a re-evaluation of the efficacy of regulatory and supervisory frameworks intended to promote systemic stability, i.e. prudential frameworks. Reform of the Basel framework pursuant to this aspect has various indirect implications for EU mortgage lenders via the revised Capital Requirements Directive and Regulations; however, consideration of this aspect is not within the scope of the present work. What is significant for current purposes is that this strand of reform precipitated the establishment of a supranational framework for the supervision of financial markets and, in doing so, created a new EU role in the sphere of residential mortgage regulation. Although the European System of Financial Supervision (ESFS) was a more broadly directed financial market reform; it is relevant to the residential mortgage context as a result of the vesting of supervisory competence and quasi regulatory capacity for the EU banking sector in the European Banking Authority (EBA).

The second strand of crisis related reform stems from the extent to which the factors which led to the financial crisis challenge the rationale underpinning the pre-crisis neo liberal paradigm of financial regulation. In particular, it exposed weaknesses in

the assumption that economic self-interest was a sufficient restraint against excessive risk taking by market participants. In the residential mortgage context, it had been assumed that economic self-interest would ensure that '…any loan that was granted was also sustainable and affordable, to the benefit of consumers, creditors and the financial system'.[1138] The indebtedness crisis among national mortgage consumers profiled in chapters' five and six, and the profile of pre-crisis lending in chapter two, highlight the inconsistency between this assumption and the reality of pre-crisis loan origination. In both Ireland and Spain, indebtedness linked to residential mortgage loans has had social and economic consequences for the individual consumer and, at the aggregate level, for the national economy. The link between mortgage markets and the macro economy is not novel; it is implicit in the use of mortgage markets as a transmission mechanism for monetary policy, and accordingly, it is not the major learning experience from the crisis. What is of particular significance from a post-crisis regulatory policy perspective is the exposition of conduct of business as a threat to the stability of the financial system. The systemic threat from mortgage loan origination arises though two channels; the impact of mortgage loan origination on the viability of creditors and by extension the broader banking sector and, with reference to the economic portal between primary and secondary mortgage markets, the capacity for such loans to serve as a source of broader financial market contagion via capital market based funding mechanisms. This provided the stimulus and justification for international principle based benchmarks in respect of mortgage loan origination, i.e. FSB guidelines based on a G20 mandate, the introduction of the first EU legislative framework in respect of residential mortgage lending, i.e. the MCD and reform of national legal frameworks via the imposition of increased conduct of business requirements, i.e. a reduction in the market based component and an increase in formal regulatory frameworks. The emergence of FinCoNet is an interesting development, providing as it does an international technocratic perspective on regulatory and supervisory practice in respect of consumer credit related issues. It could be viewed as providing an international equivalent to a peer review by the EBA; i.e. a normative threshold which may encourage convergence towards 'best practices'. In terms of the jurisdictions and the period under review in the current analysis, it did not have an identifiable role in reform. However, its

[1138] 'Opinion of the European Banking Authority on Good Practices for Responsible Mortgage Lending' (EB –Op-2013-02, European Banking Authority 13 June 2013) 3.

emergence on the global arena is significant and the evolution of its role and its impact in the future is a point of interest.

7.5.2. Increased Significance of Conduct of Business within Facilitative Sphere

In the pre-crisis regulatory paradigm, prudential frameworks were the dominant regulatory mechanism for mitigating systemic risk, and conduct of business regimes in consumer law and financial services regulation were used to promote specific economic policy and market related objectives, i.e. market integration with reference to EU consumer law and market efficiency, transparency and integrity in the context of financial regulation. In the post-crisis era, conduct of business in respect of loan origination has taken on a new dimension as an instrument of systemic risk mitigation. This is manifest in the G20 financial stability model of consumer protection. Notwithstanding that the inclusion of substantive provisions on responsible lending within conduct of business frameworks are ostensibly of benefit to consumers, they are also intended to protect lenders and by extension the broader financial market from the type of loan origination which occurred pre-2008. It is relevant in this regard that these provisions within the national sphere fall within the realm of financial services regulation and not consumer law. The locus of the CBI at the apex of post-crisis conduct of business frameworks in Ireland, and the role of the EBA in benchmarking at EU level is logical when viewed from this perspective, as the supervisory authority for financial markets and services is the body traditionally entrusted with prudential aspects, i.e. supervision of aspects related to systemic stability. In Ireland, the role of consumer law as a mechanism of intervention within the facilitative sphere has waned in the post-crisis context, and in both Ireland and the EU, legislative developments, i.e. the CB(S&E)Act 2013 and the Mortgage Credit Directive have enhanced the capacity for standard setting by the supervisory authority. Whilst Ireland and the EU are showing a degree of convergence in this trend, Spain is the outlier in this regard with less evidence of an increased role for the BDE in the period under review.

