

Islamic mortgage-alternatives in Ireland: A comparative reflection on a decade of consumer appetite in the face of legislative uncertainty

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Abstract:

This article provides an in-depth and comparative analysis of the accommodation of Islamic mortgage-alternatives under Irish law. It draws on results from two surveys of Ireland's Muslim community and uses a comparative approach with the UK to highlight continuing gaps in the legal framework relevant to Ireland's Islamic finance market.

Keywords:

Mortgage-alternatives; Islamic finance; taxation; regulation; Ireland; UK

A. Introduction

The Islamic finance industry overlays principles derived from religious teachings with financial objectives and encompasses financial activity and institutions that have been structured to adhere to the financial principles of Islamic law (a term frequently used interchangeably with *shari'ah*).² The industry has matured and diversified over the last two decades and is, today, a distinct segment of the global financial markets.³

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² This article will use the term Islamic law unless quoting directly or the context requires. There is no single correct means of expressing Arabic terms and sounds in the Latin alphabet. Throughout this article, quotations and the official names of products and organisations, which contain a transliteration of Arabic terms and use of italicisation which are different from that used in this article, will be reproduced without adjustment.

³ This growing maturity is reflected not only in the increasing geographic spread of Islamic finance, but also the increase in academic and industry literature that analyses complex Islamic financial products. See, R. Jarrer, "The ever-expanding frontier" (Oct-Nov 2019) *International Financial Law Review* 40-42, M.A. Khan et al., "Islamic Finance Service Industry and Contemporary Challenges: A Literature Outlook (1987-2016)" (2017) 4 *Marketing and Branding Research* 310-321. See also, A. Prasad, "Global Aspirations" (September 2015) *Finance & Development* 50-53 noting at 53 that "Islamic finance is one of the fastest growing segments of the financial industry, and not just in the Middle East." The extent to which Islamic finance has become embedded in global financial markets can also be seen in the number of Islamic finance transactions taking place outside of traditionally Muslim countries. See, for example, the London Stock Exchange plc's dedicated commentary on Islamic finance, <https://www.lseg.com/sukuk> [Accessed 12 July 2020].

While a number of Muslim-majority countries, such as Malaysia, have developed into active centres for Islamic finance activity,⁴ some countries without Muslim-majority populations have implemented legislative and/or policy measures designed to facilitate the development of Islamic finance activity within their own domestic economies.⁵ Implementing an approach that accommodates Islamic finance activities within the existing legislative framework, the United Kingdom (the UK) has sought to create the legal and institutional conditions necessary for the country's development as a centre for Islamic finance.⁶ More recently, Irish tax authorities and lawmakers have also turned their attention to the Islamic finance market. In doing so, they have not sought to favour, or to create a separate legal framework for this market. Instead, they have implemented an approach to the accommodation of certain Islamic finance products that is similar to that put in place in the UK.⁷

However, while legislative accommodations introduced to date in Ireland suggest a receptive attitude to Islamic finance by the Irish government, some remaining legal and taxation hurdles could go some way towards explaining the limited development of domestic Islamic finance in Ireland, particularly in a retail context. Focusing on Islamic mortgage-alternative products, this article provides an in-depth and comparative analysis of the accommodation of Islamic finance under Irish law. In doing so, it considers relevant guidance and legislative amendments introduced by Irish tax authorities and lawmakers with respect to Islamic finance generally and to Islamic mortgage-alternatives more specifically. Drawing on data obtained from two surveys conducted nine years apart, this article explores, for the first time in an academic context, the views of Ireland's Muslim population with respect to financial services. In the context of Islamic mortgage-alternative products, it uses a comparative approach with the UK to highlight continuing gaps in the legal framework relevant to Ireland's Islamic finance market. Reflecting on this, this article considers recent developments in the Islamic property financing market in Ireland and discusses a property financing product developed for Community Finance Ireland. This article concludes by reflecting on the potential future of Islamic

⁴ Bank Negara Malaysia, "Islamic Banking & Takaful", https://www.bnm.gov.my/index.php?ch=fs&pg=fs_mfs_bank&ac=155 [Accessed 12 July 2020]; R. G. D'Cruz and M.Z.Z. Aziz, "Malaysia" in *The Islamic Finance and Markets Review*, 4th edn (2019), <https://thelawreviews.co.uk/edition/the-islamic-finance-and-markets-review-edition-4/1209537/malaysia> [Accessed 12 July 2020].

⁵ R. Toan, "Cross-Border *Ijarah*; A Case study in the US Taxation of Islamic Finance", in *Third Harvard Islamic Proceedings* (Harvard Islamic Finance Program, 2000), 191; M. Hajjar, "Status of Islamic Finance in France in 2019", in Moyhedine Hajjar (ed.), *Islamic Finance in Europe: A Cross Analysis of 10 European Countries* (Palgrave Macmillan, 2019), 109; F. Mause et al., "Luxembourg" in *The Islamic Finance and Markets Review*, 4th edn (2019), <https://thelawreviews.co.uk/edition/the-islamic-finance-and-markets-review-edition-4/1209532/luxembourg> [Accessed 12 July 2020]. See generally, J.G. Ercanbrack, *The Transformation of Islamic Law in Global Financial Markets* (Cambridge University Press, 2015).

