THE CONSUMER FINANCE LAW REVIEW

Fifth Edition

Editors
Rick Fischer and Jeremy Mandell

THE LAWREVIEWS

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PREFACE

Consumer choice for financial products and services is continuing to proliferate across global markets. The ability to reach consumers at any time on their mobile phones, tablets or other devices has helped attract substantial capital investment in consumer financial services. Consumers in many diverse markets, with varying degrees of size, sophistication and modernisation, can now access myriad financial products and services with just a swipe, tap, wave or click. Traditionally cash-based economies now also have a wide range of options for electronic payments, alternative lending and other banking and financial services.

The substantial capital investments have, in turn, attracted non-traditional providers to the consumer financial services marketplace. From garage-based start-ups to billion-dollar valuation technology firms, companies that previously focused on delivering smartphones, social media platforms or internet-browsing capabilities are now developing innovative approaches to meet consumers' rapidly evolving demands. Traditional market participants, including banks and other non-bank financial services providers, have responded by innovating to improve their product and service offerings in order to retain and strengthen their customer relationships.

At the same time, the political landscape in various global markets continues to evolve, and this evolution may affect cross-border investments and payments, broader investments in financial technology, and the nature of regulatory and enforcement oversight.

The increasing rate of innovation in consumer financial services, the changing profile of market participants, and the evolving political landscape have given rise to new legal questions or a different spin on long-standing legal theories. This country-by-country survey of recent developments in consumer financial services considers how these new and different legal theories are being addressed in 11 jurisdictions across the globe, with particular attention to payments, deposits, and revolving credit and instalment credit arrangements.

One fundamental question confronting policymakers around the world is what entity in the financial value chain should be viewed as the provider of the financial product or service. In the alternative lending context, for example, non-bank platform operators are partnering with banks to originate loans either funded on the bank's balance sheet, on the balance sheet of the platform provider, or through raising capital from investors of varying degrees of sophistication. These 'marketplace lenders' in many cases are not lenders at all, but merely technology companies providing a platform that enables lenders to more efficiently source capital. In other cases, regulators and courts have taken the view that the marketplace lender is using a bank partnership to take advantage of the special powers of the regulated bank, without itself being subject to similar regulation. Courts and regulators are taking varying approaches to determine the rights and obligations of each entity participating in an increasingly disintermediated market.

In the payments context, policymakers have taken varying approaches to regulating electronic money schemes, as well as payment interfaces that rely on established payment networks, such as the payment card networks or batch processing networks. These approaches require careful consideration of the precise flow of funds to determine whether the payment provider accepts liability to one or more participating consumers.

Another defining characteristic of global consumer financial products and services is an increasing reliance on third-party service providers. This characteristic has led many banking regulators to focus on banks' vendor risk management programmes. Many regulators have created an expectation that banks have a hands-on, risk-based approach to managing service provider relationships, including thorough due diligence, review of policies and procedures, ongoing oversight and monitoring, and contractual provisions related to regulatory compliance. Notwithstanding the risk-based approach, these regulatory expectations are imposing significant costs on banks and their downstream service providers.

Other legal issues are affecting payment providers, consumers and regulators, as payment system stakeholders pursue faster payments and digital currencies. Jurisdictions around the world are at varying stages of developing or implementing a ubiquitous, secure and efficient electronic payment system. Stakeholders are pursuing faster payments and digital currencies as a means to make more convenient, timely and cost-effective payments, including cross-border payments. Well-settled legal issues, including settlement finality and consistent consumer protections, must be considered anew in these contexts.

Established payment system stakeholders, including payment card networks, are also refining fraud protections and data security measures to address an evolving risk landscape. For example, tokenisation in the payment card space is one fraud prevention measure that continues to achieve greater penetration by card issuers, card networks and mobile wallet providers.

The evolution of consumer demands also raises new and interesting legal questions. For example, consumers and service providers are seeking to access and aggregate account or transaction data from multiple financial institutions. There is an ever-growing number of apps and other tools by which consumers can aggregate account information and receive financial advice and personal wealth management services. These services present significant legal issues for market participants and regulators, including issues related to privacy, data security, data ownership, liability, and consumer choice and control.

High-profile cyberattacks and data security incidents underscore a continuing focus on cybersecurity and data security issues, as they relate to consumer financial services, however delivered. Regulators in many jurisdictions are trending towards more prescriptive requirements, including specific security controls, as well as aggressive enforcement.

The entry of new market participants also raises questions related to fair access to financial services for consumers. For example, marketplace lenders are using new and alternative credit models and sources of data to evaluate potential borrowers who might not otherwise meet the underwriting criteria of traditional lenders. These models and data may not be as thoroughly tested or as demonstrably statistically sound as the credit models or data used by traditional lenders. As a result, in addition to evaluating whether use of such data affects the lender's credit risk, lenders also must carefully consider whether use of alternative credit models and data sources has any unintended adverse impact on classes of potential borrowers. In addition to considering the potential adverse impact of the use of alternative credit models or data on potential borrowers, regulators and courts in some

jurisdictions are revisiting the classes of consumers that are protected by fair lending or equal credit opportunity laws.

Consumer protection authorities continue to focus on combating unfair trade practice, particularly with respect to new market entrants that may not have the same culture of compliance as traditionally regulated financial institutions. Prohibitions on unfair trade practice have been enforced against a broad range of market participants in consumer financial products and services, including payments, credit cards and other credit products, as well as deposit products.