With reference to conduct of business regimes, there is a noteworthy distinction in terms of standard setting and enforcement competence between the components within the facilitative sphere. Notwithstanding a degree of variation between the

jurisdictions, it is clear that there is to some degree a delegation of standard setting capacity to the supervisory authority in respect of financial services regulation; whereas, in the consumer law context, it is only the enforcement function which is delegated to the relevant public body. A particular efficacy issue which may arise with the fragmentation of standard setting and enforcement functions in the consumer law context is its capacity to negatively impact the propensity for public law enforcement, depending on the body to which the function is delegated. This is a point highlighted in the Irish context by the FLAC report with reference to lack of Central Bank enforcement activity in respect of the provisions of the CCA 1995, and the admission that this was largely attributable to the uncertainty regarding the thresholds for compliance. Accordingly, the unification of standard setting and enforcement functions within a single body, e.g. per the Codes of Conduct, is a potential benefit as it may encourage greater enforcement activity. It is worth noting that the difficulties experienced by the CBI in enforcing legislation have found a parallel in the expressed difficulty of the national courts in assessing the thresholds for compliance with the statutory codes of conduct devised by the CBI. There are echoes of the Legal Theory of Autopoiesis in terms of the dissonance experienced by the respective bodies, i.e. the incompatibility of techniques of statutory interpretation of legislation by the courts in the context of the CCMA 2011 and CCMA 2013, and the inability to the CBI to interpret the thresholds of compliance with obligations contained in the CCA 1995.

7.5.3. Dynamic between the Dual Regulatory Spheres

A question which arises is whether there has been a change in the legal dynamic between the regulatory spheres as a result of reforms undertaken pursuant to the crisis. Fundamentally, the issue is the extent to the post-crisis facilitative sphere of residential mortgage regulation differs from its pre-crisis counterpart in terms of impact, if any, on the private law rights of the parties to the bilateral contract. Consideration of this aspect is relevant to an assessment of the dominant regulatory objective of the post-crisis regime and, the extent to which there has been a change in the paradigm of consumer protection implicit therein. It is clear that with the exception of the UCTD provision which precluded the enforceability of the offending contractual term by the lender; conduct of business frameworks contained in pre-crisis consumer law or financial services regulation did not impact the private

law rights derived from the constitutive framework of mortgage and contract law. National legislative provisions did not link contravention with contractual enforceability or otherwise provide for mechanisms of private law enforcement or redress but instead specified administrative sanction for breach of the provisions and offered some capacity for redress via action by public law bodies.

