

THE CONSUMER  
FINANCE LAW  
REVIEW

SEVENTH EDITION

Editors

Rick Fischer, Jeremy Mandell and Calvin Funk

THE LAWREVIEWS

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# PREFACE

Consumer choice for financial products and services continues 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 continue to attract 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 developing increasingly innovative approaches to meet consumers' rapidly evolving demands. Traditional market participants, including banks and non-bank financial service providers, are responding by innovating to improve their product and service offerings 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 ever-increasing rate of innovation in consumer financial services, the changing profile of market participants, and the evolving political landscape give rise to new legal questions or put 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 a number of 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 funded on the bank's balance sheet, or 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 source capital more efficiently. 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 and digital currency 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 towards 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 put more 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 use of a 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 ever-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 continues to raise 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. An ever-growing number of apps and other tools enable consumers to 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 tending 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 the creditworthiness of potential borrowers who might not meet the underwriting criteria of traditional lenders. These models and data may not be as thoroughly tested or as demonstrably statistically sound as the time-tested credit models and data used by traditional lenders. As a result, in addition to evaluating whether use of alternative data adversely 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 protected 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 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 practices 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 both expanding choice for consumers and exciting opportunity for providers of consumer financial services. Accelerating advancements in technology have given consumers in developing markets, as well as unbanked or underbanked 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, Jeremy Mandell and Calvin Funk**

Morrison & Foerster LLP

Washington, DC

January 2023



# SPAIN

*Jaime Pereda and José Félix Velasco*<sup>1</sup>

## I OVERVIEW

Spanish law grants consumers a very high level of statutory protection. In fact, according to Article 51 of the Spanish Constitution, the provision of consumer protection by the public authorities is one of the guiding principles of social and economic policies. In relation to consumer finance, this has been reinforced by specific legislation and consumer-friendly case law.

Broadly speaking, the Spanish consumer finance legal framework is rather fragmented, combining (1) European, national and regional rules, (2) regulations and guidance issued by sectoral supervisory bodies, and (3) case law of the European Court of Justice (ECJ) and the Spanish Supreme Court (TS). Therefore, different rules simultaneously regulate the various aspects of consumer finance rather than simply one all-encompassing text, and this sometimes leads to overlaps and inconsistencies.

In the course of the year under review, the Spanish consumer finance landscape has been particularly affected by deteriorating prospects for economic growth (in line with the international trend) following Russia's invasion of Ukraine in February. Reduced growth, combined with higher inflation and tightening financing conditions, has placed many Spanish households in a situation of increased economic vulnerability. As a result, the authorities' main focus during most of the year has been to mitigate the conflict's impact on household budgets.

As regards the applicable legal framework, the most relevant recent legal developments have derived from (1) the ongoing implementation of Spain's National Recovery and Resilience Plan (NRRP) – approved in 2021 in the wake of the covid-19 pandemic to enable Spain's access to Next Generation EU funds; (2) measures approved in response to Russia's invasion of Ukraine; and (3) new ECJ and TS rulings regarding certain financial products in relation to which litigation has typically arisen over the past years (e.g., revolving credit cards and mortgage loans).

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<sup>1</sup> Jaime Pereda is a partner and José Félix Velasco is an associate at Uría Menéndez Abogados, SLP. The authors would like to thank María de la Esperanza Piñeiro for her assistance in the preparation of this chapter.

## II LEGISLATIVE AND REGULATORY FRAMEWORK

Given the breadth of the applicable legal framework, as outlined above, the following is a non-exhaustive list of the most important applicable pieces of legislation, ranging from those focusing on consumer protection in general to those covering specific aspects of consumer finance.

For brevity, and since they fall outside the scope of this publication, a number of areas have not been covered here, such as the regulation of wholesale banking, investments (including crowdfunding and cryptocurrencies), insurance, taxes and pensions.

### i Legislative framework

#### *General consumer protection*

The following two ordinances, which transpose EU Directive 2011/83/EU<sup>2</sup> on consumer rights and Directive 93/13/EEC<sup>3</sup> on unfair terms in consumer contracts, form the cornerstone of consumer protection in Spain:

- a Royal Legislative Decree 1/2007 of 16 November 2007, which approves the revised text of the general consumer protection law (the Consumer Protection Law); and
- b Law 7/1998 of 13 April 1998 on general terms and conditions.