Notwithstanding the many legal issues, this is a time of expanding choice for consumers and an exciting opportunity for consumer financial services providers. Accelerating advancements in technology have given consumers in developing markets, as well as unbanked or under-banked consumers in more well-developed markets, access to financial products and services previously unavailable to them. Thus, regulators and consumer protection agencies are challenged to ensure financial stability and a level playing field, while also promoting consumer choice.

This survey of consumer finance law describes the legal and regulatory approaches taken in the jurisdictions covered. Each chapter addresses the key characteristics of, and current climate within, a particular jurisdiction. Although payments, lending and deposits are the focus of this survey, other financial products and services are discussed where relevant.

Rick Fischer and Jeremy Mandell
Morrison & Foerster LLP
Washington, DC
January 2021

Chapter 8

SPAIN

Jaime Pereda and José Félix Velasco[1]

I OVERVIEW

The legal consumer finance landscape in Spain has been significantly affected by the covid-19 pandemic and the measures adopted to contain the pandemic and mitigate its effects, as these have invariably drawn the attention of the authorities. Their initial response was twofold:

a Royal Decree 463/2020 of 14 March declared a national state of emergency and the country's lockdown to control the spread of the disease; and

b a number of socioeconomic measures were approved to deal with the consequences and negative effects of the health crisis and the measures adopted to contain it via, among others, the Royal Decree-Law 8/2020 of 17 March on extraordinary urgent measures to face the economic and social impact of covid-19 and the Royal Decree-Law 11/2020 of 31 March on additional urgent measures to address the social and economic impact of covid-19.

The lockdown has caused a sharp decline in both consumer demand and spending during the first semester of 2020, resulting in a historic contraction in GDP.[2] Continuous uncertainty regarding the evolution of the pandemic has propelled the postponement of spending decisions even though temporary relief measures, primarily in the form of debt moratoria and public guarantees, were approved to specifically ease this situation. Long-term economic measures were also approved in parallel, such as setting a minimum living income by virtue of Royal Decree-Law 20/2020 of 29 May.

An apparent containment of the epidemic during the first half of 3Q 2020 resulted in the restrictions being eased and in a short period of partial economic recovery during which freedom of movement was gradually restored. Unfortunately, the spike in new cases prompted the authorities to implement new measures, including a second state of emergency via Royal Decree 926/2020 of 25 October to grant each region the necessary legal tools to implement new free movement restrictions for the remainder of the year until spring of 2021.

Considering the above, the extent of the impact of the economic downturn remains uncertain and heavily dependent on the pandemic's evolution. As at 26 October, the Bank

1 Jaime Pereda is a partner and José Félix Velasco is an associate at Uría Menéndez Abogados, SLP.

2 According to the data available at BBVA Research, household consumption expenditure in Spain decreased by an estimated 25 per cent during the first half of the year. Available at https://www.bbvaresearch.com/publicaciones/situacion-espana-tercer-trimestre-2020/.

of Spain estimated that pre-covid levels of activity would not be reached again until the end of 2022.[3] However, the pace of recovery will significantly depend on the effectiveness and availability of a vaccine as well as the measures implemented to further combat the crisis.

II LEGISLATIVE AND REGULATORY FRAMEWORK

i Legislation

Broadly speaking, Spanish consumer-finance regulations follow European rules and are based on the general-consumer-law framework. The following is a brief overview of the most important applicable regulations:

Legislative Royal Decree 1/2007 of 16 November approves the revised text of the general law for the protection of consumers and users and other supplementary laws, which regulates the general terms and conditions that apply to the relationship between companies (including credit entities) and consumers (i.e., the rights of consumers, contracts executed with consumers, rights of withdrawal, unfair clauses and vendor liability). The Legislative Royal Decree was modified by Law 7/2017 of 2 November, which transposed into Spanish law Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC.

Law 7/1998 of 13 April governs contracting with consumers by adhering to general terms in contracts. Law 7/1998 transposed Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts into Spanish law. All court-declared unfair clauses are recorded in Spain's General Terms in Contracts Registry, which was created by Law 7/1998. Citizens may check this registry to verify whether the clauses included in their contracts are unfair prior to entering into the contracts.

Law 10/2014 of 26 June on the organisation, supervision and solvency of credit entities, and related Order EHA/2899/2011 of 28 October on transparency and protection of banking services consumers[4] and the Bank of Spain's Circular 5/2012 of 27 June are addressed to credit entities and payment-services providers, on transparency of banking services and lending responsibility.

Royal Decree-Law 6/2012 of 9 March on urgent measures for the protection of low-income mortgagors, among others, includes:

a a code of good practices in its annex (regulated by Law 1/2013 of 14 May on measures to further protect mortgage debtors, debt restructuring and social rent) to which financial institutions may voluntarily adhere in order to assist in the renegotiation of loans and, if not possible, accept payment in kind (eliminating, in practice, the full recourse nature of the secured loan); and

b introduces some flexibility in connection with out-of-court repossessions of the mortgage collateral.

3 According to the Bank of Spain's 2020 Financial Stability Report, available at: www.bde.es/bde/es/secciones/informes/boletines/Informe_de_Estab/.

