

1 Chapter 2 1
2
3 A Legal Perspective of the Origin and the 2
4 Globalization of the Current Financial Crisis 3
5 and the Resulting Reforms in Spain¹ 4
6
7 5
8 6
9 7
10 8

9 Sergio Nasarre-Aznar 9
10 10
11 11
12 12
13 13

14 **Introduction** 14
15 15

16 This chapter examines the legal factors which were central to the US subprime crisis, 16
17 the international credit crunch and subsequent global economic developments. 17
18 The negative impact of the international financial crisis on the Spanish housing 18
19 system is considered, as well as the limited nature of reforms in the Spanish 19
20 mortgage and housing markets. It is suggested that deficient regulation in the US 20
21 mortgage securitization process has been the catalyst for the global crisis; however, 21
22 its impact has generated significant changes in national mortgage and housing 22
23 legislation in the affected countries. Some innovative developments are examined, 23
24 such as increased protection for mortgage consumers and an intermediate tenures 24
25 project in Catalonia. 25
26 26
27 27

28 **From the US Subprime Crisis to the International Credit Crunch and its** 28
29 **Legal Context** 29
30 30

31 *Background to the Crisis* 31
32 32

33 The devastating impact of the US mortgage crisis, involving massive mortgage 33
34 defaults, across the world was fundamentally due to international 'mortgage 34
35 securitization' (see Figure 2.1). This is a financial technique to 'transform' mortgages 35
36 into securities. It provides funding for a mortgage originator's lending business 36
37 through the issue of mortgage-backed securities (MBSs) by a special purpose 37
38 vehicle (SPV). In itself, it is not a detrimental process, since it allows lenders to 38
39 access greater levels of funding. However, once the original mortgage, which is the 39
40 collateral base of the security, is defective, the whole process becomes contaminated. 40
41 41

42 1 This work has been possible thanks to the 'Las tenencias intermedias para facilitar el 42
43 acceso a la vivienda' research project (Spanish Ministry of Economy and Competitiveness, 43
44 DER 2012-31409). 44

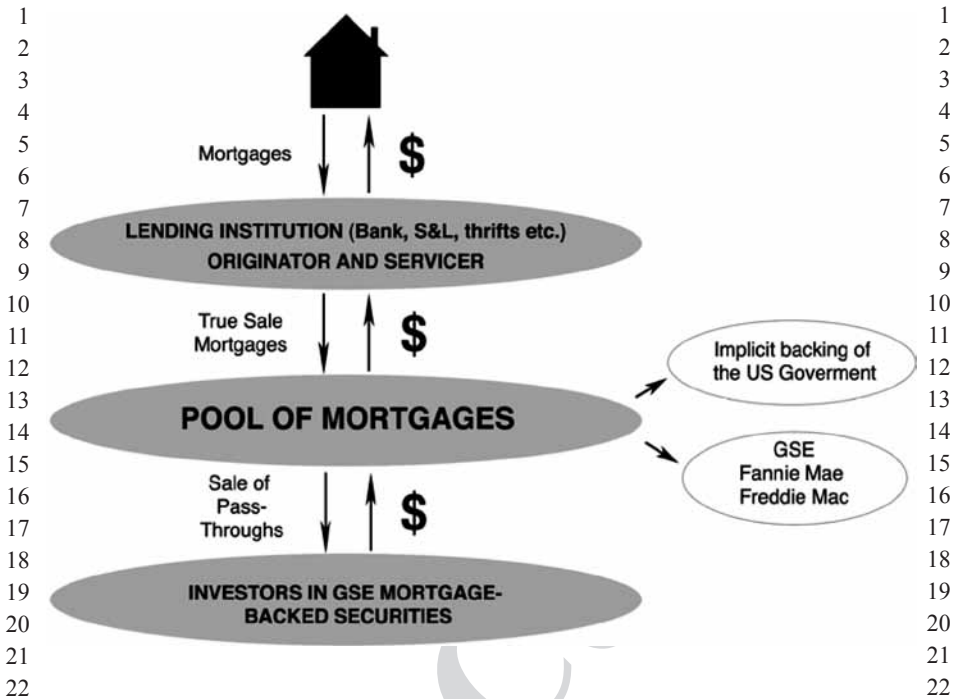


Figure 2.1 Standard US mortgage securitization.

Source: own elaboration

The degradation of the quality of securitized mortgages in the US arose from two main sources.² First, the general policy of maximizing home-ownership at any cost, even to those households that clearly did not have the resources to repay mortgage loans, created an unsustainable financial subsystem. This situation arose due to borrowers' limited economic capabilities and/or because of the conditions of the mortgages themselves, such as a high loan-to-value ratio (LTV) coupled with a high interest rate. Both Republican and Democrat administrations promoted home-ownership as part of the American Dream. As far back as 1994, President Clinton promoted wider home-ownership: 'More Americans should own their own homes, for reasons that are economic and tangible, and reasons

² There are others which are also important but which cannot be addressed here, such as the insufficient backing given by the US government to the agencies that issued the MBSs, the lack of a proper body of rules for MBS business in the US and the lack of liability for losses of rating agencies in that jurisdiction. See Sergio Nasarre-Aznar, *Securitisation and Mortgage Bonds. Legal Aspects and Harmonisation in Europe* (Saffron Walden, Gostick Hall 2004) 39. This book also discusses the weaknesses of some international mortgage securitization systems.

1 that are emotional and intangible, but go to the heart of what it means to harbour, 1
 2 to nourish, to expand the American Dream'.³ President George W. Bush endorsed 2
 3 this approach and encouraged many ethnic groups to become home-owners.⁴ 3
 4 Of course, this generalization of home-ownership necessitated a concurrent 4
 5 expansion of mortgage lending. A lowering of standards was also required in 5
 6 mortgage underwriting, and thus a reduction of quality of mortgages. There was a 6
 7 corresponding increase in the default risk of mortgages, which could not be borne 7
 8 by most lenders. For this reason, government-sponsored enterprises (GSEs),⁵ such 8
 9 as Fannie Mae, Freddie Mac and Ginnie Mae, were authorized to buy what were 9
 10 increasingly less sustainable mortgages from lenders in order to transform them 10
 11 into securities, thus generalizing, externalizing and internationalizing this default 11
 12 risk. This process is explained in more detail below. 12

13 Second, the moral hazard or conflict of interest inherent in the US model of 13
 14 mortgage securitization was hugely significant. It allowed lenders to pass on any 14
 15 default risk in the repayment of the mortgages through to MBS investors, many 15
 16 of whom were European, international banks and other financial institutions.⁶ 16
 17 These institutional investors almost blindly relied on international rating agencies' 17
 18 assessments and the theoretical/implicit backing of the US government to their 18
 19

20
 21
 22 3 Speech of Bill Clinton, 42nd President of the United States of America, 'National 22
 23 Partners in Homeownership', before the Association of Realtors (Washington DC, 1994). 23

24 4 See the American Dream Downpayment Initiative, which was signed into law 24
 25 on 16 December 2003 and provided 'downpayment, closing costs, and rehabilitation 25
 26 assistance to eligible individuals' (for more details, see [http://www.hud.gov/offices/cpd/](http://www.hud.gov/offices/cpd/affordablehousing/programs/home/addi/) 26
 27 [affordablehousing/programs/home/addi/](http://www.hud.gov/offices/cpd/affordablehousing/programs/home/addi/) accessed 29 October 2012. 27

28 5 Mortgage GSEs were created by the US Congress with the aim of improving the 28
 29 flow of credit into certain housing markets while reducing the cost of that same credit. 29

30 6 See H Blommestein, A Keskinler and C Lucas, 'The Outlook for the Securitisation 30
 31 Market' (2011) 1 OECD Journal: Financial Market Trends 2 at 3. The authors stated 31
 32 that 'regulation and underwriting standards were seen to be significantly more robust in 32
 33 Europe', that 'there's no doubt that the securitisation asset class in general was tarnished 33
 34 by the fallout from the US subprime crisis' and that 'from mid-2007 to the end of 2010, 34
 35 only 0.95% of all European structured-finance issues defaulted, compared to 7.7% of 35
 36 US structured-finance issues'. See also J Cox, J Faucette and C Valenzuela, 'Why Did 36
 37 the Credit Crisis Spread to Global Markets?' (2010), available at [http://blogs.law.uiowa.](http://blogs.law.uiowa.edu/ebook/uicifd-ebook/part-5-ii-why-did-credit-crisis-spread-global-markets) 37
 38 [edu/ebook/uicifd-ebook/part-5-ii-why-did-credit-crisis-spread-global-markets](http://blogs.law.uiowa.edu/ebook/uicifd-ebook/part-5-ii-why-did-credit-crisis-spread-global-markets), pt 5, p 3 38
 39 and 17, which says that 'European banks became involved when they invested in AAA- 39
 40 rated asset-backed securities (i.e. subprime mortgage-backed securities) produced in the 40
 41 United States', that 'Because European banks had heavily invested in U.S.-produced MBS, 41
 42 they were greatly exposed to those assets once they became toxic. By February 2009, 42
 43 European banks, specifically banks in the United Kingdom, had seventy-five percent as 43
 44 much exposure to toxic assets as U.S. banks' and that 'unfortunately, a "perfect storm" of 44
 45 regulatory breakdowns allowed what initially was a mortgage crisis in the United States to 45
 46 morph into a global financial crisis via securitization'. 46

1 GSEs.⁷ We now know that among these securitized mortgages were those created
2 through the ‘predatory lending’ of subprime mortgages.⁸

3 Subprime mortgages are those that do not fulfil the quality standards for
4 repayment for one reason or another. In the US, a variety of these were created
5 in unusual circumstances. These included situations where the LTV surpassed
6 80 per cent or because these were second mortgages (often described as ‘piggy-
7 back mortgages’)⁹ that were charged on the remaining 20 per cent LTV after
8 an existing mortgage for the first 80 per cent of LTV. Mass default on the
9 mortgages arose when housing prices dropped as mortgagors could not refinance
10 their debts. Even in non-recourse states, mortgagors voluntarily defaulted once
11 their mortgage debt was more than the value of their property.¹⁰ This impacted
12 negatively on MBSs and had an even more detrimental impact on those securities
13 known as ‘collateralized debt obligations’ (CDOs),¹¹ where the true risk was
14 almost impossible to properly assess, due to their financial complexity and the
15 remoteness of the underlying collateral. The result was the holding of ‘toxic
16 assets by many international financial institutions’.¹² Other structural conflicts
17 of interest in the standard US mortgage securitization process included the lack
18 of incentive for the originator to reveal the true value of a pool of mortgages
19 when they are transferred to the arranger of the issue, and there may indeed

20
21 7 See the explicit assertions of N Eric Weiss, ‘Fannie Mae’s and Freddie Mac’s
22 Financial Problems’, Congressional Research Service, CRS Report for Congress (10 August
23 2012) 17 <http://www.fas.org/sgp/crs/misc/RL34661.pdf> accessed 4 October 2012: ‘Fannie
24 Mae and Freddie Mac are GSEs whose charters limit them to buying single family and
25 multifamily home mortgages originated by others. This lack of diversification makes them
26 more exposed to housing and mortgage market problems than other financial institutions
27 such as commercial banks that have other lines of business. The GSEs’ charters give them
28 a special relationship with the federal government, sometimes called an implicit guarantee,
29 which has allowed them to borrow at interest rates only slightly above those paid by the
30 federal government’.

31 8 See “‘Malicious Mortgage’ Nets 400 Defendants’ (19 July 2008), https://www.fbi.gov/news/stories/2008/june/malicious_mortgage061908) accessed 4 October 2012, which
32 relates to mortgage fraud schemes that involved 400 defendants.

33 9 See Jack Guttenberg, ‘Mortgage Crisis Drives Home Value of PMI’ *InMan News*
34 (8 April 2008) [http://www.inman.com/buyers-sellers/columnists/jackguttentag/mortgage-](http://www.inman.com/buyers-sellers/columnists/jackguttentag/mortgage-crisis-drives-home-value-pmi)
35 [crisis-drives-home-value-pmi](http://www.inman.com/buyers-sellers/columnists/jackguttentag/mortgage-crisis-drives-home-value-pmi) accessed 4 October 2012.

36 10 Todd J Zywicki and Joseph D Adamson, ‘The Law and Economics of Subprime
37 Lending’ (2009) 80(1) *University of Colorado Law Review* 31 and 32. See also Andra C
38 Ghent and M Kudlyak, ‘Recourse and Residential Mortgage Default: Evidence from US
39 States’, Federal Reserve Bank of Richmond Working Paper No 09-10R (2011) 29.

40 11 CDOs are asset-backed securities issued over collections of MBSs, i.e., ‘re-securitized’
41 mortgages.

42 12 This ‘toxicity’ meant that, even if the mortgages had not defaulted, the market
43 for them had now disappeared, their value then dropped and the holders (the banks) were
44 obliged to correct their books to show this ‘write-down’ loss in order to reflect the new real
45 market value of the assets.

1 have been an incentive to hide its risks.¹³ There was also little to incentivize
 2 the originator to properly monitor the behaviour of mortgagors in matters such
 3 as timely repayment or risky behaviour towards the property, as he or she had
 4 already sold the mortgages to the arranger, passing on any risks of default to the
 5 MBS investors. While these risks were difficult to avoid, as they are part of a
 6 standard mortgage securitization process, they could have been reduced through
 7 effective supervision, due diligence and disclosure obligations.

9 *Legal Regulatory Weaknesses*

11 While these two factors are widely accepted as causes of the US financial
 12 crisis, there has been little published analysis of the legal factors behind these
 13 developments. From a legal perspective, there were at least three causative factors
 14 that explain the collapse of the ‘house of cards’ of the US mortgage market.