In respect of the post-crisis Irish regulatory framework, a particularly contentious issue has been the legal status and impact of the Codes of Conduct. The case law detailed in chapters five and six highlight the conflicting judicial perspectives on the matter; although with reference to the 2015 judgement in *Irish Life & Permanent plc v Dunne and Dunphy*,[1139] it is clear that that the Irish Supreme Court has re-asserted the boundaries between the private and public law frameworks and between the judicial and legislative functions. The Supreme Court has held that there is no substantive judicial role in respect of the CCMA 2013, or interface between the Code in its current statutory form and the private law rights of the contractual parties under the constitutive framework, and that to give such effect, would necessitate intervention by the national legislature. It has restricted the role of the courts to assessing compliance with the duration of the moratorium, and precluded judicial consideration of other aspects. It is arguable that the issue of whether or not the moratorium has been complied with is a function of whether the procedural pre-requisites have been satisfied. It would thus appear to be a somewhat artificial distinction which is intended to place the issue back in the arena of the legislature. Notably, the powers given to the Central Bank of Ireland pursuant to the CB(S&E)Act 2013 does introduce a new consumer redress component to the public law enforcement framework. In addition, an ancillary private law right of action for damages is applicable for breaches of financial services legislation; although as noted, this is not currently applicable to the residential mortgage context. Notwithstanding the observed structural differences between Ireland and Spain, broadly speaking a common characteristic of the pre and post-crisis national facilitative sphere of the jurisdictions is that they promote regulatory objectives without impacting the enforceability of the mortgage loan contract and without providing ancillary private law rights of action for breach of relevant obligations. A notable exception to this assertion is the potential for lack of compliance with

[1139] [2015] IESC 46.

information based obligations contained in Ley 2/2009, to impact the enforceability of the contract. It is relevant that the statute is classified as consumer law and within the context of Consumer Credit regimes such provisions are not unusual, e.g. CCA 1995 in respect of loans other than housing loans. It raises the question of the extent to which non-credit institutions are active the Spanish primary market, and whether this provision would remain if there was a significant level of activity.

7.5.3.1. Rationale for Lack of Substantive Impact

The distinction in the function of the dual spheres of residential mortgage regulation as conceptualised in the current work, and the potential impact on market activity where the frameworks are interfacing, offers a rationale for understanding that this lack of substantive legal impact is fundamentally economic driven. Conceptualisations from the law and finance and financial sociology literature provided by Katharina Pistor and Julia Black, as applied to the residential mortgage context result in the private law framework being conceived of as constitutive of market activity, i.e. legal certainty regarding the enforceability of the agreement underpins the willingness by lenders to engage in mortgage loan origination and investors to purchase securities collateralised by these loans. The market is thus *constituted* by the national contract and property law framework and, specific policy objectives with respect to the market are subsequently promoted via frameworks of consumer law and financial services regulation. The analysis conducted within the context of the pre-crisis EU Mortgage Credit Initiative (2003-2008) is instructive regarding the dynamic between economic and legal factors in supply side market activity. Unsurprisingly, given that broadly speaking lenders are organisations with a mandate to pursue commercial activity for the benefit of shareholder etc., the economic benefit of market activity was identified as significantly determinative of decisions regarding market entry and participation. The import of legal factors is thus fundamentally an economic one. The certainty of the legal rights under the national legal regime and the costs of creating and enforcing the security right were a component of the economic analysis and risk assessment to determine the desirability of market participation. This ‘efficiency of collateral’ perspective is equally relevant to the secondary market setting as again, the capacity to enforce the security and the costs related to this process in the assumed context of default were a component of rating assessments for mortgage backed securities. Accordingly, regulatory

intervention has the capacity to negatively impact supply side market activity, where it undermines legal certainty regarding the enforceability of mortgage loan agreements or potentially where there is a change in the balance of legal rights within national frameworks.

In the post-crisis context, there were two distinct scenarios. The first was the ex-poste context; how to address the issue of distressed mortgage loans where legally binding and enforceable contracts were in existence. It is clear that aside from any argument based on legal principle, there is an economic rationale for not permitting ex poste intervention which impacts the substantive legal rights of the contractual parties, as for example, in the context of distressed mortgage loans. Such intervention creates uncertainty regarding the enforceability of agreements and, pursuant to the current theoretical hypothesis it is detrimental to the market which is premised on this enforceability. The second scenario is the ex-ante context; how to reform legal frameworks to respond to the identified regulatory deficits with minimal impacts on supply side participation in the market. If responsive measures are linked to the enforceability of agreements, issues of legal certainty can arise with reference to the precision of the provisions.[1140] Even where the obligation is precise, the capacity for the agreement to be rendered unenforceable is likely to increase the perceived risk inherent in market activity. Where enforceability is not in issue but reforms otherwise alter the balance of legal rights and obligations, any increase in the costs associated with vindication of those rights, e.g. duration, complexity of process, costs etc., will impact the economic assessment of the desirability of market activity.