4 Order EHA/2899/2011 was recently partially amended by Order ETD/699/2020 of 24 July regulating revolving credit.

Royal Decree-Law 6/2012 and Law 1/2013 have been amended by, primarily:

a Royal Decree-Law 5/2017 of 17 March, which implements specific measures to further protect mortgage debtors who are in a vulnerable position;

b the LREC (as this term is defined below); and

c Royal Decree-Law 6/2020 of 10 March on specific urgent measures in the economic field and for the protection of public health.

As a consequence of these amendments:

a the subjective scope of the measures of protection initially established in the code of good practices has been broadened to include other individuals; and

b the moratorium on evicting vulnerable households has been extended until May 2024.

Law 16/2011 of 24 June on consumer credit (the LCC), which regulates the granting of credit to consumers, transposed Directive 2008/48/EC, of 23 April 2008, on credit agreements for consumers into Spanish law. The LCC applies to credit granted by an entity (as part of its commercial or business activity) to a consumer (defined as natural persons who are acting outside their trade, business or profession). Specific contracts are excluded from the scope of the LCC including, among others, contracts with consideration of less than €200, credit agreements secured by mortgages or leasing agreements.

Law 28/1998 of 13 July on the sale by instalments of movable goods, complements the LCC by establishing the contractual framework for the sale by instalments of non-consumable and identifiable movable goods of loan contracts intended to facilitate their acquisition and of the guarantees created to ensure compliance with the obligations arising therefrom.

Law 5/2019 of 15 March on real estate credit (the LREC) partially transposed Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property into Spanish law. The main purpose of Directive 2014/17/EU was to harmonise the regulations on consumer protection with regard to the procurement of mortgaged loans, as well as to strengthen legal transparency in the granting of real-estate financing and decrease litigiousness in connection with specific unfair clauses. At the national level, the LREC's scope extends to all natural persons, regardless of whether or not they are consumers.

Law 2/2009 of 31 March on contracting mortgage loans and credit with consumers and brokering the execution of loans and credit regulates the granting to consumers of mortgage-backed loans and the rendering of brokerage services for the granting of consumer loans. Under this regulation, entities (other than credit entities or financial credit establishments) granting mortgage-backed loans or rendering brokerage services for the granting of mortgage-backed loans to consumers must be registered with the public registry of the region where their registered address is located. Foreign entities must be registered with the national registry maintained by the National Consumers' Institution in accordance with Royal Decree 106/2011 of 28 January.

Law 22/2007 of 11 July on distance-marketing of consumer-financial services applies to contracts for financial services entered into between regulated entities and consumers where the services are rendered and the contract has been formalised at a distance. It contains a set of rules that govern the provision of pre-contractual information, communications, rights of withdrawal, payment and unsolicited services and communications.

Royal Decree-Law 19/2018 of 23 November on payment services and other urgent financial measures partially incorporates into Spanish law Directive (EU) 2015/2366 of the

European Parliament and of the Council, of 25 November 2015, on payment services in the internal market (PSD2), together with Regulation 2015/751/EU of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-payment transactions.[5] Royal Decree 736/2019 of 20 December on the legal regime for payment services and payment institutions (Royal Decree 736/2019) continues to pursue the transposition of Directive (EU) 2015/2366 into Spanish law. In particular, Royal Decree 736/2019 expands on the legal framework governing payment services and payment institutions by regulating aspects concerning the authorisation and activities of payment institutions including, among others, the requirements for own funds and guarantees, risk controls and client protection, as well as the requirements from which they may be exempted depending on their activity, size and volume of transactions. One of the most important changes introduced by Royal Decree 736/2019 is the attribution to the Bank of Spain of supervisory authority regarding the creation of payment entities; amendments to payment entities' articles of association; extensions of payment entities' activities; and structural transactions (such as mergers, spin-offs and global transfers of assets and liabilities), which fell under the scope of the Ministry of Economy. In relation to Royal Decree-Law 19/2018 and Royal Decree 736/2019, the Ministry of Economy enacted Order ECE/1263/2019 of 26 December on transparency of the conditions and information requirements applicable to payment services and amending Order ECO/734/2004 of 11 March on customer-care departments and the ombudsman of financial institutions and Order EHA/2899/2011 of 28 October on transparency and the protection of customers of banking services.

Law 5/2015 of 27 April, on promoting corporate financing, deals with crowdfunding for the first time in Spain and lays out the requirements applicable to platforms providing these services.

Law 25/2015 July 28 is on the second-chance mechanism, the reduction of financial burden and other social measures for individuals. Law 25/2015 was recently modified by Royal Legislative Decree 1/2020 of 5 May approving the consolidated text of the Insolvency Law.

In addition to the aforementioned general regulations, various regional provisions apply.

ii Regulation

The Bank of Spain, the National Securities Market Commission (CNMV) and the Directorate-General for Insurance and Pension Funds (DGIPF) are mainly in charge of implementing and enforcing regulations on consumer-finance services in Spain with regard to credit entities, investment-services firms and insurance companies, respectively. To carry out these functions, these institutions have legislative powers and may issue circulars.

Law 44/2002 of 22 November, on the measures to reform the financial system, conceived that the complaints departments of these three institutions were the most appropriate bodies to deal with and resolve any complaints, claims and queries that financial customers may have. As part of the legislative reform in the financial sector in the years that followed the 2008 financial crisis, Law 2/2011 of 4 March, on the sustainable economy, and Order ECC/2502/2012 of 16 November, on the procedure for submitting claims to the complaint departments of the Bank of Spain, the CNMV and the DGIPF, modified the

5 Although PSD2 entered into force as of 13 January 2018, the Bank of Spain extended the deadline for completing the migration to strong consumer authentication payment transactions in line with other European regulators until 31 December 2020, following the opinion published by the European Banking Authority on 16 October 2019.