#### *Financial consumer protection*

Consumer finance is heavily regulated in Spain. Although lending to consumers is not in itself a reserved activity, various rules and regulations provide an applicable framework for the protection of consumers. The main ones are listed below:

- a On consumer credit:
  - Law 16/2011 of 24 June 2011 on credit agreements for consumers (LCAC), transposing Directive 2008/48/EC<sup>4</sup> on credit agreements for consumers (currently under review); and
  - Law 28/1998 of 13 July 1998 on instalment sales of movable assets.
- b On mortgage credit:
  - Law 5/2019 of 15 March 2019 on real estate credit (LREC), which partially transposed Directive 2014/17/EU<sup>5</sup> on credit agreements for consumers relating to residential immovable property; and
  - Law 2/1994 of 30 March 1994 on the subrogation and novation of mortgage loans. Additionally, Law 2/2009 of 31 March 2009 regulates certain aspects of secured lending (i.e., any mortgage loans granted to consumers outside the scope of the LREC), as well as unsecured lending (e.g., brokering of unsecured loans) for lenders that are not credit entities.

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2 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

4 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.

5 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.

c On financial service marketing:

- Law 22/2007 of 11 July 2007 on distance marketing of financial services for consumers transposed Directive 2002/65/EC<sup>6</sup> (to be repealed). Other significant legislation includes Order EHA/2899/2011 of the Ministry of Economy, and Bank of Spain Circular 5/2012 of 27 June 2012.

Aside from these, numerous provisions impacting on the protection of financial consumers transpose the EU directives CRD IV,<sup>7</sup> MiFID II<sup>8</sup> and PSD2<sup>9</sup> (currently under review). Lastly, the legislative framework applicable in the area of consumer protection also comprises a number of pieces of legislation whose aim is to reform the financial system and to target certain financially vulnerable groups.

## ii Regulatory framework

At the regulatory level, the Bank of Spain (BoS), the Spanish Securities Market Commission (CNMV) and the Directorate-General for Insurance and Pension Funds (DGIPF) are mainly in charge of implementing and enforcing consumer finance regulations in Spain with regard respectively to (1) credit entities (i.e., banks, savings banks, credit unions and the state-owned development bank, Instituto de Crédito Oficial), payment services institutions and e-money institutions; (2) investment services firms, as well as fund management firms and funds; and (3) insurance companies. To carry out these functions, these institutions (together with the Ministry of Economy and Digital Transformation) have legislative powers and may issue relevant circulars and guidance.

## iii Recent developments

One of the most significant recent developments in the area of consumer finance was the amendment in 2022 of the Consumer Protection Law by Law 4/2022 of 25 February 2022 on consumer protection in situations of social and economic vulnerability. The main amendment consisted in introducing the concept of ‘vulnerable consumers’<sup>10</sup> into the Consumer Protection Law.

Although certain legislation already covered some vulnerable consumer groups, its scope was limited (e.g., granting relief to vulnerable debtors of mortgage loans). In contrast, the legal concept is now much wider as it has a dynamic definition; this new concept of vulnerability under Law 4/2022 clarifies that each consumer’s specific circumstances are to be

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6 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.

7 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

8 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

9 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November on payment services in the internal market.

10 This concept, which derives from the European Commission’s 2020-2025 New Consumer Agenda, had already been introduced by Royal Decree-Law 1/2021 of 19 January on the protection of consumers and users in situations of social and economic vulnerability (revoked by Law 4/2022).

assessed in the context of the particular consumer relationship (i.e., on a case-by-case basis). The additional protections to be afforded to vulnerable consumers will need to be developed further in law and through case law.

### III PAYMENTS

#### i Overview

Given that PSD2 and the Payment Accounts Directive,<sup>11</sup> which form the core of the European payment framework, have already been transposed, recent regulatory developments in the Spanish payments sector stem from its accelerated digital transformation. New participants, new business models and new distribution channels have emerged in the context of this enhanced digital environment, putting the conventional legal framework under increasing strain as it seeks to adapt progressively to the fast-paced technological changes following numerous regulatory developments and initiatives at EU level. To guide this transformation and cement its position as one of the EU digital leaders, Spain is implementing a number of legislative reforms and allocating significant resources to this area.<sup>12</sup> Many of the reforms derive directly from the different initiatives co-existing at EU level, such as the digital finance strategy.