⁶ B. Cosgrave, "United Kingdom" in *The Islamic Finance and Markets Law Review*, Andrew M Metcalf and Michael Rainey (eds) (Law Business Research Ltd, 2016) 68, 68. L.M. Al-Rimawi, "Briefing on Islamic financial law in the UK" (2020) 41(4) *Company Lawyer*, 101-102.

⁷ Department of Finance, *Islamic Finance in Ireland; An Information Note* (Department of Finance, Dublin, March 2010), 4, <https://taxpolicy.gov.ie/wp-content/uploads/2011/03/Information-Note-on-Islamic-Finance-in-Ireland-March-2010.pdf> [Accessed 12 July 2020].

property financing in Ireland and the further legal clarifications and reforms that may be needed to encourage the development of a domestic Islamic mortgage-alternative industry.

B. Surveys and Methodology

This article draws on the results from two surveys circulated amongst members of the Muslim community in Ireland, one in 2010⁸ (the 2010 Survey) and the second in 2018 and 2019 (the 2019 Survey and, together with the 2010 Survey, the Surveys).⁹ The two Surveys were carried out independently and by different researchers. As a result, there are inevitable differences in the framing of certain questions in each Survey. Nevertheless, in both Surveys questions were kept simple and focused on the same subject matter of Islamic finance and specific products, including Islamic mortgage-alternatives. This has led to a high degree of comparability between the two Surveys and, for the first time, has facilitated a mapping of community sentiment towards Islamic finance over a period of nearly a decade. A similar survey was carried out in the UK in 2019 by Gatehouse Bank (an Islamic retail bank in the UK). Unlike the Surveys referred to in this article, however, the Gatehouse Bank survey did not include comparative data from earlier surveys and so did not chart the evolution of Muslim sentiment towards Islamic finance over an extended period of time.¹⁰

The 2010 Survey was circulated online via a survey platform and in hard copy in mosques and Muslim community centres in Dublin, Ireland.¹¹ During the month-long period during which the survey was open, 137 responses were received. The 2019 Survey was conducted online between December 2018 and February 2019. Participation was encouraged through a poster campaign run in conjunction with mosques and Muslim community centres across Ireland,¹² and through social media amongst Ireland's Muslim community. The 2019 Survey received 422 responses. Respondents across the two Surveys included students (9.9 percent of those who answered the question), those in employment, either as employees or self-employed (85.2 percent of those who answered the question), those who are retired (1.4 percent of those who answered the question) and those not currently working (3.4 percent of those who answered the question). In the 2010 Survey, only 7 percent of those who answered the question were Irish citizens, while in the 2019 Survey, 60.8 percent of those who answered the relevant question were Irish citizens.

⁸ The 2010 Survey was carried out as part of the doctoral research of Dr Edana Richardson and the research carried out by Dr Vivienne Ibrahim for "The history of Islam in Ireland" project at University College Cork, Ireland.

⁹ The 2019 Survey was carried out as part of a Philip Lee Solicitors' analysis of the Islamic finance market in Ireland.

¹⁰ Gatehouse Bank, *Islamic Finance Consumer Report 2019*, <https://www.gatehousebank.com/insights/islamic-finance-consumer-report-2019> [Accessed 12 July 2020].

¹¹ In the Lucan, Blanchardstown and Clonee areas of Dublin, Ireland.

¹² Mosques and Muslim community centres / groups were contacted in Ireland's largest cities of Dublin, Cork, Galway, Tralee and Limerick, as well as in smaller population centres.

It must be acknowledged that in the case of both Surveys, the opinions of respondents may not necessarily be representative of the opinions of all Muslims in Ireland. The nature of the venues in which physical Surveys were left (most notably mosques and Muslim community centres) and the manner in which the online Surveys were promoted (including through Muslim community networks) may have resulted in the respondents coming from a subset of the wider and more diverse Muslim community in Ireland.¹³ Vulnerability to selection bias has been noted in the results of surveys of Muslim populations conducted in other countries¹⁴ and it is important to acknowledge that the concept of Muslim “designates not a homogeneous and solidary group but a heterogeneous category”¹⁵ within the Irish population.¹⁶ Nevertheless, by using Surveys promoted through different channels, a large sample of responses was received. The Surveys have, therefore, provided an opportunity to engage directly with Ireland’s Muslim community in the context of financial services and in doing so, to explore this community’s developing perceptions and awareness of Islamic finance activity, including Islamic mortgage-alternatives.

C. Muslims in Ireland

In April 2016 (the date of the last census of Ireland prior to 2019 Survey), the Republic of Ireland’s Muslim population was 63,443,¹⁷ representing an increase of 95 percent since 2006 (the date of the last census of Ireland prior to the 2010 Survey).¹⁸ Reflecting the nationality of the Survey respondents, in 2006 the majority (55 percent) of Ireland’s Muslim population were non-Irish citizens,¹⁹ while in 2016 the majority (55.6 percent) were Irish citizens.²⁰ As at April 2016, just under half (47.3 percent) of Ireland’s Muslims lived in Dublin, with smaller populations spread out across the rest of the country.²¹

¹³ R. Brubaker, “Categories of analysis and categories of practice: a note on the study of Muslims in European countries of immigration” (2013) 36(1) *Ethnic and Racial Studies* 1-8, 5.