Spanish system for addressing customer complaints in the financial sector aiming to improve the efficiency and effectiveness of these departments. Resolutions issued by these departments are not binding.

Law 7/2017 of 2 November, which transposed Directive 2013/11/EU of the European Parliament and of the Council of 21 May on the alternative resolution of consumer disputes into Spanish law, included an express mandate to the government concerning the creation of an institutional system of protection of financial customers. Although the 2020 annual legislative forecast incorporated this objective, it remains unclear whether this will ultimately occur given how the covid-19 pandemic has distorted previous forecasts.

Consumers may also state their complaints and submit suggestions through Spain's regional consumer associations. Given the structure of regional governments, Spain has 17 distinct consumer-protection bodies (one per autonomous region). Some municipalities and cities have also created their own bodies.[6]

III PAYMENTS

i Overview

As mentioned in Section II.i, payment services in Spain are regulated by Royal Decree-Law 19/2018 of 23 November on payment services and other urgent financial measures and Order EHA/1608/2010 of 14 June on transparency and payment services. These regulations govern the performance of payment transactions by any means (dealing with issues such as consent and withdrawal of consent in payment transactions, limitations on payment methods, information to be provided to the payer and beneficiary of a payment transaction, authentication, expenses derived from payment transactions, and the notification procedure for unauthorised transactions) and the provisions of services framework agreements (content, amendment and termination).

ii Recent developments

Digital transformation

On 14 November, Law 7/2020 on the digital transformation of the financial system was published in the Spanish Official Gazette. The main objectives of Law 7/2020 are as follows:

a to propose a comprehensive response to the implications of the digital transformation of the financial system; and

b to create a regulatory sandbox that allows the creation of a safe environment so that technology-based financial innovations can be safely tested under the control of supervisors (the Bank of Spain, the CNMV and the DGIPF) before they are released to the wider public.

Mobile payments

The covid-19 pandemic has not given rise to any noticeable incidents in the operation of card payments, which have been affected by consumers' preference for alternative electronic-payment instruments rather than cash (with a notable decrease in cash withdrawals

6 A list of Spain's various consumer bodies is available at: http://www.cec-msssi.es/CEC/web/noticias/Organismos_de_consumo.htm.

from ATMs according to the data collected by the Bank of Spain). In addition, contactless payments through both physical and digital cards on mobile devices have also risen as the keyless payment threshold has gone from €20 to €50 in a social distancing setting.

Limits on cash payments

A limit on cash payments to prevent tax fraud entered into force in 2012 when the Spanish government passed Law 7/2012 of 29 October. Under this law, cash payments of €2,500 or more cannot be made in transactions in which at least one of the parties is a company or professional. On 13 October 2020, the Spanish Council of Ministers approved a new draft law on measures to prevent and counter tax fraud, which has been submitted for parliamentary approval. If approved, the draft law will, among other measures, further reduce the above-mentioned limit on cash payments to €1,000.

IV DEPOSIT ACCOUNTS AND OVERDRAFTS

i Deposit guarantee

The objective of a deposit-guarantee fund is to guarantee depositors in connection with the recovery of their money in the event that an entity that is a member of the fund becomes insolvent or encounters any other problem preventing it from meeting its payments and complying with its obligations. The guaranteed amount is limited to cash deposits of €100,000 per depositor.

Membership of the Deposit Guarantee Fund of Credit Institutions is mandatory for all Spanish banking institutions registered with the Bank of Spain's Special Registry, as well as for the branches of banking institutions registered in a country outside the European Union if the guaranteed deposits and securities held by that branch are not covered by a guarantee system in the country of origin, or if the corresponding coverage is insufficient. Membership of branches of financial institutions registered in an EU member state is voluntary given that deposits and securities are already covered in the country of origin.

ii Overdrafts

With regard to overdrafts, the law specifies that the client must immediately return the amount as well as the interest on the overdrawn amount and the corresponding bank fees. For consumers, the cost of the overdraft (including interest and fees) is limited by law. The annual percentage rate of the overdraft applied to a current account cannot – at any point in time – exceed 2.5 times the legal interest rate. For 2020, this limit was set at 7.5 per cent.[7]

According to Article 20 of the LCC, if overdrafts are implicitly accepted, the consumer must be informed individually, in a timely and correct manner, of the rate of the overdraft, the reference rates used (if applicable), as well as of any potential modifications. If the overdraft lasts for more than one month, the bank will inform the consumer in the same way of the overdraft and its amount, the rate applied, and the penalties, expenses or late payment interest applied. Order EHA/2899/2011 and Bank of Spain Circular 5/2012 complete the

7 The legal interest rate is set annually by the State General Budget Law, which, at the time of writing, the Spanish Parliament has not yet approved. As such, the 2019 legal interest rate continues to apply.

above-mentioned regulation mandating entities that allow for implicit overdrafts to publish the maximum applicable overdraft rates and to facilitate a detailed breakdown of any amounts charged to the consumer in connection with the account.