15 First, the lack of a strong regulatory framework for MBSs led to an ‘outlaw-
 16 like’ securitization process. Unlike the highly regulated covered/mortgage bonds,
 17 such as *Pfandbrief* in Germany,¹⁴ the situation is different in the US, and indeed
 18 all common law countries. These lack a strong and specific regulatory framework,
 19 and often there is no clear-cut and dedicated legislation that specifically deals with
 20 MBSs.¹⁵ In my opinion, this situation leads to the circumstances shown in Table 2.1,
 21 which are evidenced to some extent by the better financial performance of covered
 22 bonds, as compared with MBSs, from the start of the credit crunch onwards.¹⁶

25 ¹³ The one who financially builds up the pool of mortgages to be securitized.

26 ¹⁴ See, for more details, Nasarre-Aznar (n 2) 5–13.

27 ¹⁵ Traditionally, many authors in the US see the intervention of the state – even with a
 28 piece of legislation – in the economy as a mistake, although the fragility of the US banking
 29 and financial system has been evident throughout its recent history. See the numbers of
 30 insolvent US banks during the twentieth century in Maury Klein, ‘The Panic of 2008:
 31 Something Old and Something New’ in Lawrence E Mitchell and Arthur E Wilmarth, Jr
 32 (eds), *The Panic of 2008. Causes, Consequences and Implications of Reform* (Cheltenham,
 33 Edward Elgar Publishing 2010) 49. For the situation in the UK, see Nasarre-Aznar (n 2) 24.

34 ¹⁶ See the constant ascending outstanding covered bonds from 2003 to 2011 in
 35 European Covered Bond Council, *Fact Book*, 7th edn (September 2012) 54. Although with
 36 the help of the European Central Bank and European national central banks that provide
 37 liquidity to the system (at 21), covered bonds have performed relatively well since 2007 to
 38 the point that ‘the covered bonds asset class is still the main pillar for real estate financing in
 39 Europe’ (at 31). Most problems for covered bonds do not arise from their intrinsic standard
 40 legal structure, but from the decrease of mortgage lending in some EU countries and the
 41 problems with the Eurozone sovereign debt crisis (at 31 and 32), while the transparency
 42 to investors remains essential (at 32). This contrasts with MBSs. The outstanding principal
 43 balances of MBSs insured or guaranteed by the US agencies has constantly decreased
 44 from \$7.5 trillion in 2008 to \$2.9 trillion in second quarter of 2012 according to the US
 Federal Reserve: <http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm#fn5r>
 accessed 3 March 2013. Moreover, since the crisis, MBSs have faced increasing

Table 2.1 Regulated versus non-regulated mortgage markets	
Non-regulated contexts (most MBS contexts)	Regulated contexts (most covered bonds contexts)
More flexibility (unlimited types of MBS structures that may be adapted quickly to the market)	Less flexibility (basically, each national covered bond has its own law; non-legal covered bonds may exist. but are riskier than regulated ones)
Contractual basis (to which extent should exist an obligation to disclose contractual information to third parties)	Legal basis (everything is public: collateralization ratio, role of cover assets monitor, minimum quality of covering mortgages, etc.)
Rights of the stakeholders left to general rules of law	Specific rules for misbehaviour, losses, etc.
More dependence on 'private opinions' such as the rating agencies or government direct sponsorship (e.g. the GSEs, that distort the free (concurrence competition) in the MBS market in the US)	Transparency of the law need (the lowest profile of state intervention) reduces the need for rating agencies
More complex structures (more difficult to understand by investors and other stakeholders; more intermediation costs)	A simpler and straightforward structures (transparency)

Contract-based securitization differs fundamentally from covered bonds governed by public law regulation. The attributes of public law regulation derive from its public character, where rules are published in official documents. It also offers transparency, in the sense that these rules, regulations and expected outcomes are accessible to everyone, usually without charge (increasingly through the Internet) and often translated into English. The rules can be easily understood, not least by stakeholders. On the other hand, contractual-based securitization is closed. Only contract arrangements bind the parties and there are no clear rules on the disclosure of specific information to others involved in the transaction, legal and regulatory restrictions in Europe, such as greater disclosure requirements (see Capital Requirement Directive II, 2009/111/EC, OJ L302, 17 November 2009, P 0097–0119), more onerous capital requirements for securitizations held in trading books (see Capital Requirement Directive III, 2010/76/EU, OJ L329, 14 December 2010, P 0003–0035), more onerous liquidity requirements for residential mortgage-backed securities (RMBSs) than for covered bonds (see Proposal of Capital Requirement Directive IV; European Commission Proposal 20-7-2011, COM(2011) 453 final. For more information on these Directives see http://ec.europa.eu/internal_market/bank/regcapital/index_en.htm accessed 3 March 2013. Capital surcharge under Solvency II Directive (2009/138/EC, OJ L335, 17 December 2009, P 0001–0155) is up to 10 times higher for AAA MBSs than for AAA covered bonds and the European Central Bank requires as collateral at least AA MBSs in comparison of only B- covered bonds (at 208).

1 such as investors. There is little transparency in contractual-based securitization. 1
 2 Its performance will depend on private arrangements and the ‘opinion’ of private 2
 3 agents known as ‘rating agencies’.¹⁷ This leads to complicated structures and 3
 4 undisclosed procedures. There is a lack of transparency in relation to the description 4
 5 and identification of the actual securitized assets and their relevant features, how 5
 6 they have been transferred, which law is applicable in case of default of the 6
 7 underlying mortgages, etc. This has contributed to the widespread development of 7
 8 the so-called ‘blind trust’ crisis, where those taking part in a securitization process 8
 9 relied (often without checking due to the complexity and costs) on the statements 9
 10 of the previous stakeholder in the process. Clearly, investors were even further 10
 11 removed from such enquiries. 11

12 In contrast, the covered bonds system promotes more responsible lending, as 12
 13 the originator retains the full default risk of the mortgages and is incentivized to 13
 14 minimize risks and consequent mortgage default.¹⁸ Indeed, it has been estimated 14
 15 that the introduction of an effective covered bond system in the US would decrease 15
 16 the mortgage default rate eight times more than the provision of section 941 of the 16
 17 Dodd-Frank Act, which obliges originators to retain a five per cent credit risk of 17
 18 securitized non-qualifying mortgages on their balance sheets.¹⁹ 18

19 Second, the lack of a public standardized MBS in the US was fatal. Covered 19
 20 bond legislation in Germany, Spain, France and other European states creates a 20
 21 standardized type of covered bond for each country. Moreover, these regulated 21
 22 covered bonds fulfil the minimum requirements of Article 52.4 of the UCITS 22
 23 Directive and, because of this, they have some benefits across Europe.²⁰ The 23
 24 situation in the US has provided the opportunity for private institutions, such 24
 25 as rating agencies, to act as private gatekeepers of this market. Using their 25
 26 ratings and simple final ‘marks’ (A+, B, etc.), they purport to assess the risk of 26
 27 a specific issue of MBS for international investors. This dependence on such 27
 28 private control would not have been possible or, at least, would not have been 28
 29 so relevant within an effective securities public supervision system. Such a 29
 30 system does not exist in the US.²¹ Indeed, rating agencies are not required to 30
 31 assess the ‘legal risk’ of European covered bonds (although rating agencies 31
 32 do rate them), as the law is public and transparent for everybody. Only those 32
 33 33

34 _____ 34
 35 17 See below. 35

36 18 European Covered Bond Council (n 16) 151. 36

37 19 The Dodd-Frank Wall Street Reform and Consumer Protection Act 2010. See Ryan 37
 38 Kreitzer, *Covered Bond Markets: An Analysis of Their Impact on Mortgage Underwriting* 38
 39 (New York, Leonard N Stern School of Business 2012) 46 and 47. 39

40 20 Directive 2009/65/EC of the European Parliament and of the Council of 13 40
 41 July 2009 on the coordination of laws, regulations and administrative provisions relating 41
 42 to undertakings for collective investment in transferable securities (UCITS), OJEU 17 42
 43 November 2009, L302/32. 42

44 21 See Tamar Frankel, ‘Regulating the Financial Markets by Examinations’ in 43
 44 Mitchell and Wilmarth, Jr (n 15) 219. 44

1 securities that comply with legislative requirements can be called ‘covered 1
 2 bonds’. There is even a ‘denomination protection’. The behaviour of the 2
 3 rating agencies during the boom years has been heavily criticized for their 3
 4 contribution²² to the financial mortgage bubble. The agencies are culpable, 4
 5 not least through apparently careless ratings of MBSs and CDOs,²³ but also 5
 6 in directly assisting the issuer of these instruments in structuring them in a 6
 7 way which transmogrified subprime loans into Triple A securities. These were, 7
 8 of course, initially attractive for international investors, but were ultimately 8
 9 worthless.²⁴ Moreover, from 1983 until the introduction of the Dodd-Frank Act 9
 10 in 2010, the rule in s 436(g) of the US Securities Act 1933 prohibited anybody 10
 11 from suing for damages against any of the three biggest rating agencies – 11
 12 Moody’s, Standard & Poor’s and Fitch Ratings. These were termed Nationally 12
 13 Recognized Statistical Rating Organizations (NRSROs). Such a prohibition or 13
 14 immunity from justice should not be acceptable in states that guaranteed the 14
 15 universal right to access to justice. For instance, in Spain, anybody can sue 15
 16 anybody for any reason, according to Article 24 of the Spanish Constitution. 16
 17 After the abrogation of section 436(g) by the Dodd-Frank Act 2010, it seems 17
 18 clear that rating agencies were considered as experts and were not simply 18
 19 giving their ‘opinion’,²⁵ thus losing the protection of the First Amendment of 19

20
 21
 22
 23 22 Frank Partnoy, ‘Overdependence on Credit Ratings was a Primary Cause of 23
 24 the Crisis’ in Mitchell and Wilmarth, Jr (n 15) 116. See also Lawrence J White, ‘The 24
 25 Credit Rating Agencies’ (2010) 24(2) *Journal of Economic Perspectives* 218–21: ‘The 25
 26 securitization of these subprime mortgages was only able to succeed ... because of the 26
 27 favourable ratings bestowed on the more senior tranches’. 27

28 23 Steven L Schwarcz, ‘Too Big to Fail?: Recasting the Financial Safety Net’ in 28
 29 Mitchell and Wilmarth, Jr (n 15) 96. 29

30 24 Mark Anchor Albert ‘Ratings Wars. The Lawsuit Filed by Calpers May Be Able to 30
 31 Overcome the Rating Agencies’ Traditional First Amendment Defense’ *Los Angeles Lawyer* 31
 32 (October 2009) 38. We mentioned above the concept of the ‘blind trust’ crisis. Paragraph 32
 33 10 of the introduction of European Regulation 1060/2009, of the European Parliament and 33
 34 of the Council of 16 September 2009, on credit rating agencies (OJ L302/1, 17 November 34
 35 2009) states that: ‘Credit rating agencies are considered to have failed, first, to reflect early 35
 36 enough in their credit ratings the worsening market conditions, and second, to adjust their 36
 37 credit ratings in time following the deepening market crisis. The most appropriate manner 37
 38 in which to correct those failures is by measures relating to conflicts of interest, the quality 38
 39 of the credit ratings, the transparency and internal governance of the credit rating agencies, 39
 40 and the surveillance of the activities of the credit rating agencies. The users of credit ratings 40
 41 should not rely blindly on credit ratings but should take utmost care to perform [their] own 41
 42 analysis and conduct appropriate due diligence at all times regarding their reliance on such 42
 43 credit ratings’. 43

44 25 As was considered the case in many cases, such as *Jefferson County Sch Dist v* 44
 43 *Moody’s Investors Servs* 1999 175 F 3d 848, 856 (10th Cir 1999) and *County of Orange v* 43
 44 *McGraw-Hill Cos* 1999 245 BR 151, 157 (CD Cal 1999). 44

1 the US Constitution for their ratings.²⁶ The *CalPERS* case²⁷ was an example 1
 2 of an institution that incurred losses of about \$1,000 million by relying on 2
 3 the rating agencies' representations. In December 2012, the court held that the 3
 4 defendants did not seem to be protected by the First Amendment. 4

5 Third, the deficient regulation of the 'US mortgage securitization market' is 5
 6 a major concern. At the end of the day, the assets which are securitized in a 6
 7 mortgage securitization process are mortgages.²⁸ The strength of a mortgage, and 7
 8 the securities on which it is backed, depends on a pool of factors. Some of these 8
 9 are directly related to the property charged, such as location, building materials, 9
 10 whether the property is a flat or a house, etc. Similarly, the type and features of 10
 11 the mortgage loan involved, such as the LTV, interest rate, etc., are important. 11
 12 However, some key factors are directly related to the legal configuration of 12
 13 the mortgage itself, such as the way in which it is legally structured within a 13
 14 particular legal environment. 14

15 It is useful to outline here the details of the so-called 'US mortgage' – the 15
 16 type of mortgage at the base of the chain of any US mortgage securitization 16
 17 process, although it is difficult to talk about a single type of 'US mortgage'.²⁹ 17
 18 Traditionally, from a legal perspective, there are two basic types: those states, 18
 19 mainly west of the Mississippi river, which follow the lien theory (the creditor 19
 20 has a security interest, but the title is not transferred to him or her) and those 20
 21 states, mainly east of the Mississippi river, which follow the title theory (in which 21
 22 the mortgage title is transferred to the lender).³⁰ However, other classifications 22
 23 can be made depending on different criteria, such as the way in which mortgages 23
 24 are formalized (regular mortgages between mortgagee and mortgagor, deeds of 24
 25 trust where there is a trustee between both who holds the mortgage title)³¹ and 25
 26

27 _____ 27
 28 26 See *New York Times v Sullivan* 376 US 254 (1964). 28

29 27 *California Public Employees Retirement Scheme v Moody's Corp et al* CGC-09- 29
 30 49024. See <http://dockets.justia.com/docket/california/candce/3:2009cv03628/217999> 30
 31 accessed 17 September 2012. 31

32 28 This is true for the US and most countries that allow mortgage securitization, but 31
 33 not, for example, for Spain. See Nasarre-Aznar (n 2) 60–63. 32