¹⁴ See, for example, T. Brekke, “Halal Money: Financial inclusion and demand for Islamic banking in Norway” (January-March 2018) *Research and Politics* 1, 3. See also, S. Hussaina and J. Sherifb, “Minority religions in the census: the case of British Muslims” (2014) 44(3) *Religion* 414–433, 416. K.I. Leonard, *Muslims in the United States: The State of Research* (Russell Sage Foundation, 2003), 43.

¹⁵ R. Brubaker, “Categories of analysis and categories of practice: a note on the study of Muslims in European countries of immigration” (2013) 36(1) *Ethnic and Racial Studies* 1-8, 6.

¹⁶ N. Jeldtoft and J.S. Nielsen, “Introduction: methods in the study of ‘non-organized’ Muslim minorities” (2011) 34(7) *Ethnic and Racial Studies* 1113-1119, 1115.

¹⁷ Central Statistics Office, *Religion*, Central Statistics Office, (Dublin, 2017), 72, http://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Chapter_8_Religion.pdf [Accessed 12 July 2020].

¹⁸ Central Statistics Office, *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion*, <https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rnc/> [Accessed 12 July 2020].

¹⁹ Central Statistics Office, *2006 Census Of Population - Volume 13 Religion*, <https://www.cso.ie/en/csolatestnews/pressreleases/2007pressreleases/2006censusofpopulation-volume13religion/> [Accessed 12 July 2020].

²⁰ Central Statistics Office, *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion*, <https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rnc/> [Accessed 12 July 2020]. See also, F. McGinnity et. al., *Monitoring Report on Integration 2018* (ESRI / Department of Justice and Equality, 2018), 90.

²¹ Central Statistics Office, *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion*, <https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rnc/> [Accessed 12 July 2020].

In the same period, 53.3 percent of Muslim men in Ireland were working, in contrast to 23.6 percent of Muslim women.²²

Making up 1.3 percent of the Irish population in 2016, Ireland's Muslim community remains a comparatively small sector of Irish society. Nevertheless, this community is, on average, noticeably younger than the state average (26 years old compared to 37.4 years old)²³ and more likely to be in a professional occupation (23.5 percent of Muslims compared to 19.1 percent of the total population).²⁴ While Muslims make up a larger percentage of the UK population (4.8 percent in 2018),²⁵ Muslims in England and Wales are less likely to have a professional occupation than those in Ireland, with 16.43 percent of Muslims in England and Wales in higher managerial, administrative and professional occupations or lower managerial, administrative and professional occupations compared with 30.45 percent of the population as a whole.²⁶

As a population that has seen steady growth over the last 20 years then, Ireland's Muslim community now represents a distinct segment of Irish society and one that would appear to be well placed to engage with Ireland's financial services industry.

D. Islamic Finance in Ireland

I. Accommodation of Islamic Finance

The remit of Islamic law extends beyond what some may consider to be strictly religious aspects of an adherent's life.²⁷ As a result, Islamic legal principles form a benchmark against which private, social and economic life are measured.²⁸ The Islamic finance industry has developed against this backdrop. Reflecting this, the financial principles of Islamic law that have guided and shaped the contemporary Islamic finance industry are derived from a number of sources. The *Qur'an*, the holy book of Islam, is considered to be the direct revelation from Allah, as spoken to the Prophet Mohammad.²⁹ *Sunnah* are

²² Central Statistics Office, *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion*, <https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rnc/> [Accessed 12 July 2020].

²³ Central Statistics Office, *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion*, <https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rnc/> [Accessed 12 July 2020].

²⁴ Central Statistics Office, *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion*, <https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rnc/> [Accessed 12 July 2020].

²⁵ Office for National Statistics, *Muslim Population in the UK* (last updated 2 August 2018), <https://www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/muslimpopulationintheuk/> [Accessed 12 July 2020].

²⁶ Nomis, *NS-SeC by religion by sex by age, Table ID DC6207EW* (Census 2011), <https://www.nomisweb.co.uk/census/2011/dc6207ew> [Accessed 12 July 2020].

²⁷ M. Hussain, "A general introduction to Islamic Finance" in Rahail Ali (ed) *Islamic Finance: A Practical Guide* (Globe Business Publishing Ltd. 2008) 7, 8. H. Visser, *Islamic Finance: Principles and Practice*, (Edward Elgar, 2009), 10.

²⁸ See generally, N.J. Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964); J. Schacht, *An Introduction to Islamic Law* (Oxford University Press, 1982).