As to payment methods, Spain still ranks as one of the EU countries with the highest amounts of cash payments.<sup>13</sup> Other popular payment methods in Spain include both credit cards and (the preferred) debit cards, bank transfers (including Bizum, a mobile instant person-to-person payment solution launched in 2016 by Spanish banks in response to the rising challenges posed by new entrants in the payments market) and digital wallets (e.g., PayPal, Samsung Pay, Google Pay).

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11 Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

12 Although Spain ranks seventh among the 27 EU Member States in the 2022 edition of the European Commission's Digital Economy and Society Index (DESI), the European Commission's most recent report on the country underlines how much remains to be done. In this regard, the authorities have devoted significant resources (28.2 per cent) from Spain's National Recovery and Resilience Plan (NRRP) to digital transformation, making it one of Europe's most ambitious recovery plans in this sphere. The full DESI report is available at <https://digital-strategy.ec.europa.eu/en/policies/desi-spain>.

13 According to a December 2020 study by the European Central Bank (ECB), 83 per cent of all payments in Spain were made in cash. The full report is available at [https://www.ecb.europa.eu/pub/pdf/other/ecb\\_spacereport202012-bb2038bbb6.en.pdf](https://www.ecb.europa.eu/pub/pdf/other/ecb_spacereport202012-bb2038bbb6.en.pdf).

## ii Recent developments

Enhanced efforts to reduce corruption<sup>14</sup> and consumer preferences in the context of post-pandemic social distancing are some of the factors that have contributed to the gradual demise of cash. With the number of cash automated teller machines (ATMs) gradually decreasing amid increased digitalisation (as exemplified by the continuous increase in the number of point-of-sale terminals, both physical and digital, and mobile payments<sup>15</sup>), matters such as the digital divide and financial exclusion have persistently made the headlines of late.<sup>16</sup>

As part of the strategy to tackle the digital divide, Law 4/2022 mandates the authorities to enact legislation aimed at reducing unequal access in the payments sector, especially among the elderly (who are considered vulnerable consumers under this Law).

As regards financial exclusion, the state-owned postal service company, Correos, reached an agreement with the major unions in the banking sector in July 2022 to make cash available to citizens living in scarcely populated areas where ATMs are no longer available.<sup>17</sup>

Other recent payment-related developments include the progressive implementation of the digital finance strategy at EU level. The recent entry into force of the Digital Services Package is notable in this context,<sup>18</sup> although it may yet be some time before this is fully effective.

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14 Law 11/2021 of 9 July on measures to prevent and combat tax fraud, transposing Council Directive (EU) 2016/1164 of 12 July 2016, established a limit of €1,000 for cash payments in transactions in which at least one of the parties is a company or professional. Although the ECB concluded on 15 March 2022 that this limit was disproportionately low, the government has publicly defended its advantages. The full opinion of the ECB is available at <https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:52022AB0009&from=EN#:text=ECB-PUBLIC,-6&text=blanqueo%20de%20capitales%20o%20la,ser%20de%2010%20000%20EUR.>

15 According to the data BoS collected, available at: <https://www.bde.es/f/webbde/SPA/sispago/ficheros/es/estadisticas.pdf>.

16 A June 2022 study carried out at the behest of the three major banking unions in Spain reflected that since 2008, the number of local bank branches in Spain has decreased by 58 per cent, with automatic teller machines decreasing by 23 per cent in the same period. The full study is available (in Spanish) at: <https://s1.aebanca.es/wp-content/uploads/2022/07/informe-sobre-la-inclusion-financiera-en-espana-290622.pdf>.

17 This measure joins others implemented in this regard in recent years. For example, Correos was already rendering this service with six Spanish banks (Banco Santander, Ibercaja, Evo Banco, Banco Mediolanum, Triodos Bank and Bancofar). Additionally, certain banks have also started rendering services in these scarcely populated areas through financial agents, and by operating 'mobile offices' (i.e., branch employees who drive around offering individuals access to basic banking services in scarcely populated areas that have no banks with a permanent physical presence).

18 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services.

## IV DEPOSIT ACCOUNTS AND OVERDRAFTS

### i Overview

#### *Deposit accounts and protection*

In Spain, Law 10/2014 of 26 June 2014 on the regulation, supervision and solvency of credit institutions reserves to those credit institutions authorised under the Law the taking of repayable funds from the general public, for any purpose whatsoever, in the form of deposits, loans, temporary assignments of financial assets or any other similar activities.