34 29 Although this expression is the one that is used in response to international investors 33
 35 when they ask for the type of collateral of the MBSs or CDOs they are about to buy, in 34
 36 fact the mortgage pooling is done at the federal level through the agencies, and the rules 35
 37 that govern these mortgages are state or even county-based. Conversely, securitizations 36
 38 organized in Europe are national and it is not common to sell them whilst saying that they 37
 39 are backed by 'European mortgages' as no 'European mortgage' exists. 38

40 30 GJ Siedel and Janis K Cheezem, *Real Estate Law*, 4th edn (Boston, MA, South- 39
 41 Western College Publishing 1999) 310. 40

42 31 Robert Kratovil, 'Mortgage Law' in Robert H Pease and Homer Virgil Cherrington 40
 43 (eds), *Mortgage Banking* (New York, McGraw-Hill 1953) 24 states that this type can be 41
 44 useful if there are a number of lenders as a trustee acquires mortgage titles (instead of 42
 45 the lenders) who can eventually also foreclose the mortgage instead of the default of the 43
 46 mortgagor. 44

1 others (reverse mortgages, equitable mortgages). But, apart from this, mortgages 1
2 are registered, conveyed and foreclosed in a different way between states. Indeed, 2
3 this diversification and lack of common regulations at a federal level³² contributes 3
4 to the weakness of an efficient securitization process,³³ especially in those aspects 4
5 relating to investors' protection. 5

6 In relation to registration, there is no common land register in the US, but 6
7 instead many county equivalents, amounting to some 3,000 registers, following 7
8 a tradition since the seventeenth century. Each county register has its own 8
9 requirements, fees, procedures, rules, etc. In fact, they have been defined as 'a 9
10 terribly cumbersome, paper-intensive, error-prone, and therefore costly process 10
11 for transferring and tracking mortgage rights'.³⁴ To attempt to make the system 11
12 more efficient, title insurance companies maintain copies of the records of the 12
13 county recorders and assume, through their policies, the risks (mistakes, omissions, 13
14 etc.) that accompany those records, although this system has its own problems.³⁵ 14
15 This wholesale inefficiency in the mortgage registration system was the impetus 15
16 for the main US mortgage market stakeholders – Fannie Mae, Freddie Mac and 16
17 the Mortgage Bankers Association of America – to create a private land register 17
18 in 1995. This would operate alongside, but outside of, the rules of the county 18
19 registers:³⁶ a device called Mortgage Electronic Registration Systems (MERS). 19

20 MERS performs two functions. It is a private land register for those members 20
21 of the system where it assumes the role of 'land registrars', as mortgages are 21
22 transferred within the system. Significantly, MERS also acts as the mortgagee in 22
23 each recorded mortgage relationship. Remarkably, it is registered in the county 23
24 register as the mortgagee, even though it is not the lender. Any other operation 24

25 _____ 25
26 32 Grant S Nelson, 'Confronting the Mortgage Meltdown: A Brief for the Federalization 26
27 of State Mortgage Foreclosure Law' (2010) 37(538) *Pepperdine Law Review* 606. Various 27
28 attempts in the last 90 years at different types of initiatives (e.g. the soft law of the American 28
29 Law Institute with its Restatement (Third) of Property: Mortgages 1997) have been 29
30 insufficient to achieve a country-wide mortgage. In Europe, doctrinal works have been 30
31 carried out through the drafting of a Eurohypotheq, a common mortgage for Europe (see 31
32 Agnieszka Dzieciewicz-Tulodziecka (ed), *Basic Guidelines for a Eurohypotheq* (Warsaw, 32
33 Mortgage Credit Foundation 2005). See also Sergio Nasarre-Aznar, 'Eurohypotheq: 33
34 Drafting a Common Mortgage for Europe' (2010) 2(1) *Journal of Legal Affairs and Dispute 34
35 Resolution in Engineering and Construction* 50. 35

36 33 Nelson (n 32) 594. 36

37 34 Phyllis K Slesinger and Daniel McLaughlin, 'Mortgage Electronic Registration 37
38 System' (1995) 31 (808) *Idaho Law Review* 808. 38

39 35 Christopher L Peterson, 'Foreclosure, Subprime Mortgage Lending, and the 39
40 Mortgage Electronic Registration System' (2010) 78 *University of Cincinnati Law Review* 40
41 1366. From a European perspective, the problem of data protection should be added to 41
42 those listed by the author, as it is questionable whether private companies can hold and 42
43 manage the personal data and details of the titles over land. 43

44 36 Instead of focusing on trying to push forward a sort of harmonized system, such as 44
45 the EULIS initiative in Europe: <http://eulis.eu> accessed 3 March 2013. 45

1 with the mortgage registered in this way is not public and does not alter the county 1
 2 register,³⁷ but operates within the MERS system. It should be noted that MERS is 2
 3 directly operated by the members involved in each transaction³⁸ and is a unique 3
 4 system for the whole country. Two-thirds of the mortgages originating in the US 4
 5 are contained within MERS, amounting to approximately 60 million mortgages 5
 6 in 2007.³⁹ In many ways, the MERS system distorts the character of an ideal land 6
 7 registry system, which should be public, accessible by everybody, controlled by the 7
 8 public administration and controlling the validity of the recorded titles. Indeed, it 8
 9 has created a range of new problems, where, among other issues, it claims to be the 9
 10 mortgagee and also the enforcer of the default arrangements, but not the lender. Of 10
 11 course, this leaves the mortgagor unprotected, since it is clearly inappropriate that 11
 12 the enforcer of the security in the mortgage is not the lender under the mortgage 12
 13 loan arrangement. Several court resolutions have stated that MERS cannot enforce 13
 14 the mortgage as it does not hold the promissory note (technically it does not 14
 15 have a claim),⁴⁰ which probably has remained in the hands of the originator of 15
 16 the mortgage.⁴¹ Thus, it may be the case that MERS is contributing to the poor 16
 17 identification of liabilities arising from the predatory lending process.⁴² This may 17
 18 be related to the ‘robo-signing’ scandal, involving the forging of false documents 18
 19 evidencing the transfer of promissory notes to the bank purported to foreclose the 19
 20 mortgage.⁴³ In December 2011, the Massachusetts Attorney General filed the first 20
 21 major state lawsuit over ‘robo-signing’ against several major banks and MERS.⁴⁴ 21
 22 The Attorney General alleged that these five entities: 22

23
 24 engaged in unfair and deceptive trade practices in violation of Massachusetts law 24
 25 by pervasive use of fraudulent documentation in the foreclosure process, including 25
 26

27
 28 37 This remains recorded with MERS as ‘mortgagee’. This allows the mortgage 28
 29 industry to use MERS to evade paying the fees and taxes related to mortgage transactions. 29
 30 See Peterson (n 35) 1362.

31 38 This leads to new problems, such the one raised in *Deutsche Bank National Trust* 30
 31 *Co v Maraj* 2008 NY Slip Op 50176 (U) (NY Sup Ct Kings Co).

32 39 Peterson (n 35) 1362 and 1373. 32

33 40 See National Consumer Law Center, *Foreclosures* (4th edn, Boston, MA, National 33
 34 Consumer Law Center 2010) 143. See also the decision in *Johnson v Home State Bank* 501 34
 35 US 78, 111, S Ct 2150, 2154, 115 L Ed 2d 66 (1991). 35

36 41 In fact, it is MERS itself that alternately presents itself as a mere agent of the 36
 37 mortgagee (when it is sued for fraud, bad practice or violation of consumers’ rights) or as 37
 38 a mortgagee (when tries to foreclose a mortgage). See, in this sense, Peterson (n 35) 1376. 38

39 42 *ibid*, 1399. 39

40 43 ‘Mortgage Mess: Who Really Owns Your Mortgage’ *Sixty Seconds* (3 April 2011) 40
 41 <http://www.cbsnews.com/video/watch/?id=7361596n> accessed 19 July 2013.

42 44 *Commonwealth of Massachusetts v Bank of America et al* (Superior Court 41
 42 Department of the Trial Court 11-4363, 1 December 2011) [http://www.mass.gov/ago/news-](http://www.mass.gov/ago/news-and-updates/press-releases/2011/five-national-banks-sued-by-ag-coakley.html)
 43 [and-updates/press-releases/2011/five-national-banks-sued-by-ag-coakley.html](http://www.mass.gov/ago/news-and-updates/press-releases/2011/five-national-banks-sued-by-ag-coakley.html) accessed 29 43
 44 October 2012. 44

1 so-called ‘robo-signing’, foreclosing without holding the actual mortgage, 1
 2 corrupting [the] Massachusetts land recording system through the use of MERS, 2
 3 and failing to uphold loan modification promises to Massachusetts home-owner.⁴⁵ 3
 4 4

5 In relation to this, JP Morgan, Bank of America, Citigroup, Ally Financial and 5
 6 Wells Fargo & Company were accused of faulty foreclosure practices. However, 6
 7 in 2012, a settlement was reached with the Department of Justice, the Department 7
 8 of Housing and Urban Development and 49 states, through which the lenders 8
 9 were given immunity from prosecution for this cause in exchange for direct 9
 10 compensation (\$25 billion) to home-owners who were at risk of foreclosure or 10
 11 who had already been foreclosed. 11

12 Thus, the system of mortgage transfer in the US is in jeopardy, giving rise 12
 13 to questions concerning the credibility of the whole US mortgage securitization 13
 14 process. This situation creates major risks for US MBS holders. It is remarkable 14
 15 that only now, after 40 years of US mortgage securitization, is there an active 15
 16 discussion in the US on how mortgages can be properly transferred as an essential 16
 17 step in any standard US securitization process. This discussion is taking place 17
 18 at a number of levels: in the report of the Permanent Editorial Board for the 18
 19 Uniform Commercial Code 2011;⁴⁶ regarding the differences in the transfer of 19
 20 regular mortgages and deeds of trust;⁴⁷ among authors who have evidenced sharp 20
 21 differences among different systems;⁴⁸ within the mortgage industry itself;⁴⁹ and in 21
 22 the courts, such the decisions in *Ibanez* and *Bevilacqua*.⁵⁰ 22
 23 23

24 _____ 24
 25 45 ‘First Major State Lawsuit Filed Over “Robo-Signing”’ *CNBC* (1 December 2011) 25
 26 <http://www.cnn.com/id/45511868> accessed 15 March 2013. 26

27 46 The Permanent Editorial Board for the Uniform Commercial Code, ‘Application of 27
 28 the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes’ 14 November 28
 29 2011. The American Law Institute and the National Conference of Commissioners on 29
 30 Uniform State Laws (14 November 2011) establishes a set of four rules on the basis of the 30
 31 Uniform Commercial Code, but it says that: ‘The enforcement of real estate mortgages by 31
 foreclosure is primarily the province of a state’s real property law.’

32 47 See National Consumer Law Center (n 40) 145; and *Landmark National Bank v* 32
 33 *Kesler*, 216 P 3d 158 (which establishes that separating interests of note and deeds of trust 33
 34 can leave the mortgage unenforceable). 34

35 48 Nelson (n 32) 591 and 592. 35

36 49 See the discussion of the report of the American Securitization Forum, ‘Transfer 36
 37 and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market’ ASF 37
 38 White Paper Series (16 November 2010). 38

39 50 The first case is *US Bank National Association v Antonio Ibanez*, *Supreme Judicial* 39
 40 *Court of Massachusetts*, 7 January 2011 (458 Mass 637), in which the Court stated that: 40
 41 ‘In Massachusetts, where a note has been assigned but there is no written assignment of 41
 42 the mortgage underlying the note, the assignment of the note does not carry with it the 42
 43 assignment of the mortgage. *Barnes v Boardman* 149 Mass 106, 114 (1889). Rather, the 43
 44 holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has 44
 an equitable right to obtain an assignment of the mortgage, which may be accomplished

1 It is worth mentioning the relevant inefficiencies (delays and losses) of the 1
 2 mortgage enforcement systems in the US that directly affect the capacity for 2
 3 lenders to recover the money they have lent, and therefore the capacity of investors 3
 4 in MBSs to recover the money they have invested in those securities. The average 4
 5 time to process a foreclosure in the US increased from 253 days in 2007 to 674 5
 6 days in 2011, although the duration is about three years in Florida, Washington 6
 7 and New York.⁵¹ Mortgage foreclosure law differs from one state to another.⁵² In 7
 8 40 per cent of states, it is only possible to start a judicial foreclosure, which is a 8
 9 long, complex, expensive and inefficient system.⁵³ If the lender finally succeeds in 9
 10 foreclosing, the inefficient auction process involving the sheriff does not facilitate 10
 11 a proper sale of the property based on its market price – a system which causes 11
 12 losses to the lender that may affect the stability of the securitization structure in 12
 13 which that particular mortgage was included. Second, those states in lighter grey 13
 14 in Figure 2.2 are non-recourse states – where the mortgagee is only secured with 14
 15 the charged property and not with the rest of the estate of the mortgagor. The 15
 16 possibility of mortgage default can be up to 81 per cent higher in these compared 16
 17 with recourse states.⁵⁴ This has given rise to the phenomenon of the ‘strategic 17
 18 defaulter’ – those mortgagors who can pay the mortgage, but since their property 18
 19 is worth less than the money they still owe to the lending institution, they simply 19
 20 ‘walk away’, giving the lender the keys of the property.⁵⁵ 20
 21
 22
 23
 24

25
 26 by filing an action in court and obtaining an equitable order of assignment.’ In the praxis 26
 27 this means that thousands or even millions of mortgages are unenforceable (and therefore 27
 28 the MBSs issued over them depreciated greatly or simply defaulted as they were often 28
 29 structured over closed pools of mortgages) unless mortgagees acquire all those notes or 29
 30 ‘forge’ them through robo-signing because they did not exist at all. The second case is 30
 31 *Bevilacqua v Rodriguez*, Supreme Judicial Court of Massachusetts, 18 October 2011 (460 31
 32 Mass 762), which confirmed that the mortgage holder must have a valid assignment of 32
 33 mortgage to foreclose a property.

33 51 Les Christie, ‘Foreclosure Free Ride: 3 Years, No Payments’ *CNN Money* (28 33
 34 December 2011) http://money.cnn.com/2011/12/28/real_estate/foreclosure/index.htm accessed 34
 35 18 September 2012.