It should be noted that these interventions potentially have a dual impact on loan origination in a jurisdiction. The negative impact can be with reference to the *willingness* of the lender to extend credit and the *capacity* to do so in terms of the impact on funding markets. It is worth pointing out, that although the argument is being cited with reference to the impact of these types of interventions on the willingness to participate in the market; this may manifest in various ways, i.e. an unwillingness to extend credit or extension of credit with significant increased costs to the borrower to compensate for the additional risk. In either context, the result is

[1140] This is potentially the issue which arises in Catalonia with Catalan Law 20/2014, which imposes a responsible lending obligation on mortgage lenders; however the parameters of the obligation are not clearly defined in the legislation and are intended to be assessed by the judiciary in specific cases.

reduced market access. In the contemporary EU context, the move from direct to market based provision links access to mortgage credit with access to housing, and thus reduced market access has implications for consumers and the state, from a housing policy perspective. The 'efficiency of collateral' perspective which may be viewed as being counter to the interests of consumers due to its association with enforcement, is conversely also of benefit to consumers, to the extent that it facilitates funding of mortgage origination through capital markets and thereby enhances consumer access to credit.

7.5.4. Judicial Response to Crisis Reforms

Evidently, the 'financial collateral' perspective creates a regulatory incentive for legal certainty with reference to the enforceability of mortgage loan contracts. However, in the post-crisis national context this perspective was strained by the affordability crisis among mortgage consumers and, the potential for enforcement of defaulting loans to create a large scale social crisis. The tension between competing public policy interests in responding to the indebtedness crisis was more proximate to the national than the EU context. In Ireland and Spain, different legal mechanisms were used in an attempt to provide some measure of relief for indebted mortgagors. However, as in both jurisdictions the enforcement rights of the lender remained intact, it is clear that the responsive measures were set within the parameters of a vindication of contractual rights. The strain arising from the inability to satisfy the competing social and economic imperatives in the indebted mortgagor context was manifest in the judicial arena. In Ireland, the issue arose in the juxtaposition between the clear objective of the various CCMA's, i.e. to ensure compliance with protocols as a pre-requisite to repossession, and the mechanism through which this was given effect, i.e. statutory code. The dilemma for the judiciary was to reconcile the issue of potentially giving the CCMA a legal effect it did not merit, or, to allow the expressed statutory objective of the CCMA to be frustrated by its legal basis. It was this issue which led, somewhat reluctantly as is evident from the judgements, to case law which established a requirement for compliance with the CCMA as a pre-requisite for possession; an obligation the scope of which has been limited by the Supreme Court decision in *Dunne*. The judicial approach to the application of the CCMA was relevant both in itself and, for its future import for the obligations in the CPC 2012, as both Codes had the same statutory basis. Whilst the refusal of a possession order

to realize the security in the property pending compliance with certain procedural pre-requisites is one issue, the imposition of substantive obligations and the impact of breach where for example there is provision of an unsuitable product contrary to the requirements of the CPC 2012, is entirely another. However, this is potentially the dilemma which would arise where the CCMA 2011 or CCMA 2013 requirements were given substantive legal effect, and issues of legal coherence would arise where a differential legal effect was prescribed for measures with the same legal basis. In contrast to the Spanish judiciary, there was more evidence from Irish case law of judicial efforts to assert and maintain the boundaries of the legislative and judicial functions; although, this must be contextualised with reference to the distinction in economic and social context in terms of the scale of enforcement activity and issues which subsequently emerged regarding the extent to which Spanish consumers had inappropriately become the counterparty to risk transfer under certain types of mortgage loan. In Spain, the absence of a CCMA type moratorium, and the comparatively large scale of repossessions from an early stage of the post-crisis period led to two distinct stages of judicial activism. In the first post-crisis period, this activism was characterised by 'a distortion' of Spanish law to provide justice between the parties as detailed in chapter five. In the second post-crisis stage, this 'Robinhoodian' case law was succeeded by a 'Preliminary Reference' approach which sought to address the underlying weighting of policy interests within the constitutive framework using existing EU consumer law and, from 2013 onwards, rights contained in the EU Charter of Fundamental Rights. As noted in this chapter, the approach moves from one which provides relief in an individual context to one which offers collective relief via reform of the underlying legal framework for enforcement.