²⁹ F. Al-Omar and M. Abdel-Haq, *Islamic Banking Theory, Practice and Challenges* (Zed Books, 1996), xvi; N.J. Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964), 11.

the sayings, actions or tacit approvals of the Prophet Mohammad in light of revelations in the *Qur'an*.³⁰ Non-divine sources of Islamic law are developed through human effort and include *qiyas* (analogy) and *ijma'* (consensus of legal scholars). *Qiyas* and *ijma'* are used as a means of deducing rules of Islamic law where the *Qur'an* and *Sunnah* are not explicit.³¹

Guided by these sources of Islamic law, four rules applicable to financial activity have been derived: the prohibition of *riba*³² (unjustified gain in a transaction, often interpreted as interest); the avoidance of *maysir* (gambling and speculation);³³ the need to limit *gharar* (risk and uncertainty);³⁴ and the unlawfulness of *haram* (forbidden) activities, such as the making or selling of alcohol and pork products.³⁵ The connection between Islamic law and Islamic finance is central to the development of the Islamic finance industry. The underlying legal structures of Islamic finance products, therefore, are designed to ensure the products' compatibility with the financial principles of Islamic law.³⁶ At the same time, these Islamic finance products are often also structured to function as alternatives to conventional finance products. In doing so, they aim to replicate the economic substance (although not necessarily the legal form) of their conventional alternatives.³⁷ This approach to product engineering facilitates adherence to Islamic finance principles, while still providing market participants with finance products that function as economic substitutes for certain conventional finance products.³⁸

³⁰ *Qur'an* 4:80, "He who obeys the Messenger (Muhammad), has indeed obeyed Allah, but he who turns away, then we have not sent you (O Muhammad as a watcher over them)." All extracts from the *Qur'an* in this article are taken from *Interpretation of the Meanings of The Noble Qur'an in the English language, A Summarized Version of At-Tabari, Al-Qurtubi and Ibn Kathir with comments from Sahih Al-Bukhari Summarized in One Volume*, Muhammad Taqi-ud-Din Al-Hilali and Muhammad Muhsin Khan (trans) (Maktba Dar-us-Salam, 1996); F. Al-Omar and M. Abdel-Haq, *Islamic Banking Theory, Practice and Challenges* (Zed Books, 1996), 1.

³¹ Potter LJ in the UK Court of Appeal noted that "most of the classical Islamic law on financial transactions is not contained as 'rules' or 'law' in the *Qur'an* and *Sunnah* but is based on the often divergent views held by established schools of law formed in a period roughly between 700 and 850 CE," *Shamil Bank of Bahrain v Wemtec International Ltd* [2004] 1 Lloyd's Rep 1 [30] (Potter LJ). W.B. Hallaq, *An Introduction to Islamic Law* (Cambridge University Press, 2009), 19.

³² See, amongst others, *Qur'an* 4:161, "that they took *Ribā* (usury) though they were forbidden from taking it and their devouring of men's substance wrongfully (bribery). And We have prepared for the disbelievers among them a painful torment." Though the area is not without disagreement, Saleh suggests that enough Islamic scholars now interpret the *Qur'an* as prohibiting all forms of bank interest that *ijma'* may have been reached on the issue, NN.A. Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law*, 2nd edn (Graham & Trotman, 1992), 15.

³³ *Qur'an* 5:90, "O you who believe! Intoxicants (all kinds of alcoholic drinks), and gambling...are an abomination of Shaitan's (Satan) handiwork. So avoid (strictly all) that (abomination) in order that you may be successful."

³⁴ One tradition notes that the Prophet Mohammed forbade the "sale by means of pebbles" (*Bay' al-Hast*) and the *gharar* sale (*Bay' al-Gharar*), *Sahih Muslim*, Book 10, Introduction, A.H. Siddiqui (trans), http://www.documentacatholicaomnia.eu/03d/0834-0893,_Sahih_Muslim,_Hadith,_EN.pdf [Accessed 12 July 2020]. See also, F.E. Vogel and S.L. Hayes, *Islamic Law and Finance, Religion, Risk and Return* (Kluwer Law International 1998), 87.

³⁵ For example, the *Qur'anic* prohibition of pork; *Qur'an* 2:173: "He hath forbidden you only Maitah (dead animals), and blood, and the flesh of swine...."

³⁶ I. Warde, *Islamic Finance in the Global Economy*, 2nd edn (Edinburgh University Press, 2010), 45.

³⁷ J. Ercanbrack, "The Regulation of Islamic Finance in the United Kingdom" (2011) 13 *Ecclesiastical Law Journal* 69-77, 70.

³⁸ Department of Finance, *Islamic Finance in Ireland; An Information Note* (Department of Finance, Dublin, March 2010), 4, <https://taxpolicy.gov.ie/wp-content/uploads/2011/03/Information-Note-on-Islamic-Finance-in-Ireland-March-2010.pdf> [Accessed 12 July 2020].

In countries where the legislative framework has not been designed or modified to support the legal forms that are specific to Islamic finance activity, Islamic finance transactions, institutions and market participants may be taxed and regulated based on the particular legal and contractual structure used, rather than the economic substance of the relevant Islamic finance product.³⁹ As a result, legal treatment of Islamic finance activity may be different (and often less favourable) from that imposed on economically similar conventional finance activity. Where Islamic finance products have been designed to function economically like conventional finance products, differences in their tax and regulatory treatment may make the Islamic finance products uncompetitive or economically unviable.⁴⁰

In order to facilitate Islamic finance within domestic economies, therefore, a number of non-Muslim majority countries have taken steps to accommodate Islamic finance by clarifying the domestic legal position of the contracts commonly found in Islamic finance activity.⁴¹ These reforms have generally sought to minimise differences in the tax and regulatory position of Islamic finance transactions. In doing so, those countries have sought to level the playing field between the legal treatment of certain Islamic finance products and their conventional alternatives.⁴²