On deposit protection, Royal Decree-Law 16/2011 of 14 October and Royal Decree 2606/1996 of 20 December transposed Directive 2014/49/EU on deposit guarantee schemes.<sup>19</sup> Pursuant to this legislation, the Deposit Guarantee Fund of Credit Institutions (DGF) was created and developed to guarantee recovery of up to €100,000 per depositor in Spain should a member entity be unable to meet its payment obligations. Membership is mandatory for (1) all Spanish credit entities registered with the BoS Special Registry, and (2) the branches of those credit entities registered in a country outside the EU if the branch's deposits are not covered by a guarantee system or are insufficiently covered in their country of origin. Membership of branches of credit entities registered in an EU Member State is voluntary given that deposits and securities are already covered in the country of origin.

#### *Overdrafts*

Banks in Spain can voluntarily decide whether to grant overdrafts to clients, who may opt out by delivering written notice. Overdrafts are regulated in the LCAC (but only those lasting over a month), Order EHA/2899/2011 and Circular 5/2012. For consumers, the LCAC limits the cost of overdrafts such that the combined amount of the overdraft interest rate and any overdraft fees may not exceed an annual effective rate higher than 2.5 times the legal interest rate of money in Spain. This limit was set at 7.5 per cent for 2022.

### ii Recent developments

On 13 March 2020, the TS ruled for the first time on the validity of an overdraft commission on a checking account, concluding that the amount charged to the customer was consistent with the above-mentioned legal requirements. In particular, throughout its ruling, the TS distinguished between interest on arrears (which does not necessarily accrue once there is an overdraft, as the TS recognised this as being a new credit granted by the bank, for which the client is not automatically in default) and overdraft interest rates or any overdraft fees the lender charges to recover the amounts owed.

## V REVOLVING CREDIT

### i Overview

Revolving credit is a type of credit for which repayment is made in periodic instalments that can be a fixed amount or a percentage of the outstanding debt. Once the initial amount has been repaid, that amount becomes available anew. Delaying repayment over a longer period than other forms of credit (e.g., credit card users tend to pay off their accumulated

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<sup>19</sup> Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast).

expenditure by the end of the month), together with the lack of a corresponding increase in any related guarantees, entails that interest rates for this type of credit are far higher than most other forms of consumer credit. As such, there can be instances where the amount of interest accruing equals or even surpasses the amount the borrower is repaying, which means that the credit amount will never decrease but, rather, will stay the same or increase. This type of credit is often associated with revolving credit cards, through which the borrower can make payments against its line of credit, and which have been among the most litigated products in Spain over the past few years.

This litigation has been on the rise particularly since 25 November 2015, when the TS declared that a 24.6 per cent interest rate on a revolving credit granted to a consumer by a Spanish entity was null and void in accordance with the Usury Law of 23 July 1908 (the Usury Law). The TS handed down another landmark ruling on 4 March 2020, again applying the Usury Law to establish that a 26.82 per cent interest rate on a revolving credit was null and void. Unfortunately, in both rulings the TS failed to determine clearly the parameters that lower courts could use to ascertain whether a rate is usurious, and so the number of related lawsuits surged.<sup>20</sup>

For an interest rate to be declared null and void in accordance with the Usury Law, it must be (1) 'notoriously higher than the average rate for money' and (2) 'manifestly disproportionate to the circumstances of the case', provided that (3) 'there is reason to believe that the borrower has accepted it because of their distressed situation, inexperience or limited mental faculties' (i.e., a subjective element). The TS's reasoning in these two rulings underlined the importance of the first two requirements, and sidelined the third. Regrettably, many lower courts have struggled to determine whether the rates examined in each case are usurious or not (i.e., whether rates applicable to revolving credits comply with both requirements). 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 can be explained by taking into account the repayment conditions under which the credit is granted and, therefore, that these credit rates can only be judged against the revolving credit-specific interest rates in place at the time the credit was granted.

Since 2010, the BoS has published monthly the market-average ordinary interest rate of outstanding revolving credit cards, which many courts have used as the comparable average rate of money for revolving credits. However, in its 4 March 2020 ruling, the TS clarified that the interest rate that should be compared with the average rate of money is not the ordinary rate of a revolving credit but, rather, its annual percentage rate of charge (APR), incorporating the ordinary interest and other related fees or expenses. However, the BoS does not publish the market-average APR for revolving credit, which has led many lower courts to compare the APR on each revolving credit with available data for other types of consumer lending products (although these may have lower average rates). The result is that the related litigation has not decreased over time.