36 52 Nelson (n 32) 586.

37 53 Prentiss Cox, ‘Foreclosure Reform Amid Mortgage Lending Turmoil: A Public 37
 38 Purpose Approach’ (2008) 45 (3) *Houston Law Review* 699; see also Nelson (n 32) 586. 38

39 54 Ghent and Kudlyak (n 10) 29. See also Kreitzer (n 19) 46 and 47. 39

40 55 Moreover, there is a plethora of techniques available to the borrower to delay 40
 41 the foreclosure, such as filing for bankruptcy, staying at home during foreclosures, equity 41
 42 skimming, etc. Other arrangements with the lender, such as deeds in lieu, short sales or 42
 43 conciliations, also affect the secondary mortgage market as they usually entail a loss to 43
 44 the lender, which is transferred to the MBS investors if that mortgage was included in a 44
 45 backing pool.



Figure 2.2 Recourse (dark grey) and non-recourse (light grey) states.

Source: own elaboration⁵⁶

Thus, it is questionable whether the inefficiencies in ‘US mortgages’ were already known by investors at the time they bought US MBSs and CDOs, or whether they were being taken into account by rating agencies when they were giving ‘Triple A’ ratings to those mortgage-collateralized MBSs and CDOs. All this evidences a significant level of distortion⁵⁷ of the legal system and generalized reckless practices in the origination, transfer and enforcement of mortgages in the US. This has clearly contributed to the failure of the international financial system and the globalization of the crisis.

From the International Crisis to the Detrimental Impact on the Spanish Housing System

In 2009, global losses in the international banks and other financial institutions arising from US-originated assets were estimated at approximately \$2.7 trillion.⁵⁸ In Europe, three major British banks lost \$31.8 billion, two major Swiss banks

⁵⁶ Using the data of Ghent and Kudlyak (n 10) 44 and 55.

⁵⁷ On this concept, see Steven L Schwarcz, ‘Distorting Legal Principles’ (2010) 35(4) Journal of Corporation Law, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1532465 accessed 18 September 2012.

⁵⁸ International Monetary Fund, ‘Global Financial Stability Report (GFSR)’ (April 2009) 11 <http://www.imf.org/external/pubs/ft/gfsr/2009/01/pdf/text.pdf> accessed 18 September 2012.

1 lost \$62.3 billion, and \$41.1 billion was lost by three major German banks up to 1
 2 December 2008, – all traceable to the US subprime crisis.⁵⁹ These losses heavily 2
 3 affected the capital position of the banks, which entered a liquidity crisis. The 3
 4 securitization market dropped dramatically, as did interbank lending, due to the 4
 5 general lack of trust between financial institutions. In some countries, such as 5
 6 Spain, banks almost completely ceased lending to families or businesses, thus 6
 7 virtually halting the economy. It is significant that in 2007, loans (mostly mortgage 7
 8 loans) represented about 65 per cent of the Spanish banks' balance sheets.⁶⁰ 8

9 Indeed, the Spanish economy and financial system has performed even worse 9
 10 than would be expected during a globalized crisis, particularly when compared 10
 11 to the impact in the majority of EU countries. Although many causes could have 11
 12 contributed to this, it is suggested that the last housing boom/bubble (1995–2007) 12
 13 is one of the most relevant. In a manner similar to the US pattern described above, 13
 14 the promotion of widespread home-ownership at any cost, combined with the 14
 15 speculative or the buy-to-let business approach, has been prevalent in Spain and 15
 16 other European countries. Spanish housing policy, before and during the housing 16
 17 bubble, involved massive construction and enormous levels of mortgage loans, 17
 18 which has now led to an over-indebted society.⁶¹ This was facilitated by ready 18
 19 access to mortgage credit as a result of low interest rates and the liquidity of 19
 20 Spanish banks, which benefited from a good interbank lending system (based 20
 21 on trust among banks), and the massive issuing of Spanish covered bonds and 21
 22 MBSs. In fact, Spanish banks had for many years been the second largest issuer of 22
 23 covered bonds and MBSs after Germany (covered bonds), and the UK (MBSs).⁶² 23
 24 Other countries such as Ireland experienced similar policies and a housing market 24
 25 collapse on a similarly large scale.⁶³ 25

26
 27 _____ 26
 28 59 Cox, Faucette and Valenzuela (n 6) 18. 27
 28 60 Ibid. 28

29 61 For numbers, see below. 29

30 62 See Sergio Nasarre-Aznar, 'Operaciones pasivas. La refinanciación de créditos y 30

31 préstamos hipotecarios' in Esther Muñiz Espada, Sergio Nasarre-Aznar and Elena Sánchez 31
 32 Jordán (eds), *La reforma del mercado hipotecario* (Madrid, Edisofer 2009) 399–552, but 32
 33 especially 406–12, where the bad performance of Spanish covered bonds when compared 33
 34 to other European covered bonds since the beginning of the crisis is discussed. 34

35 63 At least three authoritative reports on the Irish financial crisis have highlighted 35
 36 massive overlending, which overheated the housing market. See Klaus Regling and 36
 37 Max Watson, *A Preliminary Report on the Sources of Ireland's Banking Crisis* (Dublin, 37
 38 Government Publications Office 2010); Commission of Investigation into the Banking 38
 39 Sector in Ireland, *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland* 39
 40 (March 2011), known as the Nyberg Report; Governor of the Central Bank, *The Irish* 40
 41 *Banking Crisis. Regulatory and Financial Stability Policy 2003–2008* (Dublin, The 41
 42 Stationery Office 2010). This latter report shows that by 2006, the increase in construction 42
 43 and housing had increased beyond population needs, reflecting speculative purchases that 43
 44 represented 15 per cent of the housing stock that stood vacant. But it also says (at 30) that 44
 45 taxation incentives aimed at the construction sector, e.g. lowering stamp duty five times

1 However, in Spain, the situation was more severe as a consequence of the 1
 2 unavailability of a *real* alternative housing tenure to home-ownership. For years, the 2
 3 Spanish housing rented sector remained one of the smallest in Europe (see Figure 3
 4 2.3), which in practice meant that it was of poor quality and relatively expensive.⁶⁴ 4
 5 All tax benefits were targeted at home-owners rather than tenants/lessees. There 5
 6 was an inefficient eviction process for rented properties, which compared poorly 6
 7 with an efficient (but very lender-oriented) mortgage enforcement procedure. 7
 8 State housing plans revolved around build-to-sell rather than a renting-what-is- 8
 9 already-built-oriented approach. Market advantages, in the form of structured and 9
 10 funded mortgage facilities, have overshadowed an undeveloped rented market, 10
 11 while Spanish legislation over the past 60 years focused on the needs of banks 11
 12 and home-owners rather than lessors and lessees. The result is that, even today, 12
 13 only about 15 per cent of households occupy rented housing and only two per cent 13
 14 occupy social rented housing. Thus, there is still no real (in terms of affordability, 14
 15 quality, stability, etc.) alternative to home-ownership for families, which is an 15
 16 issue in many other European states.⁶⁵ 16

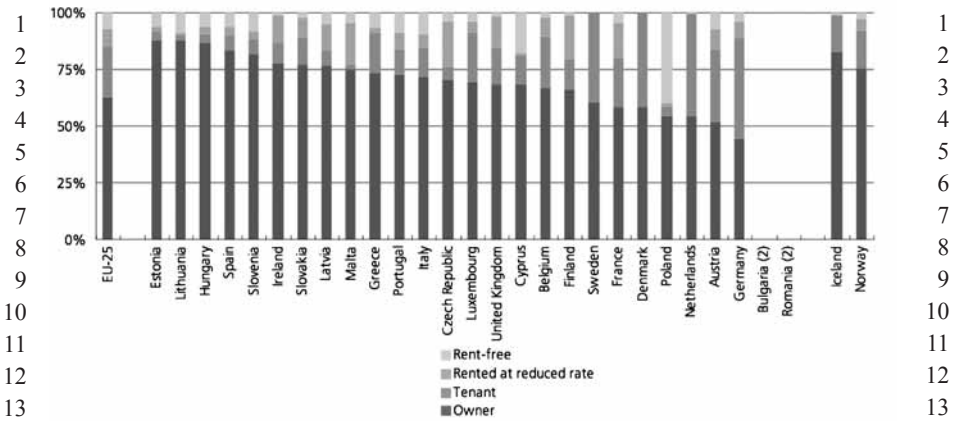
17 In fact, since the beginning of the financial crash in the last quarter of 2007 17
 18 (and the subsequent mortgage and housing crisis), Spanish economic stability⁶⁶ 18
 19 19
 20 20

21 between 2001 and 2007 to improve the affordability of houses to first-time buyers and 21
 22 special schemes, existed for many types of constructions. Moreover (at 31), the ceiling on 22
 23 the income tax deductibility of mortgage interest for owner-occupiers was increased four 23
 24 times between 2000 and 2008. See also P van den Noord, 'Tax Incentives and House Price 24
 25 Volatility in the Euro Area: Theory and Evidence', OECD Economics Department Working 25
 26 Papers No 356, 2011, 9, which clearly stated that the tax system was subsidizing housing in 26
 27 Ireland and Spain (among others). 27

28 64 See a complete discussion in Sergio Nasarre-Aznar and Estela Rivas Nieto, 'La 28
 29 naturaleza jurídico-privada y el tratamiento fiscal de las nuevas sociedades cotizadas de 29
 30 inversión en el mercado inmobiliario (SOCIMI)' en la Ley 11/2009 Estudios Financieros. 30
 31 Revista de Contabilidad y Tributación, 2009 DIC; (321); and D Rae and P van den 31
 32 Noord, 'Ireland's Housing Boom. What Has Driven it and Have Prices Overshot?' OECD 32
 33 Economics Department Working Papers No 492, 6. 33

34 65 See a complete discussion of this in Montserrat Pareja Eastway, 'El régimen de 34
 35 tenencia de la vivienda' in Jesús Leal (ed), *La política de vivienda en España* (Madrid, Ed 34
 35 Pablo Iglesias 2010) 101. 35

36 66 Which has been recently (2011–12) replicated into a political crisis (e.g. the 36
 37 form of state divided into autonomous regions since 1978 is in question, with Catalonia's 37
 38 current government requesting the independence from the rest of Spain (see http://www.nytimes.com/2012/10/06/world/europe/in-catalonia-spain-artur-mas-threatens-to-secede.html?partner=rss&emc=rss&smid=tw-nytimes&_r=0 accessed 6 October 2012) 38
 39 and serious social unrest (e.g. just in the main city of Spain, Madrid, there have been 39
 40 983 demonstrations between July and September 2012 (see 'Las manifestaciones pasan 40
 41 factura a Madrid' *La Vanguardia* (27 September 2012) [http://www.lavanguardia.com/](http://www.lavanguardia.com/local/madrid/20120927/54351933893/las-manifestaciones-pasan-factura-a-madrid.html) 41
 42 [local/madrid/20120927/54351933893/las-manifestaciones-pasan-factura-a-madrid.html](http://www.lavanguardia.com/local/madrid/20120927/54351933893/las-manifestaciones-pasan-factura-a-madrid.html) 42
 43 accessed 6 July 2013). 43
 44 44



15 **Figure 2.3** Number of dwellings by type of tenure in Europe, 2009.

16 Source, Eurostat.

19 itself has been in constant danger.⁶⁷ This has had an important impact on housing.
 20 The following data outlines the current situation of housing in Spain after five
 21 years of economic crisis:

- 23 1. From 2007 to 2011, there have been 330,000 mortgage foreclosures.⁶⁸
- 24 Paradoxically, the new census of 2011 reveals that there are 3.5 million
- 25 empty dwellings.⁶⁹
- 26 2. Mortgage funding and house sales are still decreasing – down by 29.3 in
- 27 2011 compared to 2010.⁷⁰

31 67 The massive banking reforms through mergers and acquisitions and nationalization,
 32 the current lack of liquidity of Spanish banks that remain untrustworthy in international
 33 business, the ‘intervention’ of the EU in the Spanish economy in July 2012, the creation of
 34 a ‘bad bank’ with thousands of unsold properties at bargain prices, the sovereign rate risk
 35 that exceeded 600 basic points in relation to Germany in July 2012 and the cuts in workers’
 36 salaries and other social rights are only some examples of the elements of the drama.

37 68 Consejo General Del Poder Judicial, ‘Datos sobre el efecto de la crisis en los
 38 órganos judiciales 3T 2011’ (Madrid, 2011) www.poderjudicial.es accessed 19 July 2013,
 39 under ‘Estadística’. However this data does not differentiate between first residences and
 40 other dwellings or even between dwellings and other type of properties.

41 69 See, however, Juan Carlos Martínez, ‘En España un 20 per cent de las viviendas están
 42 vacías’ *El País Economía* (8 May 2012) http://economia.elpais.com/economia/2012/01/05/actualidad/1325752378_850215.html accessed 18 September 2012.

43 70 Statistics can be found at the website of the Ministerio de Fomento <http://www.fomento.gob.es/BE2/?nivel=2&orden=34000000> accessed 18 September 2012.