II. Accommodating Islamic Finance in Ireland

In Ireland (as is the case in the UK), tax liability is generally determined not by a finance product's economic substance, but by its legal form as determined by its contractual structure.⁴³ For some Islamic finance products, their legal form would allow the application of Ireland's existing tax laws in a manner that reflects those products' respective economic substance. However, the legal form of certain other Islamic finance products has meant that, without legislative amendment, these products would be subject to tax treatment that does not reflect their economic substance and that is inconsistent with the

³⁹ K. Conway, J. Taylor and M. Krismanek, "Rules Refined to Ensure Shari'ah Compliance" (2010) 21 *International Tax Review* 42-44.

⁴⁰ Baroness Warsi, "The future of Islamic finance in a global economy", speech given at the Oxford Centre for Islamic Studies (7 June 2013), <https://www.gov.uk/government/speeches/the-future-of-islamic-finance-in-a-global-economy> [Accessed 12 July 2020].

⁴¹ See for example in the case of Luxembourg, Luxembourg for Finance, *Islamic Finance* (2017), <https://www.luxembourgforfinance.com/en/financial-centre/islamic-finance/> [Accessed 12 July 2020]; in the case of France, Direction Générale des Finances, Bulletin Officiel Des Impôts, No 78 of 24 August 2010, "Régime Applicable aux Sukuk d'investissement" (Direction Générale des Finances Publiques 4 FE/S2/10, 2010). For more details on the approach of French authorities with respect to Islamic finance see I.Z. Cekici, "Managing Islamic finance vis-à-vis laïcité: the case of France" in Valentino Cattelan (ed) *Islamic Finance in Europe, Towards a Plural Financial System* (Edward Elgar, 2013), 192. While these (and other) countries in Europe have sought to engage with Islamic finance, a less interventionist approach has generally been taken with respect to amending existing legislative provisions.

⁴² See, for example, HM Treasury, *The Development of Islamic Finance in the UK: The Government's Perspective* (HM Treasury 2008).

⁴³ *McGrath v McDermott* [1988] IR 258 (SC), 276 (Finlay CJ) and 277 (McCarthy J) who noted that the substance over form approach to determining tax liability was "attractive in equity but it is wrong in law." See also, *Inspector of Taxes v Kiernan* [1981] IR 117 (SC), *O'Sullivan (Inspector of Taxes) v P Ltd* (1962) 2 ITC 464 (HC), *Revenue Commissioners v Doorley* [1933] IR 750 (SC). See also K. Conway, J. Taylor and M. Krismanek, "Rules Refined to Ensure Shari'ah Compliance" (2010) 21 *International Tax Review* 42-44, 44.

taxation of comparable conventional finance products.⁴⁴ As a result, official attempts to clarify the legal treatment of Islamic finance products in Ireland have taken the form of non-statutory guidance (for those Islamic finance products whose legal form results in those products being taxed like comparable conventional products) and binding legislative amendments (for those Islamic finance products that would otherwise be taxed differently).

The first such measure was published in October 2009 when the Irish Revenue Commissioners (the Revenue) issued a Tax Briefing confirming the tax position in Ireland of certain Islamic finance products (the Tax Briefing 2009).⁴⁵ This briefing note did not amend Irish law. Instead, it sought to explain and confirm the taxation of specific Islamic finance products. The Tax Briefing 2009 therefore confirmed that three finance products - *takaful* (Islamic insurance), *ijarah* (Islamic leasing) and Islamic investment funds - would be subject to the same tax regime as conventional insurance, leasing and investment funds, respectively.⁴⁶ While the Tax Briefing 2009 indicated a willingness of Irish authorities to engage with the contracts found in Islamic finance transactions, it simply confirmed what would otherwise have been the existing tax position of *takaful*, *ijarah* and Islamic investment funds (even without the publication of the Tax Briefing 2009). This is because the legal form of these three Islamic finance products aligns with that of economically comparable conventional finance products, thereby reducing the risk that the application of Ireland's existing tax legislation would result in the inconsistent tax treatment of relevant Islamic and conventional finance products.⁴⁷

In contrast, the legal form of certain other Islamic finance products not covered in the Tax Briefing 2009 meant that without specific legislative amendments, these finance products would be taxed in a manner that reflected their legal form, not their economic substance.⁴⁸ This would have led to a disparity of tax treatment between Islamic finance products and economically comparable conventional finance products and would, according to the Irish Department of Finance (the Department of Finance), act as

⁴⁴ Irish Revenue Commissioners, "Tax Treatment of Islamic Financial Transactions", *Tax and Duty Manual* (Part 08A-01-01) (Irish Revenue Commissioners, 2018), [1.3]. See also, Irish Revenue Commissioners, *Guidance Notes on the Tax Treatment of Islamic Financial Transactions* (Irish Revenue Commissioners, 2010), 6. The *Tax and Duty Manual* (Part 08A-01-01) replicates almost exactly the content of the *Guidance Notes on Tax Treatment of Islamic Financial Transactions*.