On 13 March 2020, the Spanish Supreme Court ruled in favour of a credit institution concluding that the overdraft rate charged to a customer was consistent with the above-mentioned legal requirements. In particular, throughout its ruling, the Court analysed the difference between interest on arrears, overdraft rates and the fees charged by credit institutions to recover the amounts owed.[8]

V REVOLVING CREDIT

i Overview

Revolving credit is often associated with payment instruments that allow for the establishment of a flexible or revolving deferred payment method, which facilitates their accessibility. The main difference compared with standard credit cards is that the client is given a maximum spending limit over a specific period that the individual can choose when to pay off. Furthermore, the amounts credited that the cardholder repays periodically are automatically renewed upon maturity, thereby resembling a permanent credit line. This increase in repayment time, and the lack of a corresponding increase in any related guarantees, entails that interest rates are far higher than those in connection with any other form of consumer credit, averaging nearly 19 per cent in 2020. The data provided by the Bank of Spain reveals that this type of financing has experienced sustained growth since 2010 in terms of volume while average interest rates peaked in 2014.[9]

ii Recent developments

Since 25 November 2015, when the Spanish Supreme Court declared that a 24.6 per cent interest rate applicable to a revolving credit granted by a Spanish credit entity to a consumer was null, applying the Usury Law of 23 July 1908, the litigation associated with revolving credit in Spain has been on the rise.

For an interest rate to be declared null in accordance with the Usury Law, it must be both 'notoriously higher than the average rate for money' and 'manifestly disproportionate to the circumstances of the case'. As such, many lower courts have previously struggled to determine whether rates applicable to revolving credits complied with these two requirements, particularly taking into account that the Bank of Spain only started publishing revolving credit-specific interest rates in 2017. While average rates for this type of credit are, as indicated above, abnormally high, many courts have ruled out nullity stating that the difference in rates

8 On 30 October 2019 the Spanish Supreme Court held that a €30 fee charged by a credit institution to recover amounts owed that accrued repetitively and automatically was null, finding it in breach of the applicable legislation. The Spanish Supreme Court took the opportunity to restate the four requirements established by the Bank of Spain in order for these fees to be valid: (1) its amount must be linked to the real cost of the collection management; (2) it must not be recurrent for any additional costs incurred by the entity for the same end, even if the negative balance is prolonged in successive settlements; (3) its amount must be a single payment, without percentage fees; and (4) the amount must not be applied automatically.

9 The latest available data can be found at https://clientebancario.bde.es/pcb/es/menu-horizontal/productosservici/relacionados/tiposinteres/guia-textual/tiposinteresprac/Tabla_de_tipos__a0b053c69a40f51.html.

can be explained taking into account the repayment conditions under which the credits are granted and, therefore, that the rates for these credits can only be judged considering the revolving credit-specific interest rates at the time the credit was granted. On 4 March 2020, the Spanish Supreme Court handed down another ruling on the matter establishing that a 26.82 per cent interest rate on a revolving credit was null applying the above-mentioned criteria and comparing the interest rate with the average published by the Bank of Spain for the product. In particular, the Supreme Court argued that 'the higher the index to be taken as the "normal interest of money", the less margin there is to increase the price of the credit operation without incurring usury'.

In connection with the above, the Ministry of Economy recently approved Order ETD/699/2020 of 24 July, regulating revolving credit, which aims to reduce litigation and provide legal certainty on the matter. Order ETD/699/2020 essentially focuses on two areas:

a creditworthiness or scoring assessments, by introducing guidelines for potential lenders to ensure sufficient repayment capacity of customers; and

b new transparency obligations, both in the pre-contractual phase and during the term of the contract, reinforcing the information that the client must be provided.

The various sections of Order ETD/699/2020 will enter into force on varied dates, starting on 2 January 2021.

VI INSTALMENT CREDIT

i Overview

Mortgages

The conditions of mortgage loans vary depending on the type of asset to be mortgaged including main residence and secondary residences. In general, financial institutions offer more favourable terms for main residences. Virtually all mortgages in Spain are amortising mortgages with variable rates with a fixed spread over the 12-month EURIBOR, although more recently fixed-rate mortgages have become an increasingly popular choice for homeowners and have even surpassed variable-rates mortgages for some periods over this past year. The maximum permitted term is 30 years and the loan-to-value ratio can only exceed 80 per cent in specific exceptional cases.

In the event of default, repossession of the asset can be executed through court proceedings or an out-of-court agreement (attested by a notary), depending on the contractually agreed terms.

Personal loans

This type of financing has traditionally been easier to obtain, given the loan's higher remuneration and its relatively short term (e.g., compared with a mortgage loan). The financial institution assesses the client's repayment capacity and does not normally require any specific guarantee, although borrowers are liable for the debt with their present and future assets.

There are various ways to repay a personal loan, depending on the frequency of the instalments (normally monthly) and how the amounts change over time (constant, increasing or decreasing). Another option is to establish an initial period with no payment of principal. However, standard practice is for financial entities to extend personal loans with a repayment schedule consisting of periodic instalments of equal amounts that include both interest and repayment of principal.

ii Recent developments

As mentioned in Section I, the Spanish government has various measures targeted to support workers, families and vulnerable groups in order to address the economic and social impact of the covid-19 pandemic. Among the debt-relief measures approved in relation to instalment credit, the following are especially relevant for consumers, particularly the legal and conventional moratoria:

Legal moratoria

Royal Decree-Law 8/2020 (as amended), introduced an initial legislative moratorium on mortgaged-backed loans for individuals (both borrowers and guarantors) who could be considered vulnerable as a result of the covid-19 pandemic. The moratorium consists of a three-month grace period, along with a corresponding extension of the loan term for the same period, and includes principal, ordinary interest and arrears. It also includes a standstill (i.e., preventing the lender from accelerating the mortgaged loan and initiating any judicial or extrajudicial proceedings to recover the entire loan). The deadline to request this moratorium ended on 29 September 2020. Financial institutions had 15 days to formalise it starting from the date the debtor requested it as it automatically applied upon being requested, provided the requesting individual met the legal requirements.