7.5.5. Distinction in National Approach to Distressed Mortgage Loans

Although in substantive legal terms the Irish CCMA did not diminish the lenders rights or the borrowers' obligations, it did provide temporary relief to a broad spectrum of borrowers. Notwithstanding that this amounted in practical terms to a freezing of legal rights rather than any substantive alteration, it was nonetheless more counter to the financial collateral perspective than the Spanish approach. Since there is an equivalent policy imperative towards vindicating the contractual rights of the

lender, a question which may justifiably be posed is why? There are two economic factors, which in the view of the current author are of potential relevance in explaining the diversity of national measures. The first is the dependence on securitisation as a funding mechanism in the Spanish mortgage market context. This increases the significance of the financial collateral perspective, as in broad terms the issue is one of the enforcement rights of investors whose securities are collateralised by residential mortgage loans and, upon whose continued funding widespread access to mortgage credit is predicated. This may be a contributory factor in the perceived weighting of Spanish procedural law towards an efficiency of collateral perspective; a weighting which would appear to be substantiated by the post-crisis reform stemming from judicial activism and social protest. Whilst the prevalence of market based funding heightens awareness of enforceability, this is not to suggest that it is not significant where other funding mechanisms are more in evidence as in the Irish context, e.g. wholesale funding etc. However, the solvency issues in the Irish banking sector may have created a dual dis-incentive to vigorous enforcement activity; firstly with reference to the crystallisation of losses implicit in enforcement in the deflationary post-crisis, and secondly, due to the political capital arising from the provision of significant State guarantees to Irish banks. The latter point is perhaps supported by the varying duration of the moratoriums in the original CCMA dependent on whether the bank had been recapitalised by the State. The foregoing factors may have contributed to the diversity of national frameworks, with reference to the greater capacity to suspend the enforcement right of the lender, without detrimental impacting the perceived 'efficiency of the collateral'.

7.5.6. National / EU Dynamic

In respect of post-crisis developments in the jurisdictions under review in the current analysis, there are parallels which may be drawn between Ireland and the EU which are not shared with Spain. The parallel in the reform to respective EU and Irish supervisory structures has already been identified, as has the economic stimulus to these reforms. This is in direct contrast to the lack of institutional reform in Spain, and the lack of consumer protection competence within the BDE mandate, of which both the EBA and the CBI are possessed. From a legislative perspective, there is significantly more dynamism in the Spanish framework than its Irish counterpart. The constitutive framework of contract and mortgage law remains unchanged in

Ireland, as does national consumer law. In Spain, there has been reform of the constitutive framework, which as noted, was a function of the perceived weighting of existing procedural law towards the financial collateral perspective and the lack of effective relief for distressed mortgagors. The post-crisis evolution of regulatory frameworks in Ireland, and to an extent, in the EU is characterised by the emergence of a new tier of regulation; supervisory authority regimes based on a delegated legislative mandate. This trend has not per se been replicated in the Spanish context. However, the distinction between the jurisdictions in the locus of post-crisis developments in the facilitative sphere does not impute a variation in legal impact, since as asserted, neither as yet provides for enforcement or a direct right of action for the individual consumer in a private law forum.