⁴⁵ Irish Revenue Commissioners, "Islamic Finance, Tax Briefing Issue 78" (Irish Revenue Commissioners, October 2009), <http://www.revenue.ie/en/tax-professionals/historic-material/tax-briefing/2009/tax-briefing-78-2009.pdf>, [Accessed 12 July 2020].

⁴⁶ Irish Revenue Commissioners, "Islamic Finance, Tax Briefing Issue 78" (Irish Revenue Commissioners, October 2009), <http://www.revenue.ie/en/tax-professionals/historic-material/tax-briefing/2009/tax-briefing-78-2009.pdf>, [Accessed 12 July 2020].

⁴⁷ Irish Revenue Commissioners, 'Tax Treatment of Islamic Financial Transactions', *Tax and Duty Manual* (Part 08A-01-01) (Irish Revenue Commissioners, 2018), [1.3].

⁴⁸ Irish Revenue Commissioners, 'Tax Treatment of Islamic Financial Transactions', *Tax and Duty Manual* (Part 08A-01-01) (Irish Revenue Commissioners, 2018), [1.3]. See also, Irish Revenue Commissioners, *Guidance Notes on the Tax Treatment of Islamic Financial Transactions* (Irish Revenue Commissioners, 2010), 6.

a “disincentive to such Islamic transactions occurring or being sited in Ireland.”⁴⁹ As a result, the Finance Act 2010 introduced amendments to Ireland’s existing tax laws: the Taxes Consolidation Act 1997 (the TCA 1997) and the Stamp Duties Consolidation Act 1999 (the SDCA 1999). These amendments were designed to facilitate greater equality of tax treatment between certain conventional and Islamic finance products,⁵⁰ and to address the tax position of Islamic finance products whose legal form would otherwise have resulted in the application of Ireland’s tax laws in a manner that did not reflect their economic substance.⁵¹

Ss 39 and 137 of the Finance Act 2010 deal with “specified financial transactions”⁵² and insert Part 8A⁵³ into the TCA 1997 and s 85A⁵⁴ into the SDCA 1999, respectively (together the Finance Act Amendments). Neither of the Finance Act Amendments refers to Islam or Islamic finance and so participants in any transaction that falls within the structures provided for in the Finance Act Amendments can elect for that transaction to be treated for tax purposes as a specified financial transaction.⁵⁵ Despite this use of religiously-neutral language, the Irish government has clearly confirmed that the aim of these legislative provisions is to “extend tax treatment applicable to conventional finance transactions to Shari’a compliant or Islamic financial products which achieve the same economic result in substance as comparable conventional products”.⁵⁶ As a result of the Finance Act Amendments, the structures commonly used in three Islamic finance transactions are now addressed in Irish tax law: “deposit transactions” (Islamic deposits); “credit transactions” (covering a number of Islamic financing arrangements); and “investment transactions” (*sukuk*, often referred to as Islamic

⁴⁹ Department of Finance, ‘Section 1 of Finance Act 2010, Report on Tax Expenditures’, *PRN A10/0776* (July 2010) [9.3] <<http://taxpolicy.gov.ie/wp-content/uploads/2011/03/Section1ofFA2010ReportonTaxExpenditures.pdf>> accessed: 16 February 2020.

⁵⁰ For more recent Irish government discussions on Islamic finance in Ireland, see Department of Finance, *IFS2020: A Strategy for Ireland’s International Financial Services sector 2015-2020* (The Stationery Office 2015) 20, in which it was noted that ‘Islamic Finance will continue to feature in the sectoral and regional strategies outlined in IFS2020’.

⁵¹ Irish Revenue Commissioners, ‘Tax Treatment of Islamic Financial Transactions’, *Tax and Duty Manual* (Part 08A-01-01) (Irish Revenue Commissioners, 2018), [1.3].

⁵² Defined in Part 8A TCA 1997 as meaning a “credit transaction,” a “deposit transaction” or an “investment transaction”.

⁵³ Inserted by Finance Act 2010, s 39. See also, Oireachtas, “Finance Bill 2010, Explanatory Memorandum”, 10 <https://data.oireachtas.ie/ie/oireachtas/bill/2010/9/eng/memo/b0910d-memo.pdf> [Accessed 12 July 2020].

⁵⁴ Inserted by Finance Act 2010, s 137.

⁵⁵ This must be a positive election and the provisions dealing with specified financial transactions will not apply unless the election is made - see, TCA 1997, s 267U, as amended by Finance 2012, s 37.

⁵⁶ Department of Finance, *Islamic Finance in Ireland; An Information Note* (Department of Finance, Dublin, March 2010), 5, <https://taxpolicy.gov.ie/wp-content/uploads/2011/03/Information-Note-on-Islamic-Finance-in-Ireland-March-2010.pdf> [Accessed 12 July 2020]. See also, Irish Revenue Commissioners, *Notes for Guidance - Taxes Consolidation Act 1997 - Finance Act 2019 edition*, ‘PART 8A Specified Financial Transactions’ (December 2019), 2, <https://www.revenue.ie/en/tax-professionals/documents/notes-for-guidance/tca/part08a.pdf> [Accessed 12 July 2020].

bonds). Minor clarifications to the specified financial transactions tax framework have been introduced in subsequent Finance Acts,⁵⁷ although the scope of the accommodations has remained unchanged.