Royal Decree-Law 11/2020 introduced an additional moratorium on obligations arising from unsecured credit contracts for individuals who are economically vulnerable as a result of the covid-19 pandemic on terms broadly similar to those applying to the above-mentioned moratorium on mortgaged-backed loans.

Private or conventional moratoria

As a complement to the legal moratoria, the Spanish government introduced the legal framework for conventional moratoria, with a wider scope than the legal moratoria, via Royal Decree-Law 19/2020 of 26 May. This framework relies on sectorial moratoria agreements reached by the main associations comprising the Spanish financial entities at a private level, which would then have to be notified to the Bank of Spain. Through this type of moratoria, mortgaged loans and specific unsecured loans could be amended to introduce a 12-month (for secured loans) or six-month (for unsecured loans) grace period for the payment of principal and, where appropriate, an extension of the payment protection or repayment insurance. The deadline to request this moratorium also ended on 29 September 2020.

The exposure of banks and households under the moratoria is currently being studied. The Bank of Spain and the European Banking Authority are monitoring the situation at the national and European level, respectively. In its 2020 Financial Stability Report, the Bank of Spain highlighted that the outstanding balance of mortgage-backed loans affected by the moratoria exceeded €20.5 billion, while the balance for unsecured loans reached €3 billion and that for the conventional moratoria €28.7 billion. The total amount affected by the moratoria accounts for 7.9 per cent of the total credit stock in balance granted by Spanish credit institutions in connection with eligible credits. Empirical evidence reveals that the most vulnerable households are the primary beneficiaries of the moratoria, which casts doubts on the repayment of these credits once the grace periods end.

VII OTHER AREAS

Crowdfunding

As stated in Section II.i, Law 5/2015 regulates crowdfunding, an area previously unregulated by Spanish law. Law 5/2015 establishes the legal framework governing crowdfunding platforms and addresses:

a the authorisation, registration and setting aside of the activity of the platforms; and

b the regulations applicable to each of the three sides involved (the project owner requiring the financing, the investors interested in participating financially, and the platform through which the project owner announces the project and raises funds), including restrictions on activities permitted and rules to protect non-qualified investors, as defined in Law 5/2015.

Subject to specific particularities, regulations on the protection of consumers apply to relationships between project owners and investors, as well as to relationships between platforms and project owners, in the event that the project owner is considered a consumer.

Stakeholders have been demanding an update of Law 5/2015 based on recent developments that they believe have made Law 5/2015 obsolete. Among other areas, the lack of access of foreign investors and promoters to services offered by a Spanish crowdfunding platform has been criticised. In this regard, Law 5/2015 is set to be adapted to the newly approved European crowdfunding regulatory framework. As such, Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020, on European crowdfunding service providers for business, and Directive (EU) 2020/1504 of the European Parliament and of the Council, of 7 October 2020, will enter into force on 10 November 2021 and are designed to provide a unified framework for crowdfunding for business at the European level.

VIII UNFAIR PRACTICES AND LITIGATION

In addition to the aforementioned practices and regulation of usury, the following unfair practices that have recently drawn attention from the courts are highlighted.

i Limitation on late payment interest

The Spanish Supreme Court has ruled on this various times in recent years (Supreme Court rulings of 22 April 2015, 3 June 2016, and 28 November 2018), following a number of related rulings by the Court of Justice of the European Union (CJEU). According to those rulings, in the absence of a specific legal provision on the matter, any late payment interest that is set higher than the legal interest rate plus 2 per cent (i.e., > r + 2 per cent) on a loan granted to a consumer should be considered unfair and, as such, null. Once declared null, the Supreme Court has established that the agreed remunerative interest rate for the loan should accrue instead.

In 2019, the LREC established a mandatory amount for the maximum late payment interest for individuals who are contracting a mortgage loan to finance the acquisition of residential housing at the legal interest rate plus 3 per cent (i.e., r +3 per cent). Whether or not this legal limit should be applied extensively to other loans granted to consumers is uncertain, as the scope established by the LREC is limited to the above-mentioned case and the Supreme Court has yet to rule on the matter since the LREC entered into force.

ii Mortgage interest rate floor clauses declared unfair due to a lack of transparency

In recent years, Spanish mortgage loan agreements have often included floor clauses establishing that, if the interest rate falls below a certain threshold, the client must nevertheless continue to pay a minimum interest equal to that threshold. There has been a great deal of discussion as to whether these clauses are unfair to consumers, and, consequently, numerous individuals have initiated judicial proceedings seeking a court ruling declaring floor clauses unfair and unenforceable. In this regard, the Supreme Court's ruling on 9 May 2013[10] declared some floor clauses void (i.e., those establishing a minimum variable interest rate for mortgages) for lack of transparency.

Owing to considerations of financial stability and the public interest, the Supreme Court also obliged financial institutions to pay clients back all overcharged amounts as from May 2013 (the date of the ruling).