- 1 3. Some 5.7 million people were unemployed in July 2012, an employment 1
2 rate of 24.63 per cent.⁷¹ This has a significant influence in the increasing 2
3 number of defaulted (mortgage) loans. 3
- 4 4. According to *The Economist* (9 February 2012), on the basis of 4
5 unemployment and inflation ratios, Spain is currently the sixth poorest 5
6 country out of a list of 92.⁷² According to UNICEF, some 2.2 million 6
7 children in Spain are living in families below the poverty threshold.⁷³ 7
- 8 5. According to Eurostat, some 37 per cent of the Spanish population between 8
9 18 and 35 consider access to a dwelling as one of the most important 9
10 problems facing Spanish youth⁷⁴ and as the main cause of why children 10
11 are not leaving their parents' house until they are 30 years old.⁷⁵ Even 11
12 then, some 30 per cent still need economic support from their parents or 12
13 other relatives.⁷⁶ 13

14
15 There are at least four legal factors which, in my opinion, contribute to an 15
16 understanding of the current situation of Spanish housing and mortgage markets, 16
17 and which bear similarities to factors in the US that caused the crisis. 17

18 First, bad banking practices are a major contributory factor. For many years, 18
19 Spanish banks undertook bad practices by offering inadequate products,⁷⁷ 19
20 including those related to their mortgage loans. Subprime mortgages were also 20
21 a reality in Spain during the housing bubble. Lenders granted mortgages of even 21
22 more than 100 per cent LTV, regardless of the capability of the borrower to pay 22

23
24
25 71 According to the Instituto Nacional de Estadística (INE): [http://www.ine.es/](http://www.ine.es/jaxi/menu.do?type=pcaxis&path=per%20cent2Ft22%20per%20cent2Fe308_mnu&file=inebase&L=0)
26 [jaxi/menu.do?type=pcaxis&path= per cent2Ft22 per cent2Fe308_mnu&file=inebase&L=0](http://www.ine.es/jaxi/menu.do?type=pcaxis&path=per%20cent2Ft22%20per%20cent2Fe308_mnu&file=inebase&L=0)
27 accessed 18 September 2012. 27

28 72 'Feeling Gloomy' *The Economist* (9 January 2012) [http://www.economist.com/](http://www.economist.com/blogs/graphicdetail/2012/01/daily-chart-0)
29 [blogs/graphicdetail/2012/01/daily-chart-0](http://www.economist.com/blogs/graphicdetail/2012/01/daily-chart-0) accessed 18 September 2012. 28

30 73 UNICEF, 'La infancia en España 2012–2013. El impacto de la crisis en los niños' 29
31 (May 2012) 8 [http://www.unicef.es/sites/www.unicef.es/files/Infancia_2012_2013_final.](http://www.unicef.es/sites/www.unicef.es/files/Infancia_2012_2013_final.pdf)
32 pdf accessed 17 September 2012. 31

33 74 Centro de Investigaciones Sociológicas (CIS), 'Estudi 2835' (27 April 2010) 32
34 <http://www.cis.es> accessed 18 September, 2012. 33

35 75 Eurostat, 'Youth in Europe. A Statistical Portrait' (2009) 31 [http://epp.eurostat.](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-78-09-920/EN/KS-78-09-920-EN.PDF)
36 [ec.europa.eu/cache/ITY_OFFPUB/KS-78-09-920/EN/KS-78-09-920-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-78-09-920/EN/KS-78-09-920-EN.PDF) accessed 18
37 September 2012. 36

38 76 Fundación Encuentro, 'Informe España 2011. Una interpretación de su realidad 37
38 social' (2011) 191 <http://www.fund-encuentro.org/> accessed 19 September 2012. 38

39 77 As an example, the Spanish Securities Exchange Commission (Comisión Nacional 39
40 del Mercado de Valores) has established fines for 10 credit institutions for commercializing 40
41 a kind of security called 'preferred participations' (*participaciones preferentes*) without 41
42 explaining them properly to their clients, and thus failing to fulfil the Markets in Financial 42
43 Instruments Directive requirements to obtain a proper consent from them: [http://economia.](http://economia.elpais.com/economia/2012/09/13/actualidad/1347528967_278279.html)
44 [elpais.com/economia/2012/09/13/actualidad/1347528967_278279.html](http://economia.elpais.com/economia/2012/09/13/actualidad/1347528967_278279.html) accessed 13 September 43
44 2012. 44

1 the instalments under the mortgage.⁷⁸ The careless examination of the repayment 1
 2 capability of the borrower led, according to the Bank of Spain, to a delinquency 2
 3 rate of housing mortgage loans of 3.22 per cent in mid-2012, up from 1.31 per 3
 4 cent in mid-2008.⁷⁹ The risk to banks was usually covered by requiring borrowers 4
 5 to find a friend or a relative to mortgage their own dwelling, or even provide 5
 6 a personal guarantee (*aval*) with their whole estate for the repayment of the 6
 7 mortgage loan. This practice has contributed to the extension of the housing crisis 7
 8 among families of all income levels.⁸⁰ Similarly, for years, Spanish banks had sold 8
 9 risky financial products to both small corporations and consumers. These were 9
 10 arranged with corresponding credit default swaps, to stabilize the volatility of the 10
 11 variable interest rate of their mortgage loans (referenced to the Euribor index)⁸¹ or 11
 12 to provide a floor clause within the mortgage loan contract terms. These types of 12
 13 financial products were commercialized just a few months before the biggest drop 13
 14 of the Euribor in its history⁸² and some months after the first effects of the credit 14
 15 crunch in Spain.⁸³ Many of those contracts were worded in an obscure manner for 15
 16 clients. The reference indexes were imposed by the banks (a fixed reference index 16
 17 of around 4.5 per cent), which, in practice, meant that since October 2008, clients 17
 18 have been paying extra over and above their mortgage instalments to the banks 18
 19 on a monthly basis. This is the typical obligation resulting from an interest rate 19
 20 swap or a floor clause, as the Euribor has remained since then lower than those 20
 21 'agreed' reference indexes. 21

22 Moreover, customers/clients found it very difficult to assess the real legal 22
 23 and economic consequences of underwriting those contracts, as neither neutral 23
 24 nor complete information was provided to them. There was no legal requirement 24
 25 to ensure that customers/clients understood all the details of the arrangement, 25
 26 demonstrating the major asymmetry of information between the parties. Banks 26
 27 could have reasonably been expected to have known in advance that the Euribor 27
 28 rate would drop significantly, or were at least more likely to do so than the 28
 29 29

30 78 Since 2002, banks have been legally allowed to securitize Spanish subprime 30
 31 mortgages through the issue of Spanish asset-backed securities (ABSs) (*bonos de titulización* 31
 32 *de activos*). This meant that Spanish banks were allowed to get rid of problematic mortgages 32
 33 as soon as they were granted and therefore they had no problem in granting them to families 33
 34 and people who were unable to repay them. 34

35 79 It is about 25 per cent for mortgage loans granted to builders. See Asociación 35
 36 Hipotecaria Espanola, 'Tasas de dudosa hipotecaria, Segundo Trimestre 2012' (2012) 36
 37 <http://www.ahe.es/bocms/images/bfilecontent/2006/04/26/90.pdf?version=17> accessed 6 37
 38 October 2012. 38

39 80 'Las ejecuciones hipotecarias amenazan ya a las familias de las zonas de rentas 39
 40 altas' *El Mundo* (24 September 2012) <http://www.elmundo.es/elmundo/2012/09/24/suivienda/1348478744.html> accessed 9 September 2012. 40

41 81 'EURIBOR' (the Euro Interbank Offered Rate) is the money market reference rate 41
 42 for the euro. 42

43 82 October 2008. 43

44 83 September 2007. 44

1 consumers or small businesses with whom they made such arrangements. The 1
2 courts have reacted to this situation by declaring many hundreds of swaps, caps, 2
3 floor clauses and similar financial derivative agreements void. 3

4 It is significant that the transposition of the Markets in Financial Instruments 4
5 Directive (MiFID)⁸⁴ into Spanish law arrived late, in 2008, when all banking 5
6 activity had already virtually stopped. Although now implemented, its application 6
7 has been disappointing for non-professional customers. Indeed, non-professional 7
8 customers can still engage in contracts associated with the vast majority of risky 8
9 financial products, even where the non-professional customer has not passed 9
10 the adequacy or convenience test. This, in practice, means that he or she does 10
11 not know what he or she is contracting, and is bound just by signing that he 11
12 or she agrees to the contract (even if he or she does not understand it and/or 12
13 its consequences). Conversely, banks are using these tests as a defence against 13
14 claims from consumers to demonstrate that they had properly assessed them, and 14
15 that the customers wished to enter into contracts for these products, even if they 15
16 did not understand them.⁸⁵ 16

17 Spanish legislation has allowed and even promoted new forms of risky 17
18 banking practices, even in the delicate field of housing. In this sense, the reform 18
19 of the mortgage market in Spain, by Act 41/2007,⁸⁶ introduced two new risky 19
20 20

21 84 Directive 2004/39/EC of the European Parliament and of the Council of 21 21
22 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC 22
23 and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council 23
24 and repealing Council Directive 93/22/EEC (OJEU, 30 April 2004, L145/1). 24

25 85 This is a similar criticism noted in C Castronove, 'Information Duties and 25
26 Precontractual Good Faith' (2009) 4 *European Review of Private Law* 568 of consumers' 26
27 protection through long lists of pre-contractual information to be provided by the 27
28 professional seller before an arrangement (see, as an example, the 20 pieces of pre- 28
29 contractual information to be provided in distant contracts according to art 6 of Directive 29
30 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on 30
31 consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the 31
32 European Parliament and of the Council and repealing Council Directive 85/577/EEC and 32
33 Directive 97/7/EC of the European Parliament and of the Council, OJEU 22 November 33
34 2011, L304/64). Basically, consumers do not read all this information on a regular basis 34
35 and, even if they do so, in some cases they may not fully understand it, thus evidencing that 35
36 there is not necessarily a correlation between more pre-contractual information and more 36
37 consumer protection. For criticism of this system, see T Sefton Green, *Mistake, Fraud 36
38 and Duties to Inform in European Contract Law* (Cambridge University Press, 2009) 398. 37
38 See also research on this in the US in O Ben-Shahar and CE Schneider, 'The Failure of 38
39 Mandated Disclosure', *Chicago Working Paper Series Index* (March 2010) 64, where it is 39
40 shown that the history of compulsory provision of information 'is a history of failure'. See 40
41 also F Marotta Wurgler, 'Will Increased Disclosure Help? Evaluating the Recommendation 41
42 of the ALI's "Principles of the Law of Software Contracts"' (2011) 78 (1) *University of 42
43 Chicago Law Review* 165

43 86 Spanish Act 41/2007, 7 December, which modifies Act 2/1981, 25 March, of 43
44 regulation of the mortgage market (BOE 8 December 2007, no 294, 50593). 44

1 practices that were discouraged by the European Commission White Paper on the 1
 2 Integration of EU Mortgage Credit Markets.⁸⁷ The first of the two is related to the 2
 3 tying practices, i.e. banking practices that make it more difficult for the borrower 3
 4 to change his or her lending institution because of the costs or the numerous links 4
 5 with the existing lender. Thus, while Act 41/2007 limited the effects of former 5
 6 Article 2 of Act 2/1994 on subrogation and modification of mortgage loans,⁸⁸ from 6
 7 2007 onwards, as soon as the borrower receives an offer from a new lender, he or 7
 8 she cannot change if the existing lender matches this offer. Significantly, Objective 8
 9 3.4 of the European Commission White Paper 2007 strongly discourages the 9
 10 establishment of such limitations on borrowers in Europe.⁸⁹ Moreover, Article 10
 11 of the Report of the Economic and Monetary Affairs Committee⁹⁰ of the European 11
 12 Parliament clearly states that countries should forbid these tying products. 12
 13 Surprisingly, however, Article 18 of the same Report foresees a similar outcome 13
 14 to the one in Spanish Act 41/2007, which is not desirable as it is contrary to the 14
 15 EU principle of freedom of movement of people and is against free competition 15
 16 among lending institutions in Europe, freedom of choice and consumer mobility. 16

17 A second paradox arises in the context of the Commission's caution in the White 17
 18 Paper in respect of equity-release products, such as the reverse mortgage. Yet, these 18
 19 type of products are legally backed in Article 18 of the Report of the Economic 19
 20 and Monetary Affairs Committee and the reverse mortgage was introduced for 20
 21 the first time into Spanish law by Additional Disposition 1 of Act 41/2007. As an 21
 22 example of this approach in Spain, Figure 2.4 shows the 'recommended' way in 22
 23 which a person's life can be linked to a single lending institution. First the lender 23
 24 grants a mortgage loan to buy the first family dwelling when the borrower is in 24
 25 his or her mid-twenties; then it grants consumer loans when the borrower has 25
 26 partially repaid the mortgage loan and he or she is between his or her mid-forties 26
 27

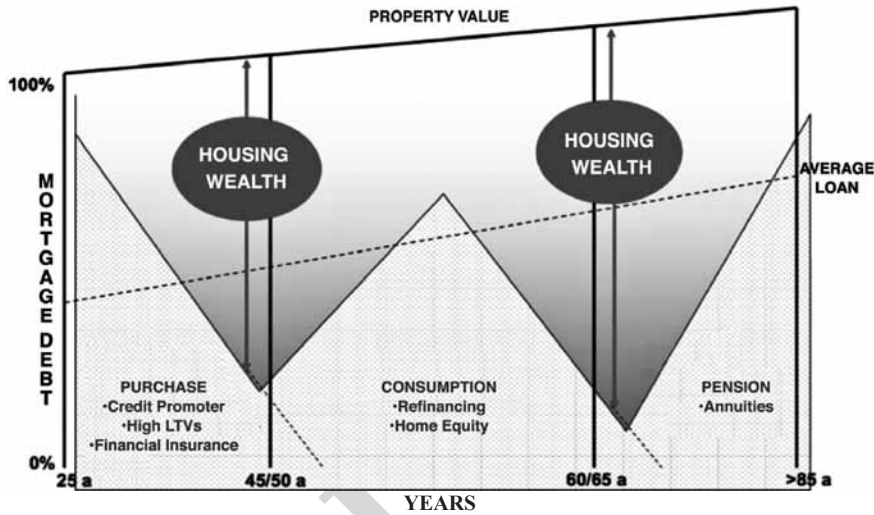
28 _____ 28
 29 87 White Paper on the Integration of EU Mortgage Credit Markets, COM(2007) 807 29
 30 final. 30

31 88 BOE 4 April 1994, no 80, 10364. 31

32 89 Consumer mobility is a clear-cut objective of the White Paper to achieve a true 32
 33 European mortgage market. In this sense, it says (at 5) that: 'Information alone cannot, 33
 34 however, facilitate customer mobility. By increasing switching costs, "tying" practices 34
 35 (e.g. obliging the consumer to open a current account or take out an insurance policy with 35
 36 the same company when purchasing a mortgage credit) effectively bind consumers to a 36
 37 particular financial services provider, thus restricting mobility and weakening competition. 37
 38 Practices such as obliging consumers to transfer their salary to the current account attached 38
 39 to the mortgage credit may have a similar effect. These practices not only have implications 39
 40 for customer mobility but can also reduce price and product competition in the markets 40
 41 for the tied and tying products and discourage the entry of new players, particular those 41
 42 providers specialising in the tied product.' 42

43 90 'Home Loans: Better Advice for Borrowers, More Stable Markets for Lenders', 43
 44 press release, Committee of Economic and Monetary Affairs (7 July 2012) [http://www. 44](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20120604IPR46265+0+DOC+XML+V0//EN&language=EN)
 45 europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20120604IPR462 45
 46 65+0+DOC+XML+V0//EN&language=EN accessed 9 September 2012. 46

1 and mid-sixties; and finally it grants equity-release products when the borrower
 2 retires. This form of continuous dependency on the same financial institution
 3 means that it is too onerous or complicated to change the lending institution. From
 4 25 years to death (where the reverse mortgage operates), this process even links
 5 the borrower's heirs to the lender, since the heir must decide whether to repay
 6 the parent's reverse mortgage (perhaps with another mortgage loan) or allow the
 7 family home to be sold or be given to the lender.