Now that an EU regulatory role is established, an inevitable question which arises is the capacity for the EU framework to promote convergence of Member State frameworks. In the jurisdictions under review, it is clear that Ireland is ahead of the trend; its supervisory authority framework having pre-dated that of the EU, and the evolution of the powers of the supervisory authority having increased via the CB(S&E)Act 2013 in advance of the adoption of the Mortgage Credit Directive and the 2015 guidelines issued by the EBA. The question is rather the extent to which the EU framework will create convergence of the Spanish framework towards a minimum harmonisation threshold. This is not possible to fully assess at present as the deadline for the transposition of the MCD has not yet passed and until the national transposing measures are confirmed, no effective assessment of the degree of convergence of institutional competence can be undertaken, e.g. allocation of supervisory competence in respect of the MCD and the role of the BDE. However, it is clear that that it will at least create convergence in respect of the scope and content of regulatory obligations imposed on lenders and intermediaries, e.g. responsible lending obligations irrespective of classification of lender etc. The financial crisis was the catalyst for an EU role which had not been possible in the pre-crisis context. We have already observed this development with reference to EU supervisory structures and, in legislative terms, it is manifest in the adoption of the Mortgage Credit Directive (MCD). This binding form of legislative intervention had not been feasible in the pre-crisis context; however, in the post-crisis context it was legitimated by the need to promote systemic stability and the exposure of consumer

detriment arising from loan origination. Ironically, there is a synergy between the financial stability and Single Market objectives, in the sense that the former is promoted through a convergence of standards as a hedge against instability, which approximates to the harmonisation of regimes in support of market integration. Consequently, to the extent that the regulatory regimes of Member States are convergent, i.e. harmonised, the Single Market objective is furthered as much through post-crisis financial services regulation as it was through pre-crisis consumer law.

7.5.7. Paradigm of Consumer Protection

A final point of inquiry must be the issue of whether a change in the paradigm of consumer protection is implicit in the post-crisis reforms. Certainly the crisis substantiated the negative impact that imprudent lending can have on consumers. However, the dominance of financial services regulation as the mechanism for addressing regulatory deficits associated with loan origination and, indeed the role of the supervisory authority at the apex of the regimes in Ireland as opposed to a public body with a dominant consumer mandate, could be taken to infer that the dominant regulatory objective for the development of these regimes was the need to respond to the systemic threat arising from conduct of business rather than the consumer protection aspects. Any enhancement in consumer protection is thus a corollary of market regulation which is instrumental in promoting the broader systemic and economic objectives. According to this perspective, the benefit to consumers arises because measures directed at improving origination practices to reduce systemic risk via creditors should reduce the risk of lending which leads to consumer indebtedness. The improved redress options for consumers within the Irish framework pursuant to the CB(S&E)Act 2013 exemplify the interplay between market objectives and consumer benefit. Clearly the customer redress provision of the CB(S&E)Act 2013, offers protection to consumers by sanctioning lenders for breaches of statutory obligations such as those contained in the CPC 2012 or the CCMA 2013. However, the scheme is intended to promote market discipline and standards, and redress only arises, where there is significant collective deviation across the market or persistent deviation by a market participant. The threshold and the focus are thus market rather than consumer based, and the benefit to the consumer is thus a corollary of the market objective, albeit that these are inevitably intertwined. The relevant question

then, is whether the role of consumer protection as a function of the market based objective, i.e. a corollary rather than the primary objective, differs from the focus inherent in pre-crisis intervention pursuant to for example Consumer Law? The answer is no. As we have already observed, notwithstanding its nomenclature, consumer law was a mechanism for advancing the EU Single Market objective; a point manifest in the EC Treaty provisions which authorise intervention for consumer protection with reference to this objective. The extent to which measures which appear by their nomenclature to be primarily consumer oriented, i.e. Consumer Law, Consumer Protection Code etc., are in fact measures within which the conceptualisation of consumer protection is derived from the economic policy objective for the market remains largely consistent pre and post-crisis. This is a point which is highlighted in the Consumer Law and Policy literature with reference to the changing conceptualisation of the consumer in EU legislation, i.e. from consumer protection to economic consumerism.