Several Spanish courts asked the CJEU whether limiting the effects of the invalidation to cases after the Supreme Court's judgment is compatible with Council Directive 93/13/EEC of 5 April on unfair terms in consumer contracts given that, according to the Directive, such clauses are not binding on consumers. On 21 December 2016,[11] the CJEU ruled against the limitation on retroactivity, concluding that the overcharged amounts had to be returned not only from May 2013, but also from their original start date.

In its ruling on 24 February 2017,[12] the Spanish Supreme Court amended its own criteria to be consistent with the CJEU's judgment of 21 December 2016. The Supreme Court recognised the invalidity of floor clauses with retroactive effects, not only from 9 May 2013 (as initially established), but as from their original start date.

In turn, the Spanish government approved Royal Decree-Law 1/2017 of 20 January on urgent measures for the protection of consumers in floor clause matters, which, among other things, implements measures expediting recovery process for amounts unduly paid by consumers to credit entities as a result of floor clauses contained in loan or credit agreements guaranteed by chattel mortgage; and establishes a preliminary procedure for the out-of-court settlement of disputes that is voluntary for the affected consumer, establishing the obligation of the banking entities to implement this procedure and ensure that consumers who have floor clauses in their loan or credit agreements have been properly informed about their existence.

Royal Decree-Law 1/2017 was expanded upon by Royal Decree 536/2017 of 26 May, the main purpose of which was to create and regulate the monitoring, control and evaluation commission established by Royal Decree-Law 1/2017.

10 Supreme Court ruling of 9 May 2013, available at: www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=6703660&links=2807911991201310000 9&optimize=20130510&publicinterface=true.

11 Judgment of the CJEU of 21 December 2016, joined cases C154/15, C307/15 and C308/15, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=186483&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=561464.

12 Supreme Court ruling of 24 February 2017, available at: www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7946094&lins=%22123%2F2017%22&optimize=20170228&publicinterface=true.

In addition, the Spanish General Council of the Judiciary issued a resolution of its Permanent Commission, dated 25 May 2017, assigning specific courts exclusive jurisdiction over all disputes relating to general conditions included in financing agreements containing *in rem* guarantees involving a borrower who is a natural person.

Several subsequent rulings from the Spanish Supreme Court (including the ruling of 16 October 2017) have confirmed the *de jure* nullity of floor clauses, emphasising the impossibility of parties agreeing to validate those types of clauses, which are automatically voided. However, on 11 April 2018, the Spanish Supreme Court issued a ruling that seemingly accepted the possibility that extrajudicial agreements could be agreed between parties in relation to floor clauses.[13]

On 10 September 2019, the Supreme Court decided to temporarily suspend pending appeals in floor clause matters in light of the CJEU's imminent ruling on the matter. As of 30 September 2019, Spanish banks had returned €2.25 billion to borrowers as reimbursement of excess interest paid on the basis of floor clauses.[14]

iii Acceleration clauses

The Spanish Supreme Court declared in its ruling on 23 December 2015 that mandatory early-repayment clauses in mortgage loans in the event of non-payment of fewer than three instalments were null and unfair. In this regard, in order for Spanish financial entities to initiate mortgage foreclosure proceedings there must be a material breach by the debtor of its payment obligation under the loan agreement and the acceleration event must be registered with the corresponding land registry. Likewise, since 2013, the new ground for challenging foreclosure proceedings consisting of the existence of unfair contract clauses can be raised by the debtor or the judge in the course of the foreclosure proceedings until the creditor effectively repossesses the asset.

iv Mortgage loan reference index (IRPH)

The mortgage loan reference index (IRPH), introduced by Bank of Spain Circular 8/1990, partially repealed by Bank of Spain Circular 5/2012, was marketed in Spain for years as a less volatile alternative to EURIBOR for mortgage loans. In fact, it is estimated that as many as one million mortgage loans exist in Spain – between 10 per cent and 20 per cent of the total number of secured loans. However, litigation has increased in recent years as consumers have claimed that the index lacks transparency.

On 14 December 2017, Supreme Court Ruling 669/2017 confirmed the validity of clauses that establish IRPH as a reference index, concluding that it could not be subject to unfairness control in accordance with Directive 93/13/EEC, owing to IRPH's official nature as an index published by the Bank of Spain. The ruling was controversial and, on 29 January 2018, the CJEU was asked to provide a preliminary ruling on the matter.

13 Supreme Court ruling of 11 April 2018, available at: www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8348440&links=clausula%20suelo%20%22205%2F2018%22&optimize=20180413&publicinterface=true.

14 The most recently available data can be found at http://www.mineco.gob.es/portal/site/mineco/menuitem.32ac44f94b634f76faf2b910026041a0/?vgnextoid=ccbe2d55e0e70610VgnVCM1000001d04140aRCRD.