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20 For illustrative purposes, data provided by the BoS indicates that the number of complaints filed by customers in relation to these products grew by 212 per cent in 2020 compared with 2019: <https://www.bde.es/ff/webbde/Secciones/Publicaciones/PublicacionesAnuales/MemoriaServicioReclamaciones/20/MSR2020.pdf>.

## ii Recent developments

In terms of recent case law, the TS has handed down several new rulings on this matter. Of particular interest this year were those of 4 May (No. 367/2022) and 4 October (No. 3503/2022). In these rulings, the TS not only reiterated its previous criteria regarding the comparable average rate of money for revolving credits but also shed new light on the matter, referring to reloadable cards and deferred payment cards as the products most similar to revolving credit cards. Although the BoS did not publish data for revolving credit cards before 2010, it did publish data for both of these products, and for which the average APR from 1999 to 2009 remained between 23 per cent and 26 per cent. Consequently, the general interpretation has been that a 26 per cent cap has been set for the APR of revolving credit card contracts executed with consumers prior to 2010. On a less positive note, the rulings do not clarify the parameters to be used after that date, nor do they reintroduce the above-mentioned subjective element that the Usury Law requires for a rate to be considered usurious, both of which could help reduce litigation in this area.

At the legislative level, following the approval of Order ETD/699/2020 of 24 July 2020 by the Ministry of Economy in an effort to contain litigiousness in the area, the BoS published Circular 3/2022 of 30 March 2022 modifying, among others, Circular 5/2012. This amendment develops certain transparency requirements for BoS-supervised entities for the compliant marketing of revolving credits, both in the pre-contractual phase and during the term of the contract.

## VI INSTALMENT CREDIT

### i Overview

#### *Mortgages*

The conditions of mortgage loans vary depending on the type of asset to be mortgaged, including main and secondary residences. In general, financial institutions offer more favourable terms for main residences. The maximum permitted term is 30 years and the loan-to-value ratio can only exceed 80 per cent in specific exceptional cases.

Virtually all mortgages in Spain are amortising mortgages with variable rates with a fixed spread over the 12-month Euribor. While fixed-rate mortgages have become increasingly popular in recent years, mounting interest rates could see this trend reverse, with clients opting for other options (such as mortgages combining periods of fixed and variable rates). In 2019, the LREC established a mandatory amount for the maximum default interest for individuals who are taking out 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 this legal limit should apply 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 TS has not issued a ruling on the matter since the LREC entered into force.

In the event of default, asset repossession 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 (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 the variability of the amounts 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.

According to case law, in the absence of a specific legal provision on the matter, any default interest on a loan granted to a consumer that is set higher than the legal interest rate plus 2 per cent (i.e.,  $>r + 2$  per cent) should be considered unfair and, as such, null and void. In the event that a default interest rate is declared null, the TS has established that the agreed remunerative interest rate for the loan should accrue instead.

#### **ii Recent developments**

The main recent developments in this area relate to the Spanish authorities' reaction to the progressive measures known as 'quantitative tightening' adopted by the European Central Bank, together with other G20 central banks, and which aim to reduce rising inflation rates across the eurozone. Consequently, Euribor and other interest rates have surged for most of the past year, going from negative values at the start of the year to values of more than 2.5 per cent at the start of Q3.

Given that socioeconomic measures approved in the wake of the covid-19 pandemic to support certain financially vulnerable groups have already reached their end date, and considering the sharp increase in interest rates, the government has approved Royal Decree-Law 19/2022 of 22 November 2022. This rule reinforces current relief measures for low-income families, differentiating between those at a greater or lower risk of vulnerability. It also amends the LREC and Law 2/1994 to minimise the cost of early repayments of mortgage loans, as well as providing for the conversion of variable-rate to fixed-rate mortgages. Royal Decree-Law 19/2022 also targets financial education, mandating the BoS to publish a guide of available legal tools for vulnerable borrowers with mortgage loans.

## **VII OTHER AREAS**

### **Complaint handling**

#### ***Overview***

The BoS, the CNMV and the DGIPF have complaint departments to which consumers of financial services may submit claims if they do not agree with answers received from the relevant regulated entity's customer service department or if they receive no answer at all within a month. While complaint resolutions issued by the regulators' customer service departments are not binding, the institutions concerned tend to comply with them.