27 **Figure 2.4** ‘Useful’ life of an immovable versus indebtedness
 28 (literal translation from the original title)⁹¹

31 In relation to mortgage procedural law, the Spanish mortgage enforcement
 32 system and insolvency system is one of the most lender-oriented in Europe. The
 33 former has not traditionally allowed the borrower as a consumer to raise any
 34 defence in relation to abusive clauses (Articles 695 and 698) that may be present in
 35 the loan contract, an approach which does not seem reasonable.⁹² A request to the
 36 European Court of Justice to determine whether the system foreseen in Spanish
 37

38
 39 ⁹¹ Santos Gonzalez Sanchez, ‘Presente y futuro del negocio hipotecario’ a handout
 40 of a paper given at the *Curso de crédito hipotecario* conference (Barcelona, Universidad
 41 Rovira i Virgili 2008).

42 ⁹² According to art 83 RDL 1/2007, they are void and can render the whole loan
 43 contract ineffective. In this case, the ineffectiveness of the loan contract will affect the
 44 mortgage validity that secures that loan contract, thus making it void. This is because
 45 Spanish mortgages are legally dependent on the credit they secure (legal accessoriness).

1 law conflicts with European consumer law⁹³ has been recently decided (in *Aziz v* 1
 2 *Catalunya Caixa*),⁹⁴ where it has been stated that this situation goes against EU 2
 3 law (Directive 93/13/CEE).⁹⁵ thus forcing the Spanish government to reform the 3
 4 law (Act 1/2013, 14th May⁹⁶) and causing the suspension of hundreds of mortgage 4
 5 enforcement procedures. Moreover, the mortgagee can, in the same procedure, 5
 6 take action against the rest of the estate of the consumer after an unsuccessful 6
 7 auction of the mortgaged property (Article 579 LEC), a situation that is not the 7
 8 case in many European countries.⁹⁷ 8

9 Moreover, the Spanish insolvency legislation does grant any second opportunity 9
 10 to ‘start again’ for an ‘insolvent in good faith’⁹⁸ natural-person borrower after an 10
 11 insufficient/unsuccessful insolvency process. In contrast, many other European 11
 12 jurisdictions offer more lenient insolvency consequences for natural-person 12
 13 borrowers or consumers, as is shown in Figure 2.5.⁹⁹ A timid reform on this field has 13
 14 not arrived until art. 21 Act 14/2013, 27 September¹⁰⁰, to promote entrepreneurship. 14

15 To further demonstrate the lender-oriented nature of Spanish law, it is notable 15
 16 that one of the most relevant problems for the Spanish insolvency procedure is the 16
 17 opacity of the auction of the immovable property. Quite often, only professional 17
 18 auctioneers attend these auctions, which often end without any offer. In this case, 18
 19 the property is assigned to the lender, thus bypassing the historical prohibition of 19
 20 the *pactum commissorium* (Article 1859). This makes it more difficult to achieve 20
 21 the real price of the property, a situation detrimental to the borrower, since he 21

22
 23
 24
 25
 26 And this is precisely the mechanism that cannot be discussed – because of legal constraints – 26
 27 during a mortgage enforcement procedure, which of course affects the rights of consumers. 27

28 93 OJEU 12 November 2011, C 331/7. 28

29 94 Case C-415/11. 29

30 95 Directive 93/13/CEE of 5 April 1993 on unfair terms in consumer contracts (OJEC 30
 L095, 21 April 1993).

31 96 BOE 15 May 2013, no 116, 36373. 31

32 97 See the whole discussion for both aspects in Sergio Nasarre-Aznar, ‘Malas 32
 33 prácticas bancarias en la actividad hipotecaria’ (2011) 727 *Revista Crítica de Derecho* 33
 34 *Inmobiliario* 2721–23. 34

35 98 ‘Bona fide insolvent’ is quite a difficult concept, but basically means that such a 35
 36 person has not put himself or herself negligently into insolvency, that he or she has always 36
 37 collaborated with his or her creditors to try to solve his or her case, and that he or she has 37
 38 not hidden goods or has not lied to the judge or to the insolvency trustees. 38

39 99 Figures 2.5 and 2.6 are the result of an intensive research task undertaken by more 39
 40 than 30 researchers from around Europe and Japan, led by Dr Otmar Stöcker (VdP), since 40
 41 2005 on mortgage law in Europe in the so-called ‘Runder Tisch’. The latest versions of 41
 42 the maps can be found in M Stocker Otmas and Rolf Stürner, *Flexibilität, Sicherheit und* 42
 43 *Effizienz der Grundpfandrechte in Europa Band III*, 3 erweiterte Auflage, Band 50 (Berlin, 43
 44 Verban Deutscher Pfandbriefbanken 2012).

44 100 BOE 28 September 2013, no 233, 78787. 44

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44

VI. 20 What are the consequences of bankruptcy proceedings for a consumer ?

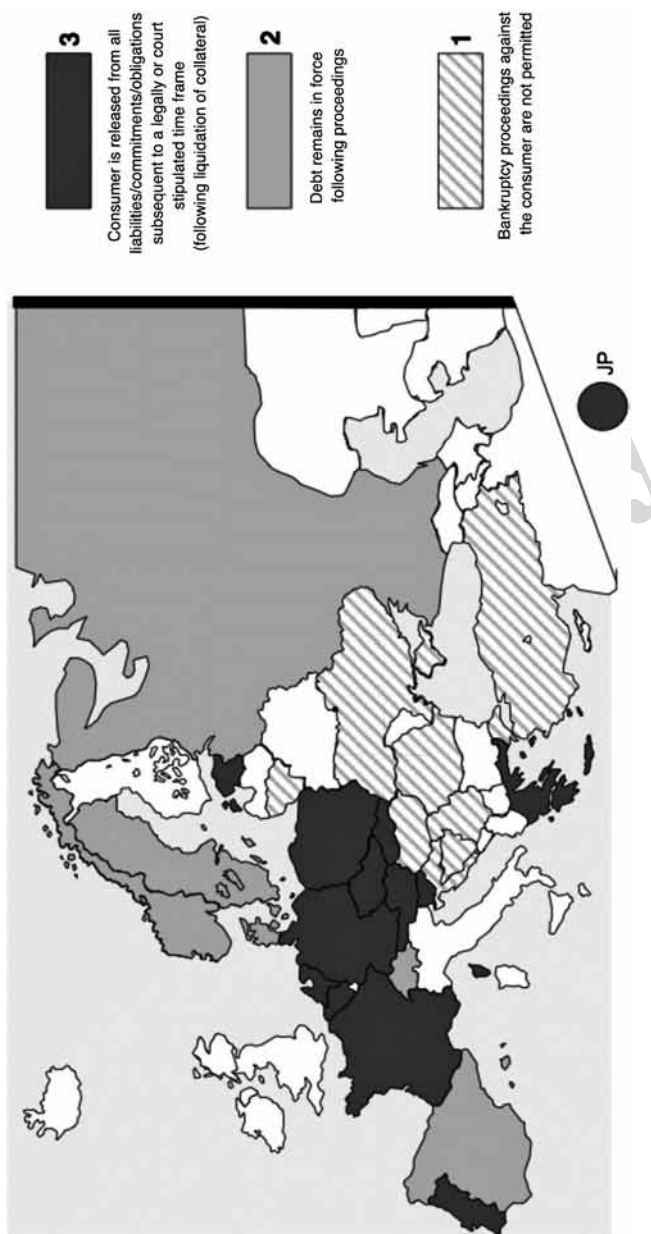


Figure 2.5 The insolvency process against consumers in Europe.

Source: Runder Tisch, 2012.⁹⁹

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44

V.9 What is the minimum of advertising of an auction (in order to facilitate the most publicity)?

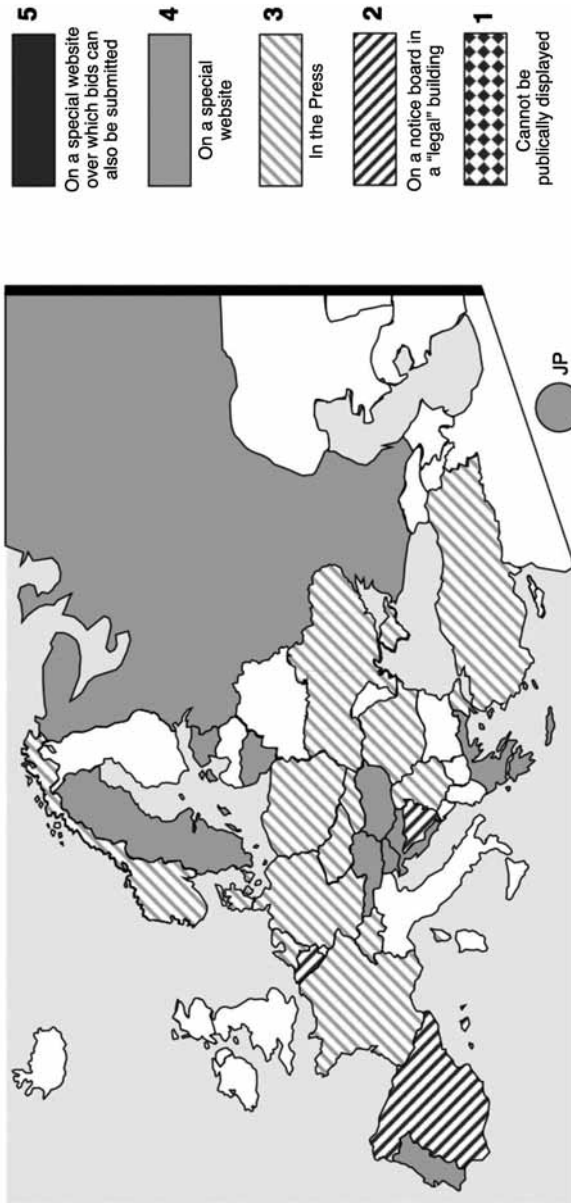


Figure 2.6. Minimum advertising of an auction in order to facilitate maximum publicity. .

Source: Runder Tisch, 2012.⁹⁹

1 or she remains a debtor for life¹⁰¹ for the amount of the loan not covered by the 1
2 amount obtained by the sale of the house.¹⁰² As shown in Figure 2.6⁹⁹, Spain is one 2
3 of the very few countries in Europe (together with Belgium and Bosnia) which 3
4 requires that only an announcement on the physical noticeboard of the court where 4
5 the auction is going to take place is adequate publicity for a mortgaged property 5
6 auction. Clearly, this is insufficient for an open, transparent international property 6
7 market. A sort of system of auctions resulting from mortgage enforcements is 7
8 foreseen in Act 1/2013, although it still needs to be developed through regulations 8
9 to exist in the praxis. 9

10 Finally, Spain still has inadequate regulation of the mortgage securities. 10
11 Spanish covered bonds (*cédulas hipotecarias*) and MBSs (*bonos de titulización* 11
12 *hipotecaria*) are insufficiently regulated under Spanish mortgage market 12
13 legislation. As this has been developed in depth elsewhere,¹⁰³ just two remarks 13
14 are necessary here. The first is that the security of Spanish covered bonds for 14
15 investors is unclear and comparatively insufficient, and their performance in cases 15
16 of insolvency of the issuer is below the standard of the securities in other European 16
17 jurisdictions. For instance, no separate estate is created in the case of insolvency 17
18 of the originator/issuer that may allow the continuation of a healthy covered bonds 18
19 business. The second is that the legal construction of Spanish MBSs is insufficient, 19
20 from a civil law point of view, to assure that the SPV (issuer) is an insolvency- 20
21 remoteness entity, and the rights of MBS holders, in case of mismanagement by 21
22 any stakeholders, are weak and unclear. This lack of legal certainty contributes 22
23 to the international lack of trust towards Spanish banks and Spanish mortgage- 23
24 related financial products. Despite this, no reform is foreseen in the short term in 24
25 this area, although it would be highly desirable. 25

26
27
28
29 _____ 29
30 101 For a number of situations, however, this is more a theoretical than a real situation 30
31 as the RDL 8/2011, 1 July (BOE 7 July 2011, no 161, 71548), has increased the mortgagor's 31
32 minimum unenforceability threshold (i.e. the part of the monthly income of a mortgagor 32
33 that cannot be foreclosed by the mortgagee). In a standard case in 2012, it has risen from 33
34 about €642/month (Art 607 LEC) to €962/month. Moreover, it is quite theoretical that a 34
35 bank will be able to recover the owed amount after a partially unsuccessful auction of the 35
36 borrower's main residence, as it is likely that he or she has no more valuable goods and 36
37 will not have any for many years. Therefore, the 'recourse' to the rest of the estate of the 37
38 borrower acts more as a preventive and deterrent measure than as a real way for the lender 38
39 to recover the rest of the money. 39