A further aspect from which an assessment of any change in the paradigm of consumer protection might be derived is the extent to which the post-crisis frameworks have different legal impacts than their pre-crisis counterpart, i.e. in terms perhaps of an increase in the private law rights of the consumer with reference to new conduct of business frameworks. Certainly, with reference to the dynamic between the dual regulatory spheres, the new regimes are not intended to impact the constitutive framework any more than their consumer law predecessor. An economic rationale for this lack of substantive impact on the contractual rights of the parties has already been addressed. There is some evidence of a change in Ireland in terms of the potential for a right of action in damages for breach of financial services legislation but as noted in chapter six, the relevance of this in any substantive terms to residential mortgage consumers is dependent on an elevation in the legal status of obligations currently contained in codes of conduct. Of course private law action is often prohibitive in terms of cost and thus the existence of an accessible extrajudicial forum for vindication of statutory rights is a significant feature in the context of the public law framework. However, the lack of dedicated Consumer Arbitration Boards in Spain for financial services related complaints and the issues raised about the approach taken by the Financial Services Ombudsman to the discharge of its functions in Ireland, highlights the distinction between theoretical and actual benefit.

To the extent that the new frameworks within the facilitative sphere continue to support the enforceability of contractual obligations, financial education and information based requirements remain pillars of consumer protection in the post-crisis framework. This is supported by the extent to which post-crisis reforms focus at national and EU level on disclosure and information based provisions to ensure that the consumer is informed about the nature and extent of the obligations entered into. In Ireland, it would appear also to be affirmed by the nature of the competence accorded to the Competition and Consumer Protection Commission as the successor of the National Consumer Agency. In the Irish public law enforcement framework, only this body is intended to be the advocate of the consumer in the exercise of its statutory functions. The FSO is neutral in its adjudication role and the Central Bank operates within a matrix of market related policy interests including financial stability, market efficiency and the public interest etc. Although in all other aspects the CCPC has effectively ceded competence to the CBI, the sole area of exclusive competence is the information and education based functions which were divested from the supervisory authority pursuant to the CBRA 2010. The role of the CPCC is aligned with its Spanish counterpart the INC in this regard; however, it is the extent to which the Irish supervisory authority has subsumed all other functions and become the dominant body which makes the re-allocation of information and education aspects a point of note.

Conclusion

This thesis traced the evolution of legal frameworks which regulate the interaction of borrowers and lenders in the residential mortgage context of Ireland and Spain over the period from 2008 to 2015. The objective was to identify the legacy, if any, that the financial crisis has had on national regulatory frameworks by comparing the nature, content and scope of regulatory provisions in the pre-crisis period to that which evolved in the period from 2009 to 2015. The conceptualisation of regulation as stemming from 'constitutive' and 'facilitative' spheres highlights the instrumental role of law in the residential mortgage context and the primacy of economic factors as a stimulus to reform. This conceptualisation of dual spheres also highlights the extent to which the 'constitutive' role of private law frameworks provides a rationale for a vindication of contractual rights. In the contemporary market context, legal certainty regarding the enforceability of contractual obligations is central to continued widespread availability and access to mortgage credit. From this perspective consumer protection is still primarily a function of an informed choice by consumers when entering into a residential mortgage contract. To the extent that the financial crisis has provided an impetus for a change in the orientation of frameworks within the facilitative sphere, it has been through its exposure of the inherent capacity of conduct of business obligations to play a 'prudential' role by supporting systemic stability objectives. Notwithstanding that conduct of business obligations may be imposed both by Consumer Law and Financial Services regulation, the 'systemic' relevance of such frameworks is reinforcing the pre-crisis trend towards a replacement of consumer law by financial services regulation as the dominant component of the facilitative sphere. The focus of conduct of business frameworks is on market conduct and the benefit for consumers is predicated on the alignment of market objectives with consumer interests. The systemic focus of post-crisis regimes is beneficial in this regard as there is a greater convergence between the solvency and stability objectives for the financial sector with the affordability and sustainability of loans which is in the interests of consumers. The continued dynamic regulatory context suggests that further research is required and this thesis may thus provide a

basis upon which additional analysis may be undertaken. Central points of inquiry will be the extent of the changes to national frameworks arising from the transposition of the Mortgage Credit Directive into national law. A further point of interest is the changing nature of the dynamic between the public and private law frameworks, as exemplified in Ireland, where a link has been forged by the provision of an ancillary private law right of action to enforce public law provisions. Notwithstanding that at the time of writing, its scope does not extend to provisions which are applicable to residential mortgages this may change in the future.

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