Consumers may also state their complaints and submit suggestions through Spain's regional consumer associations. In line with the structure of 17 regional governments, Spain has 17 distinct consumer-protection bodies (one per autonomous region). Some municipalities and cities have also created their own bodies.<sup>21</sup>

### ***Recent developments***

Much changed in 2022. First, on 31 May, the Council of Ministers approved a preliminary draft law on the customer care departments of regulated entities in the financial sector, which amends the legal framework applicable to these departments, currently contained in Law 44/2002 of 22 November (on measures to reform the financial system) and Order ECO/734/2004 of 11 March. This draft law is currently undergoing parliamentary scrutiny and is expected to be passed before year end.

In addition, with regard to the complaint departments of regulators (i.e., the BoS, the CNMV and the DGIPF), on 22 November 2022, the Council of Ministers approved a draft law creating the Independent Authority for the Defence of Financial Customers (IADFC), which has already been submitted for parliamentary scrutiny. Among a number of changes, the current draft of this law proposes to unify the complaint departments of the three supervisory bodies in a single institution. It also envisages that the IADFC's complaint resolutions will be binding for matters involving less than €20,000, thus reinforcing enforceability measures by allowing for the imposition of sanctions on non-compliant entities.

## **VIII UNFAIR PRACTICES**

In addition to the litigation on revolving credit covered in Section V.ii, the TS and the ECJ have handed down a number of landmark rulings on certain clauses in consumer credit and mortgage loans. Below is a non-exhaustive list of the most litigated clauses.

### **i Floor clauses in mortgage loans**

In the past, Spanish mortgage loan agreements typically included floor clauses (i.e., a clause 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). Actions related to these clauses surged in the aftermath of the 2008 crisis, with litigation increasing and decreasing over time.

This surge in litigation first peaked as a result of the 9 May 2013 ruling by the TS, which declared certain floor clauses void for lack of transparency. However, in this ruling the TS concluded that financial institutions should only pay back all amounts that had been overcharged since 9 May 2013 (i.e., since the date of the ruling). A second wave started after the ECJ ruled on 21 December 2016 against the above-mentioned limitation on retroactivity, concluding that the overcharged amounts to be returned should be backdated not simply to May 2013 but instead to their original start date. In line with this ruling, the TS amended its prior criteria to be consistent with the ECJ judgment of 21 December 2016 and, in its 24 February 2017 ruling, recognised that floor clauses were retroactively invalid (i.e., not merely from 9 May 2013, as previously established, but, rather, from their original start date). These rulings led to a new increase in mass litigation. Another connected area of litigation

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21 A list of Spain's various consumer bodies is available at [http://www.cec-msssi.es/CEC/web/noticias/Organismos\\_de\\_consumo.htm](http://www.cec-msssi.es/CEC/web/noticias/Organismos_de_consumo.htm).

concerns the validity of extrajudicial agreements between parties in relation to floor clauses, use of which sought to prevent further litigation on a matter. In this regard, both the ECJ and the TS have accepted the validity of such agreements.

Although the LREC prohibited floor clauses in mortgage loans offered to consumers, this type of clause is still a source of a great deal of litigation connected with loans executed before the LREC entered into force (i.e., 2019).

## **ii Acceleration clauses in mortgage loans**

In its ruling of 23 December 2015, the TS declared mandatory early repayment clauses in mortgage loans to be null and unfair if fewer than three instalments were unpaid. In this regard, for Spanish financial entities to initiate mortgage foreclosure proceedings, the debtor must have materially breached its payment obligation under the loan agreement, and the acceleration event must be registered with the corresponding land registry. In addition, since 2013, the debtor (or the judge during the course of the foreclosure proceedings) can use foreclosure challenge proceedings based on an unfair contractual clause, up until the point at which the creditor effectively repossesses the asset.

## **iii Mortgage loan reference index**

The mortgage loan reference index (IRPH), introduced by BoS Circular 8/1990 (partially repealed by 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 in Spain are indexed to the IRPH, namely between 10 per cent and 20 per cent of the total number of secured loans. Litigation began to increase because Euribor-linked mortgage loans saw interest payments decrease as the Euribor dropped from Q3 2008 onwards, while those using IRPH did not, with consumers claiming that the index lacked transparency.