The CJEU ruling was published on 3 March 2020 and stated as follows:

a the IRPH clause is subject to the control of national courts, which can determine whether or not the clause is 'transparent' and, consequently, whether it should be considered unfair, annulled and, if necessary, replaced by another;

b it is for the corresponding national court to determine whether, in light of the circumstances of each case, the corresponding clause satisfies the requirements of good faith, balance and transparency imposed by Directive 93/13, even if the clause regulates an essential element of the contract;

c the national court's control of transparency must seek to determine whether the corresponding clause 'enables the average consumer to understand how the method of calculating that rate works in practice'. For these purposes, it is not sufficient that the main elements relating to the calculation of the aforementioned interest rate were easily accessible given the publication of the method of calculating the interest rate. As such, the entity should provide borrowers with information on the past evolution of the index in order to allow them to compare the cost that the IRPH clause would entail as compared to other interest-rate calculation formulas (e.g., EURIBOR); and

d if a national court concludes that a clause is unfair, in order to avoid the contract being declared null, which would likely harm more than benefit the consumer as it could trigger the early repayment of the loan, the ruling recognises the possibility of the national court replacing the IRPH with a supplementary reference index; thus, allowing the contractual balance between the parties to be re-established. The replacement of the IRPH by another reference index would give rise to the credit institution's obligation to reimburse the excess that the borrower paid due to the clause in question.

The above criteria entail that consumers could seek the nullity of IRPH-governed clauses in their secured loans and that credit entities could be forced to reimburse the additional costs on a case-by-case basis, which will likely result in additional litigation on the matter. At the time of writing, the Spanish Supreme Court had issued a press release on 21 October 2020 stating that it had deliberated and ruled on four cases regarding the IRPH. Although the rulings have not yet been made public, in its press release, the Supreme Court stated that it had recognised a lack of transparency in the commercialisation of the loans due to a lack of information regarding the evolution of the IRPH in the two years preceding their commercialisation. Nevertheless, the Supreme Court stated that it did not consider this finding as unfair for these cases. A fifth case was also discussed; that ruling was made public on 6 November 2020 and concluded that no unfairness was involved, although the case was different from the others because it related to social housing, for which acquisition financing is subject to specific regulations that differ from the general framework.

v Mortgage-formalisation costs and expenses

Another litigious area involves sharing the costs and expenses generated when constituting a mortgage-backed loan (i.e., essentially the costs associated with the notary public and the registry, the processing agency and applicable taxes).

On 23 January 2019, the Supreme Court established the nullity of contractual clauses imposing an obligation on a consumer to cover all costs and expenses related to the formalisation of the agreement. The Supreme Court held that the effect of the nullity was that the parties had to 'act as if such a clause had never been included in the agreement and, thus, payment of the expenses should be borne by the party to whom it corresponds as established

pursuant to the legal system at the time the contract was signed'. This ruling was confirmed by the CJEU's ruling of 16 July 2020, which held, among others, that once a specific clause has been declared unfair and null, the application of the corresponding provisions of national law governing the matter is appropriate.

vi Other nullified clauses

In its ruling dated 23 December 2015, the Spanish Supreme Court also declared that the following clauses in financing agreements with consumers null and unfair:

a clauses imposing an obligation on the consumer to pay pre-procedural and procedural expenses or legal fees for the creditor's lawyers and legal representatives in the event of a payment default;

b clauses prohibiting the borrower from modifying the use of the building without the creditor's express authorisation; and

c clauses equating the consumer's acceptance of a telephone offer with his or her written signature and of the special terms and conditions of the agreement.

IX RECENT CASES

In 2019, the Bank of Spain's Complaints Department dealt with 45,100 new cases filed by users of financial services; 14,638 were complaints and 30,462 were enquiries. As such, the number of new cases in 2019 decreased by 9.2 per cent in relation to 2018. The top three areas of dispute in 2019 were mortgages (30.5 per cent), deposits (19.5 per cent) and cards (17.9 per cent). As highlighted by the Bank of Spain's 2019 Claim Report,[15] the number of complaints remains highly variable, correlated with certain landmark judicial rulings, even if the overall figures for 2019 reflect the continuous decrease recorded since 2017.

According to the above document, out of the 14,638 complaints, 5,641 (38.53 per cent) were decided by the Complaints Department, with 71.56 per cent of the decisions issued in favour of the claimant and only 28.43 per cent in favour of the credit entity. The data emphasises that credit entities' customer service in settling claims, which, as previously indicated, had initially been filed with the customer care departments of the corresponding credit entities, is inadequate. Finally, the corrections carried out by the corresponding credit entities as a result of decisions issued in favour of the claimant amounted to 73.1 per cent.

X OUTLOOK

Spain's economy is heavily dependent on the uncertainty surrounding the evolution of the pandemic. Moreover, an array of particularly important pre-existing geopolitical matters remain outstanding, such as the negotiations concerning the United Kingdom's exit from the European Union and the trade relationship between the United States and China.

According to the empirical evidence collected by the Bank of Spain to date, the most vulnerable households are those that have made greater use of the moratoria approved by the government. Consequently, in the view of the Bank of Spain, there exists a high risk that, once grace periods end, these households will enter into a situation of credit uncertainty if

15 Bank of Spain's 2019 Claim Report available at: https://www.bde.es/f/webbde/Secciones/Publicaciones/PublicacionesAnuales/MemoriaServicioReclamaciones/19/Documentocompleto.pdf.

the economy does not return to pre-pandemic levels. In this regard, the currently available information reveals that a large number of debtors who took advantage of the legal moratoria (the duration of which was three months) are transforming them upon maturity into moratoria with a longer grace period of up to a year (such as the conventional moratoria).

The ongoing increase in the number of impaired debtors is therefore expected to continue to rise somewhat slowly as a result of both the above-mentioned crisis-mitigation measures and the temporary mismatch between the deterioration of financial conditions and defaults on loans and their classification as impaired.

Appendix 1

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