III. Wholesale versus Retail

When discussing the accommodation of Islamic finance in Ireland, the Department of Finance outlined certain “opportunities” for Ireland that this accommodation may bring: encouraging investment into Ireland in the form of wholesale Islamic finance activity and the establishment of Islamic finance institutions; the provision of ethical investment opportunities for Irish investors; and the opportunity for Muslims to participate in financial activity in a manner that is consistent with their religious beliefs.⁵⁸ These stated benefits for Ireland address the economic benefits associated primarily with the wholesale Islamic finance sector and the social benefits arising from the availability of Islamic finance products domestically. Despite this balanced argument for accommodation, the tangible growth to date of Islamic finance in Ireland’s economy has been limited to wholesale Islamic finance activity.⁵⁹ In contrast to the growth of retail Islamic finance products in the UK where such products (including Islamic mortgage-alternatives) are now offered by a number of regulated financial institutions,⁶⁰ there has been an absence of activity at a retail level in Ireland.⁶¹

In practice, there remain gaps in the relevant legislative regime, particularly in the context of retail Islamic finance activity in Ireland. This is reflected in the fact that remaining taxation issues are still to be addressed by Irish authorities. Accommodative measures have also not yet been introduced in Ireland with respect to the regulation and consumer protection aspects of Islamic finance.⁶² As a result, the

⁵⁷ See Finance Act 2012, s 37 and Finance Act 2013, ss 24 and 75. The Finance Act 2019 s 31 referred to Part 8A TCA 1997 in order to clarify that “amounts which would be treated as interest under Part 8A [TCA 1997]” will constitute a “finance return” under Chapter 35C TCA 1997.

⁵⁸ Department of Finance, *Islamic Finance in Ireland; An Information Note* (Department of Finance, Dublin, March 2010), 4, <https://taxpolicy.gov.ie/wp-content/uploads/2011/03/Information-Note-on-Islamic-Finance-in-Ireland-March-2010.pdf> [Accessed 12 July 2020].

⁵⁹ For example, a press release published on 5 April 2018 indicated that an Irish-incorporated company issued a *sukuk*. However, no publicly available information on this issuance is available, Matheson, *News and Insights*, “Matheson Advises on the First Irish Issuance of a Sukuk Bond Under Irish Tax Law” (5 April 2018), <https://www.matheson.com/news-and-insights/article/matheson-advises-on-the-first-irish-issuance-of-a-sukuk-bond-under-irish-ta> [Accessed 12 July 2020].

⁶⁰ Most notably, Al Rayan Bank PLC, Gatehouse Bank PLC, United National Bank Limited and Ahli United Bank (UK) PLC. ABC International Bank Plc also offers high-value Islamic mortgage-alternatives.

⁶¹ H. Singh, “Overwhelming desire for Islamic mortgages, lending products in Ireland” (6 May 2019), <https://themalaysianreserve.com/2019/05/06/overwhelming-desire-for-islamic-mortgages-lending-products-in-ireland/> [Accessed 12 July 2020]; S. Hazel, “Irish banks exclude Muslim borrowers” (2 May 2010), <https://magill.ie/society/irish-banks-exclude-muslim-borrowers> [Accessed 12 July 2020].

⁶² Central Bank (Supervision and Enforcement) Act 2013, s 73 introduced an amendment to the Central Bank Act 1971 to allow banks established in non-EEA countries to open branches in Ireland. This could potentially assist with the opening of a branch of an Islamic bank in Ireland, but does not go towards the regulation of those banks.

Central Bank of Ireland (the Central Bank) as Ireland's financial services and prudential regulator, must continue to apply existing regulatory rules to Islamic finance activity and institutions.⁶³

These uncertainties with respect to tax liability, regulatory oversight and consumer protection at a retail level are particularly noticeable in the context of Islamic mortgage-alternatives.

IV. Islamic Mortgage-Alternatives – A Retail Perspective

While technically Ireland may have sought to accommodate certain Islamic finance transactions within its tax laws; in practice these accommodations have not resulted in the growth of retail product offerings for Ireland's Muslim population. The Survey results reflect this limited retail Islamic finance market in Ireland.

The 2010 Survey results indicated that 73.7 percent of those who responded to the question would be interested in using Islamic banking and finance services in Ireland, although the majority of respondents (56.9 percent of those who responded) noted that their knowledge of Islamic banking and finance was either poor or only fair. Despite this, a large number of respondents indicated that, if offered in Ireland, they would be interested in using a range of Islamic finance products, including Islamic bank accounts (81.2 percent), Islamic credit cards (66 percent) and Islamic mortgage-alternatives (65 percent).⁶⁴ The 2019 Survey results suggest that this interest in Islamic finance products remains present amongst Ireland's Muslim population and has, in fact, strengthened with respondents having a broader knowledge of, and interest in, Islamic finance products. As such, in the 2019 Survey, 82.97 percent of those who responded to the question indicated that they were aware of Islamic finance and how it operates (although 84.58 percent of respondents had never actually used an Islamic finance product) and 99.52 percent of those who responded to the question⁶⁵ indicated that they would be interested in availing of Islamic finance products if they were available in Ireland. This is a noticeably higher percentage of interest than that indicated in the Gatehouse Bank survey in the UK, where 54% of respondents confirmed their interest in using Islamic finance.⁶⁶ The Islamic finance products most