40 102 This has led to social movements to push legislative changes in Spain in favour 40
41 of the introduction of a forced *datio pro soluto*, which, in case they succeed, would convert 41
42 Spain into a form of 'non-recourse' state. As seen above in the case of the US, this does not 42
43 seem to be a good solution for any mortgage market. 43

44 103 See Nasarre-Aznar (n 2) 58. The problems addressed there were not solved in the 44
45 reform of Spanish mortgage securities in 2007, as is explained in Nasarre-Aznar (n 62). For 45
46 a summary, see also Nasarre-Aznar (n 96). 46

1 Insufficient Reforms in the Spanish Mortgage and Housing Markets 1

2

3 *The Guidelines for a New Situation* 3

4

5 In relation to the Spanish situation, a number of appropriate reforms, based on the 5
6 preceding analysis, can be suggested: 6

7

- 8 1. Measures should be taken to avoid a repetition of any of the following 8
9 circumstances that led Spain to the current situation: the easy access to 9
10 credit regardless of mortgagors' resources or repayment capacity; the 10
11 absence of any real alternative to home ownership; the promotion of 11
12 the social value of massive consumption¹⁰⁴ and a pro-lender and weak 12
13 mortgage securities legislation. All of these contributed decisively to the 13
14 creation of the mortgage and housing bubble in Spain. 14
- 15 2. The choices for families should not be either over-indebtedness due to 15
16 home-ownership or the lack of stability that results from renting a house 16
17 in Spain. Yet, even today, access to home-ownership automatically 17
18 involves over-indebtedness, since salaries in recent years have not 18
19 increased at the same rate as house prices. In June 2012, five years 19
20 after the collapse of the mortgage and housing market in Spain and 20
21 internationally, house prices remain as high as in 2005, one year before 21
22 the peak of the housing bubble. Even in the rental sphere, there are few 22
23 signs of improvement. The Spanish government has recently passed Act 23
24 4/2013, 4th June¹⁰⁵ to reform the Spanish law on urban leases (*Ley de* 24
25 *arrendamientos urbanos*: LAU). This reform brings even less stability 25
26 to tenants. For example, there is a reduction in the protection period 26
27 from five to three years, the legal right of pre-emption for the tenant is 27
28 removed and referenced prices during the protection period is removed. 28
29 Clearly, this will not increase the attractiveness of renting as a type of 29
30 housing tenure for families. 30
- 31 3. Mortgagors, and consumers in general, should be able to calculate, from 31
32 the very beginning of a mortgage agreement, the costs of the mortgage 32
33 they are about to sign. Equally, mortgagors should be aware of the risks 33
34 that this might entail. Spain lacks specific protective legislation for 34
35 mortgagors (as consumers), and these consumers are even explicitly 35
36 excluded from regular consumer protection laws.¹⁰⁶ The rules foreseen 36

37

38

39 104 See Jim Kemeny, *The Myth of Homeownership. Private vs Public Choices in*
39 *Housing Tenure* (London, Routledge & Kegan Paul 1981) 62 and 63.

40

40 105 BOE 5 June 2013, no 134, 42244.

41

41 106 See, as examples, Act 22/2007, 11 July, on distance financial contracts (BOE 12
42 July 2007, no 166, 29985); or Act 47/2007, 19 December (BOE 20 December 2007, no
43 304, 52335) on the transposition of the MiFID Directive. Even the Spanish legislator did
44 not take advantage of the possibility given in EU Directive 2008/48/CE of the European

44

1 in Order EHA/2899/2011¹⁰⁷ to avoid future bad banking practices do 1
2 not appear sufficient to avoid future bad banking practice and do not 2
3 add anything extra to the current situation. Indeed, there are no specific 3
4 legal consequences for misbehaviour by lenders in the marketing and pre- 4
5 contractual phases, such as the failure to properly assess the capability of 5
6 the debtor to repay the offered mortgage or the failure to disclose sufficient 6
7 information to the debtor so that he or she is able understand the cost and 7
8 the legal and economic consequences of the legal documentation he or 8
9 she is about to sign. Nor are there any legal consequences from this upon 9
10 the loan contract. There is a simple administrative fine in Article 14, but 10
11 this does not in any way lead to the possible invalidity of the loan contract 11
12 or any type of contractual or torts liability on the lender. Moreover, the 12
13 rules in this Order do not create greater obligations for those who take 13
14 part in the standard process of granting a mortgage loan. For instance, 14
15 there is no compulsion on a notary public to check for the validity of 15
16 all type of pre-formatted and pre-included clauses in the loan contract, 16
17 or to forbid excessively onerous mortgage loans. Indeed, the functioning 17
18 of the Latin notarial system in Spain is now being questioned.¹⁰⁸ Notary 18
19 publics in Spain still claim that it is not their duty to assess the position 19
20 of the parties, although legislation provides that they have to ‘inform’ or 20
21 to ‘warn’ them. But there is no requirement to ensure that they understand 21
22 the legal and economic consequences of underwriting a mortgage loan. 22
23 Nor, it is claimed, is it their duty to control the legality of any abusive 23
24 clauses incorporated into the public deeds unless they had previously been 24
25 declared void by a judge. This would appear to be a reasonable request, 25
26 according to Article 83 RDL 1/2007, which provides that if an abusive 26
27 clause in a contract with consumers is void, this fact must be declared by 27
28 any person, especially by notaries, which should prevent the registration of 28
29 that mortgage loan with that clause. 29
30
31
32
33

34 Parliament and of the Council, of 23 April 2008 on credit agreements for consumers and 34
35 repealing Council Directive 87/102/EEC (OJEU, 22 May 2008, L 133/66) to extend its 35
36 scope to mortgage consumers, when it implemented this Directive through Act 16/2011, 24
36 June (art 3a); BOE 25 June 2011, no 151, 68179. 37

38 107 BOE 29 October 2011, no 261, 113242. 38

39 108 See, as an example, U Schmid Christoph et al, ‘Conveyancing Services Market’, 39
40 ZERP, Study COMP/2006/D3/003 (University of Bremen, December 2007) 77 which 40
41 establishes that: ‘As shown above, most of this regulation, particularly on *numerus clausus*, 41
42 fixed fees and reserved rights is unacceptable when considered in the light of European 42
43 competition and internal market law.’ Moreover, the STS 16 December 2009 (RJ 2010/702) 43
44 revealed that lending institutions used to include void clauses in mortgage contracts that 44
44 had not been properly controlled by notary publics. 44

1 In addition to this, in order to resolve previous banking practices, the RDL 6/2012¹⁰⁹ 1
 2 was passed on 9 March 2012. However, its efficacy is very limited. First, the 2
 3 ‘good banking practices code’ which is proposed as the basic tool for protection of 3
 4 mortgagors is merely voluntary. Second, there are a large number of requirements 4
 5 to be fulfilled by mortgagors in order to qualify for specific solutions to address 5
 6 mortgage default or arrears, such as acquittances, postponement of payments, 6
 7 reduction of interest rates, *datio pro soluto*, etc. Some of these requirements are 7
 8 extremely onerous to achieve, such as the one that states that the whole family of the 8
 9 mortgagor must be unemployed and the loan should not have more guarantees. There 9
 10 is also a limitation to properties within a certain maximum value for the mortgaged 10
 11 property, depending on the size of the city where it is located. The aforementioned 11
 12 Act 1/2013 has recently relaxed the requirements to achieve by debtors and families 12
 13 in need to benefit from RDL 6/2012 but it is still uncertain if this time they will be 13
 14 the adequate to help those that really deserve these special rules. 14

15 As a consequence of all this, new and stronger rules are still required to 15
 16 create a comprehensive form of mortgagors’ protection, both in relation to the 16
 17 current consequences of reckless past lending and to avoid the negative effects 17
 18 of another housing bubble. 18

19 19

20 *Forthcoming Measures* 20

21 21

22 There are essentially two types of forthcoming measures that are being introduced 22
 23 into the Catalan legal system, thus they will only apply to Catalonia once passed 23
 24 into law. One group of provisions will deal with the necessity to really strengthen 24
 25 the protection of mortgage consumers. Another group of provisions will deal with 25
 26 the fact that new types of housing tenures are needed to augment the housing 26
 27 market, and to adapt it to the economic capabilities of each family, instead of 27
 28 making families to choose between full ownership and renting. 28

29 29

30 *More protection for mortgage consumers* 30

31 Devolution rules in relation to mortgages are unclear in the decentralized regions 31
 32 of Spain. Despite this, the Catalan legislator has drafted a Law Project to reform 32
 33 the Catalan Consumer Code (CCC) in July 2012,¹¹⁰ which addresses the main 33
 34 issues in relation to protection of the mortgagor.¹¹¹ This reform is inspired in the 34
 35 Proposal for a Directive of the European Parliament and of the Council on credit 35
 36 agreements relating to residential property of March 2011¹¹² and goes beyond any 36

37 37

38 38

39 109 BOE 10 March 2012, no 60, 22492. 39

40 110 DOGC 30 July 2012, no 364, 34. Although the Catalan Parliament is to be 40
 41 dissolved because of the calling of an elections, it is foreseeable that this draft will continue 41
 42 to be processed after the elections. If it is passed, it will be in force only in Catalonia. 42

43 111 I was, in fact, personally involved in the drafting of its first version in September 43
 44 2011. 44

44 112 Brussels, 31 March 2011, COM(2011) 142 final. 44

1 measures taken until now for the whole of Spain (including many aspects of Act 1
2 1/2013). The relevant issues are as follows: 2

3
4 (a) A clear legal limitation (new Article 251-6 CCC) on the rate of interest 4
5 charged on arrears to be limited to no more than 2.5 times the legal 5
6 interest rate of money (which is fixed on an annual basis by the Spanish 6
7 government), regardless of what the parties have arranged in the mortgage 7
8 contract. Indeed, it is currently usual to find interest rates on arrears of more 8
9 than 20 per cent in mortgage loan contracts. 9

10 (b) The obligation on the professional lender to check the economic capacity 10
11 of the borrower (consumer) to repay the mortgage loan he or she is offering 11
12 to him or her. If the lender discovers the unsuitability of that mortgage 12
13 for a particular borrower, he or she should warn the borrower about its 13
14 unsuitability (new Article 263-2.3 CCC). Unfortunately, the Catalan reform 14
15 does not foresee the same strong results as are foreseen in Article 14.2 of 15
16 the Directive Proposal (at least in its first version of 31 March 2011¹¹³) in 16
17 the event of the contravention of this obligation. Under Catalan law, the 17
18 borrower will be allowed to contract such a mortgage anyway, while in the 18
19 Directive Proposal, there is a clear prohibition on the lender from granting 19
20 it. However, the Directive Proposal fails to state the consequences for the 20
21 lender who grants that inadequate mortgage to the borrower. The natural 21
22 consequence in many legal jurisdictions would be the voidability of that 22
23 mortgage loan, which entails a difficult situation for the borrower, who 23
24 will then be obliged to return an amount of money he or she no longer 24
25 has. This is not the only case in which the Catalan proposal could have 25
26 further protected the mortgagor. The defining of the notarial role in the new 26
27 Article 123-10 CPCC is another. On the one hand, this increases notarial 27
28 duties in relation to the provision of information to the mortgage consumer 28
29 in a way in which it can be understandable,¹¹⁴ while on the other hand, it 29
30 limits the notarial control to those clauses in mortgage contracts that have 30
31 been previously declared void by a judge. Instead, it could have expanded 31
32 the notary's duty to those clauses which are clearly abusive (regardless of 32
33 33

34 113 But no longer in its version resulting of its adoption by the European Parliament 34
35 on 10 September 2013 (T7-0341/2013). Its art. 18.5 states that: "Member States shall 35
36 ensure that: (a) the creditor only makes the credit available to the consumer where the result 36
37 of the creditworthiness assessment indicates that the obligations resulting from the credit 37
38 agreement are likely to be met in the manner required under that agreement" while art. 14.2 38
39 of the Project at 31 March 2011 stated that: "Member States shall ensure the following: (a) 39
40 Where the assessment of the consumer's creditworthiness results in a negative prospect for 40
41 his ability to repay the credit over the lifetime of the credit agreement, the creditor refuses 41
42 credit", which at least seems a more expedited wording. 42

43 114 This is essential because simply providing long lists of information is not enough, 42
43 especially for financial products. See the discussion above about the dubious efficacy of 43
44 the 'long lists' system to protect consumers that is normally used in European Directives. 44

1 whether they have been previously declared void by a judge) in Article 83 1
 2 RDL 1/2007. 2

3 (c) Pre-contractual clear information for mortgagors is required in the 3
 4 marketing phase of the contractual path (new Articles 262-3 and 262-4 4
 5 CPCC). For example, when the law is passed, the following sentence will 5
 6 be compulsory in each advertisement for a mortgage product: ‘Contracting 6
 7 this mortgage may cause you to lose your dwelling and a part of your 7
 8 personal estate.’ After the marketing phase, but before the contract is 8
 9 signed, the offer by the professional lender should be incorporated and 9
 10 given to the mortgagor in a pre-formatted form, which should be the same 10
 11 for every professional lender. This application form should be formatted in 11
 12 such a way that it discloses the grounds for the final price of the mortgage 12
 13 loan (i.e. to which extent swaps, caps, floors, insurances and other linked 13
 14 financial products influence the final interest rate of the mortgage loan 14
 15 and its other conditions). Only then will the mortgage borrower have the 15
 16 sufficient information to be able to compare this particular offer with other 16
 17 offers from the same or another professional lender – this is what is needed 17
 18 by every consumer. 18
 19 19
 20 20

21 **New Forms of Housing Tenure – The Catalan Intermediate Tenures** 21

22 *Justification* 22 23 23 24 24

25 The measures described above would improve the current situation and would 25
 26 avoid repeating the mistakes of the last 15 years in relation to housing and the 26
 27 mortgage markets. However, they do not, in fact, create anything new, and there 27
 28 is really a need for imaginative measures to overcome the current situation and to 28
 29 re-start both markets. 29