Although this topic is still highly contentious today, both the TS and the ECJ have handed down numerous rulings on the matter in the past. In this regard, the ECJ has confirmed that the IRPH clause is subject to the control of national courts, which can determine whether the clause is 'transparent' and, consequently, whether it should be considered unfair, annulled and, if necessary, replaced by another. For its part, the TS has insisted that although there may have been instances in which there has been a lack of transparency, this lack does not in itself render a clause null; instead it merely renders the clause content subject to review and modification. Additionally, the TS has reiterated that the IRPH was an official index published by the BoS and even used as a reference index for financing social housing. The ECJ has recently been asked to rule on the subject again, by at least two lower Spanish courts that have found the arguments of the TS in this matter to be contradictory.

## **iv Mortgage formalisation costs and expenses**

Another area that has been heavily litigated in the past concerns how mortgage-formalisation costs and expenses (i.e., essentially formalisation, registration and processing expenses and applicable taxes) are to be distributed between the lender and the borrower.

On 23 January 2019, the TS declared null and void any clauses that forced consumers to bear all the mortgage-formalisation costs and expenses. The TS held that this declaration of nullity meant such clauses would be considered 'never to have 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'.

The ECJ confirmed this position in its ruling of 16 July 2020, which held, among other things, that once a specific clause has been declared unfair and null, national law provisions on the matter apply.

The LREC has since regulated banking fees, stipulating which are valid and which borrowers should pay.

#### **v Other nullified clauses**

In its ruling dated 23 December 2015, the TS also declared null and void the following clauses in financing agreements with consumers: (1) those that force the consumer to pay pre-procedural and procedural expenses or legal fees for the creditor's lawyers and legal representatives if the consumer defaults on any payments; (2) those that prohibit the borrower from modifying a building's permitted use without the creditor's express authorisation; and (3) those equating the consumer's acceptance of a telephone offer with his or her written signature and with acceptance of the special terms and conditions of the agreement.

### **IX RECENT CASES**

See the previous sections for information on litigation and cases of particular relevance to consumer finance in Spain.

### **X OUTLOOK**

The outlook for the coming year is very uncertain. The BoS has observed that savings consumers made during the pandemic lockdown may have been depleted faster than expected as a consequence of the abnormally high levels of inflation,<sup>22</sup> putting certain groups in an even more vulnerable situation. While this could lead to an increase in the demand for credit, the gradual normalisation of monetary policy experienced in 2022 has seen credit conditions tightening. In turn, and while uncertainty persists, this has resulted in decreases in both demand for credit and its availability. On the lender side, credit entities have already started to take non-performing assets off their balance sheets in anticipation of a potential surge in credit defaults in 2023.

At the regulatory level, 2023 is expected to bring significant changes to the current legal framework. The following are some of the most important.

The most significant change in this area will follow the expected adoption in 2023 of the Proposal for a Directive on Consumer Credits, which is currently still under review by EU lawmakers. Although it will not take effect immediately, the significant changes envisaged in the Proposal will certainly have a profound impact on this area, modernising and harmonising the consumer finance legal framework. On a related topic, more harmonisation of the consumer finance area could be on the way once the European Commission's proposal to repeal Directive 2002/65/EC enters into force.

In 2023, EU lawmakers are expected to examine and discuss one of the most important recent developments in the payments sector – the European Commission's proposal to regulate instant credit transfers in euros, published on 26 October 2022. Progress is also expected to

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22 According to the data collected by the BoS, available at: <https://www.bde.es/f/webbde/SES/Secciones/Publicaciones/InformesBoletinesRevistas/ArticulosAnaliticos/22/T3/Files/be2203-art19e.pdf>.

be made in this area (1) by gradually developing the SEPA payment account access scheme, in the context of reviewing PSD2, and (2) through the much-discussed European Commission legislative proposal on a digital euro for the EU, scheduled to be published in Q2 2023.

Finally, on litigation, the deadline for Member States to transpose Directive (EU) 2020/1828 on consumer class actions<sup>23</sup> is 25 December 2022, so Spanish authorities are now expected to approve its transposition in 2023.

In addition, and as explained above, various pieces of legislation are currently under review or about to be approved, at both national and EU level. Furthermore, there will surely be new case law on many of the contentious matters referred to in this chapter.

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23 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

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