30 Intermediate tenures can play an important role here. The Directive Proposal 30
 31 2011, as was mentioned previously, will no longer allow lending institutions to 31
 32 grant subprime mortgages, which would mean, in practice, that the maximum 32
 33 LTV would, in a best-case scenario, amount to no more than 80 per cent. If this 33
 34 is passed in this or in a similar way¹¹⁵, it will bring a completely new set of rules 34
 35 to play in the Spanish mortgage market, as it would essentially mean that lending 35
 36 institutions would only be allowed to fund 80 per cent of the value of the house. 36
 37 The other 20 per cent should be paid by the buyer upfront. Numerically, this 37
 38 would mean that for a flat valued at €150,000,¹¹⁶ the mortgagor would have to pay 38
 39 39

40 _____ 40
 41 115 As said, this seems to have been somehow softened by its version of 10 September 41
 42 2013, although member states should control anyhow that no more careless lending is 42
 43 undertaken by lending institutions. 43

44 116 This is nearly the medium price for a 80m² dwelling in Spain according to fotocasa. 43
 44 es http://www.fotocasa.es/indice-inmobiliario_fotocasa.aspx accessed 19 October 2012. 44

1 €30,000 upfront in cash, quite a large amount for many. In effect, this might mean 1
2 that many families will never be able to become home-owners¹¹⁷. 2

3 One significant initiative¹¹⁸ that is being developed in Catalonia¹¹⁹ is the 3
4 regulation of intermediate tenures,¹²⁰ based on the success of the shared-ownership 4
5 model in the UK,¹²¹ and the work of housing associations there in developing social 5
6 housing on this basis. The UK shared-ownership model is based on the device of 6
7 the leasehold, an approach conceived under common law that is unknown in many 7
8 civil law jurisdictions.¹²² 8

9 That is why, under Catalan law, the proposal is to differentiate between ‘shared 9
10 ownership’ (*propietat compartida*) and ‘temporal ownership’ (*propietat temporal*). 10
11 The using of the word ‘ownership’ is crucial to differentiate these two forms of 11
12 tenure from limited real rights – traditionally not an attractive option for either 12
13 consumers or financiers to access a dwelling. This proposal clearly points out that 13
14 they are two new alternative ways to the ‘traditional ownership’¹²³ (*propietat*) of 14
15 achieving all faculties of the full ownership – step by step in shared ownership and 15
16 time-framed in temporal ownership. 16

17 This approach is conceived, in fact, as a middle way between ownership and 17
18 renting, and is intended to create a real third housing market, which will lead 18
19 to a viable alternative for families to achieve a type of housing tenure which is 19
20

21 _____ 21
22 117 The only remaining option being to rent, and it has already addressed the issues 21
23 in relation to this type of tenancy in Spain. 22

23 118 By the Housing Research Group of University Rovira i Virgili, Tarragona, Spain 23
24 http://www.urv.cat/grups_recerca/housing/english/RGAH/Welcome.html accessed 19 July 24
25 2013. 25

26 119 The proposal is currently under consideration in the Catalan Codification 26
27 Commission in order to introduce the intermediate tenures into the Catalan Civil Code. 27

28 120 As mentioned in note 1, this work belongs to a Project of the Spanish Ministry 28
29 of Economy and Competitiveness to expand the intermediate tenures to the rest of Spain. 29

30 121 See a complete study on economic aspects of intermediate tenures in Sarah Monk 30
31 and Christine Whitehead, *Making Housing More Affordable: The Role of Intermediate 31*
Tenures (Oxford, Wiley-Blackwell 2010). 31

32 122 Although as Jane Ball in ‘Fragmentando la propiedad para la asequibilidad: la 32
33 shared ownership o ‘nuevas’ tenencias en Inglaterra y Francia’ in Sergio Nasarre-Aznar 33
34 (ed), *El acceso a la vivienda en un context de crisis* (Madrid, Edisofer 2011) 173 states, 34
35 ‘there might exist similar institutions in Continental Europe, such as the emphyteusis or the 35
36 usufruct. However, they do not achieve the grade of “utility” or “usability” as the leasehold, 36
37 as they are not ownership-like institutions but only rights in *re aliena*, which are quite 37
38 limited in their scope’. 38

39 123 This ‘traditional ownership’ date from the French Revolution and entails all 39
40 rights of use and disposal (*usus, fructus et abusus*) in relation to a thing. It is present both 40
41 in the Spanish Civil Code (art 348 CC) and in the Catalan Civil Code (art 541-1 CCC). 41
42 Both are constitutionally palliated (i.e. those faculties within the ownership are limited) by 42
43 their social function (e.g. someone cannot destroy their own thing if this affects another’s 43
44 fundamental rights, and nobody is allowed to exploit a property if, in doing so, it affects 44
45 another’s fundamental rights). 44

1	Table 2.2 Goals to achieve the Catalan intermediate tenures			1
2				2
3	Ideal goals of housing policies according to the current situation	Shared ownership	Temporal ownership	3
4				4
5				5
6	To reduce the vacant housing stock and to reactivate the housing and mortgage market	Allows the sale of portion of ownership of dwellings instead of complete title of dwellings (that are not being sold today anyway)	Allows the sale of dwellings for periods of time, adapted to the needs of each family	6
7				7
8				8
9				9
10	To reduce the financial illiquidity of financial institutions	Loans of smaller amounts: this will depend on the percentage of the acquired share of the property	Loans of smaller amounts: this will depend on how long the buyer has the property	10
11				11
12				12
13				13
14	To prevent families from becoming over-indebted	To grant smaller and more sustainable mortgage loans. Investment in housing will be more needs-based, relying somewhat on savings rather than borrowing		14
15				15
16				16
17	To create a favourable context for responsible lending and borrowing	Progressive acquisition of home-ownership (staircasing)	Real necessity to buy a dwelling based on time limits. This type of tenure clearly goes against speculative operations	17
18				18
19				19
20				20
21				21
22	To allow flexibility of approaches in access to a dwelling	A continuum in the form of housing tenure can be achieved; thus, there is one for each type of family need		22
23				23
24				24
25	To develop stable but flexible tenure	When there is more need for a stable tenure (ex. retirement), the full ownership has been already acquired. In the meantime, there is a clear and progressive investment in one's house	During the tenure, the buyer becomes the true owner of the house. Once the time expires, it returns ex lege to the original owner	25
26				26
27				27
28				28
29				29
30				30
31				31
32				32
33	In the current context of social housing, today's conjuncture does not allow too onerous intervention in social housing by the public administration	The public administration can limit its intervention to the part of rent of the shared ownership	The public administration can sell real estate and dwellings to families that can be recovered at a certain point in time to be reused (and given to another family in need), refurbished (if it is deteriorated) or rebuilt (if it is in derelict)	33
34				34
35				35
36				36
37				37
38				38
39				39
40				40
41				41
42				42
43				43
44				44

1 attainable (avoiding over-indebtedness), stable (allowing families to become 1
 2 established, unlike the aforementioned reform of the Spanish law of leases) and 2
 3 flexible (not necessarily tying families to a piece of land for 30 or more years). 3
 4 Intermediate tenures would help to reduce the vacant housing stock, alleviate the 4
 5 need for liquidity for Spanish lending institutions and, ultimately, help families to 5
 6 access to a sustainable and stable home. Table 2.2 shows how this can be achieved 6
 7 through the developing Catalan shared and temporal ownership approach. 7

8

9 *Shared Ownership* (propietat compartida) 9

10

11 The shared ownership approach provides the buyer (the shared owner) with a 11
 12 share of the property, while the other share is owned by the seller (the original 12
 13 owner), both coexisting. In other words: 13

14

15 i. The buyer is the (shared) owner of (a part of) the property from the outset. 15
 16 In this sense, this approach differs from others, such as the rental with 16
 17 purchase option (which usually only entails a delay in the purchase for 17
 18 about three years) or rights to build. 18

19 ii. The shared owner pays the (shared) seller of the property a rent for 19
 20 the portion of the legal element of the property that the former does not 20
 21 currently own. This, in combination to his or her owned share, entitles him 21
 22 or her to use the whole property in an exclusive way. 22

23 iii. This means that shared owners have all the rights related to home- 23
 24 ownership: the exclusive use and enjoyment of the whole property, and the 24
 25 ability to dispose of the share he or she owns, both *inter vivos* and *mortis* 25
 26 *causa*. As a consequence of this, the shared owner pays all taxes relating 26
 27 to the use and ownership of the house (e.g. utility bills, taxes on home- 27
 28 ownership). He or she can attend the condominium government body and 28
 29 can take part in its decisions. 29

30 iv. The shared owner can mortgage his or her share on the property, even 30
 31 for funding his or her acquisition. Of course, a mortgage on 20 per cent 31
 32 of the property (based on the norm under the English shared ownership 32
 33 scheme of five per cent funded by the buyer from his or her own resources, 33
 34 20 per cent as the first share of acquisition and 75 per cent held by the 34
 35 seller/lessor) is less onerous for the buyer and for the credit institution than 35
 36 a mortgage to fund the acquisition of the whole property. 36

37 v. The shared owner has the right to progressively acquire more shares of 37
 38 the ownership of the property (staircase up). In social housing, the scheme 38
 39 would also offer the possibility 'to staircase down', i.e., the shared owner 39
 40 can reduce his/her share of the property in accordance to his housing and 40
 41 economic needs. 41

42

43 Thus, the shared ownership approach has been designed to give those in need of 43
 44 housing and those that cannot buy a property in the private home-ownership market 44

1 the possibility to own (step by step) a house without becoming over-indebted. The 1
 2 shared owners (buyers) are granted all powers necessary to act as full owners of 2
 3 the property, although with certain limitations to protect the interests of the seller 3
 4 (who is retaining, in our example, 75 per cent of the property), and the eventual 4
 5 financier of the acquisition. Of course, the buyer in a shared-ownership scheme 5
 6 cannot alter the substance of the property, and he or she must use it for the agreed 6
 7 purpose (e.g. residence in case of social housing) and cannot alter its structural 7
 8 elements. 8

9
 10 *Temporal Ownership* (propietat temporal) 10
 11 11

12 There is also temporal ownership, where a new owner acquires the ownership 12
 13 from an original owner of a property, but only for a certain and determined period 13
 14 of time. During this time, he or she has all the powers on the property (use, 14
 15 enjoyment, disposal *inter vivos* and *mortis causa* and charge – e.g. with a mortgage 15
 16 to acquire the temporal ownership), as he or she is considered a ‘temporal owner’. 16
 17 For this same reason, the temporal owner will be responsible for all expenses 17
 18 related to the property. 18

19 This approach differs substantially from the current system, where a property 19
 20 is acquired ‘forever’ (i.e. eternally) under Spanish and Catalan laws. The 20
 21 introduction of ‘temporal ownership’ will allow the purchase of a property for 21
 22 a specified number of years. This entails important stability for the buyer and 22
 23 significantly increases its affordability. After this specified number of years, the 23
 24 ownership of the property will revert automatically and without cost to the original 24
 25 owner (the seller), unless extensions are agreed. The original owner is entitled to 25
 26 be compensated for all depreciation of the property caused by the negligent or 26
 27 wilful misconduct of the temporary owner. 27

28 This temporal ownership approach may provide a solution to a variety of 28
 29 situations, given that its duration may be decades or hundreds of years in length. 29
 30 Moreover, it is foreseen that it can be used in combination with shared ownership, 30
 31 thus increasing the fragmentation and the affordability of the available housing 31
 32 stock in the same way as the leasehold is used in combination with shared 32
 33 ownership in the UK. 33

34 34

35 35

36 **Conclusions** 36

37 37

38 It is now widely accepted that the current global financial, economic, mortgage 38
 39 and housing crisis started in the US in 2007. The origins of the US crisis can also 39
 40 be explained as a consequence of severe deficiencies in the legal architecture and 40
 41 institutions. It is difficult to understand how a market of several trillion US dollars 41
 42 could effectively operate without a specific piece of legislation covering the rights 42
 43 and obligations of the parties, or how mortgages could be effectively recorded 43
 44 and verified through more than 3,000 land registers, or how these could have been 44

1 properly and efficiently transferred fulfilling traditional rules of common law, or 1
2 how they could be properly enforced in non-recourse states, or in those states 2
3 with only judicial enforcement procedures. Only in this context can we understand 3
4 the misbehaviour of the rating agencies, the existence of structural problems in a 4
5 standard US mortgage securitization process, or the creation of MERS. The US 5
6 crisis spread to Europe and to the rest of the world due to the international mortgage 6
7 securitization of US subprime mortgages through MBSs and CDOs. This created a 7
8 'lack of trust' crisis among credit and investment institutions globally, from which 8
9 many countries have not yet recovered. Some countries, such as Spain, are in an 9
10 even deeper crisis due to a variety of factors, but fundamentally due to the high 10
11 dependence of their economy in recent years on housing construction. 11

12 Spain's current situation is a result of a range of factors that have led to a housing 12
13 bubble and its subsequent bursting. Among these are the widespread existence 13
14 of mortgage loans, now acting in detriment to other more affordable types of 14
15 housing tenure, the inadequate regulation of the mortgage and banking operations, 15
16 the lack of sufficient protection for mortgagors and bad banking practices. The 16
17 measures undertaken in reaction to the crisis by the Spanish government to date 17
18 have been insufficient. However, new measures involving increased protection 18
19 for mortgagors are being considered by Catalan legislators, which deal with some 19
20 bad banking practices and abuses, and also with the lack of sufficient and effective 20
21 pre-contractual information. There are also some innovative approaches being 21
22 developed, which seek to create a third type of housing market (in addition to 22
23 the two classic ones: home-ownership and renting) and which have the potential 23
24 to reinvigorate the housing and the mortgage market systems in Spain. These are 24
25 the so-called 'intermediate tenures', which in Catalonia are being adopted in the 25
26 forms of shared and temporal ownership. Clearly, in the face of the global and 26
27 local economic collapse which relied on many outdated and inadequate legal 27
28 structures and regulatory mechanisms, new and innovative legal approaches are 28
29 now required more than ever in relation to housing. 29

30
31
32
33
34
35
36
37
38
39
40
41
42
43
44