⁶³ Gulf Times, "Ireland readies for Islamic finance as no-deal Brexit looms" (1 May 2019), <https://www.gulf-times.com/story/630283/Ireland-readies-for-Islamic-finance-as-no-deal-Bre> [Accessed 12 July 2020]. This is in contrast to the situation in the UK, where tailored regulation of certain Islamic finance structures has been enacted, see generally, J. Ercanbrack, "The Regulation of Islamic Finance in the United Kingdom" (2011) 13(1) *Ecclesiastical Law Journal* 69-77, 72.

⁶⁴ The Islamic finance products noted to be of interest in the 2010 Survey are highly consistent with those found to be the most popular Gatehouse Bank survey, Gatehouse Bank, *Islamic Finance Consumer Report 2019*, 33, <https://www.gatehousebank.com/insights/islamic-finance-consumer-report-2019> [Accessed 12 July 2020].

⁶⁵ This reflects 414 out of 416 responses to the question "Are you interested in availing of Shari'ah compliant financial products for religious or other ethical beliefs/objectives?"

⁶⁶ Gatehouse Bank, *Islamic Finance Consumer Report 2019*, 36, <https://www.gatehousebank.com/insights/islamic-finance-consumer-report-2019> [Accessed 12 July 2020].

commonly cited as being of interest to the participants were, however, similar in both the Irish and UK surveys and included those related to Islamic property finance, such as Islamic mortgage-alternatives.

Islamic mortgage-alternatives have been developed by the Islamic finance industry to provide an alternative to a conventional interest-bearing mortgage.⁶⁷ These products avoid the prohibitions of Islamic finance (most notably the prohibition of *riba*) while still providing customers and financial institutions with a product that operates economically like a conventional mortgage.⁶⁸ Three basic structures for Islamic mortgage-alternatives exist. The first is structured around a *murabaha* contract and involves a financial institution purchasing property and then immediately selling it to the customer for the original purchase price plus an agreed mark-up (the financial institution's profit) to be paid by the customer in instalments.⁶⁹ The second incorporates an *ijarah wa-iqtina* contract involving the purchase of property by the financial institution that is then leased to the customer in return for payment of rent (which may be structured to include both a repayment and a profit element). The property's title is ultimately transferred to the customer at the end of the contractual term.⁷⁰ The third is a structure based on a diminishing *musharaka* contract and involves ownership of the property that is shared between a financial institution and customer. The financial institution leases its share of the property to the customer in return for payment of rent and progressively sells this share of the property to the customer over the contractual term. This arrangement continues until the financial institution's share of the property's ownership is zero. At that point the customer will acquire full title to the property.⁷¹

The legal form of each of these Islamic finance products involves no loan of capital or payment of interest by the customer. Nevertheless, the ultimate economic effect of each Islamic mortgage-alternative is consistent with a conventional interest-based mortgage and allows a customer to purchase property with the financial assistance of a financial institution on the basis that this financial assistance, together with an element of profit, will ultimately be returned to the financial institution.⁷²

⁶⁷ R. Wilson, "Islamic Finance in Europe" RSCAS Policy Papers No 2007/02 (European University Institute for MUSMINE 2007) 10-11, for a discussion about the development of Islamic mortgage-alternatives.

⁶⁸ J. Ercanbrack, "The Regulation of Islamic Finance in the United Kingdom" (2011) 13(1) Ecclesiastical Law Journal 69-77, 70.

⁶⁹ M. El-Gamal, *Islamic Finance; Law, Economics and Practice* (Cambridge University Press, 2006) 67; HM Land Registry, "Guidance Practice Guide 69: Islamic financing" (updated 9 September 2019), <https://www.gov.uk/government/publications/islamic-financing/practice-guide-69-islamic-financing> [Accessed 12 July 2020].

⁷⁰ H. Dar, "Islamic House Financing in the United Kingdom: Problems, Challenges and Prospects" (2002) 12 Review of Islamic Economics 47, 51.

⁷¹ M. Ainley et. al., *Islamic Finance in the UK: Regulation and Challenges* (Financial Services Authority, 2007), 20.

⁷² HM Land Registry, "Guidance Practice Guide 69: Islamic financing" (updated 9 September 2019), <https://www.gov.uk/government/publications/islamic-financing/practice-guide-69-islamic-financing> [Accessed 12 July 2020].

a. Taxation of Islamic mortgage-alternatives

Following the Finance Act Amendments, the TCA 1997 now provides for a number of “credit transactions” that are structurally similar to *murabaha*- and diminishing *musharaka*-based Islamic mortgage-alternatives.⁷³ If the criteria set out in s267N TCA 1997 are fulfilled, therefore,⁷⁴ Part 8A TCA 1997 will now deem these credit transactions to have established a loan relationship between a financial institution and a customer.⁷⁵ Like similar accommodations introduced into English tax law,⁷⁶ Part 8A TCA 1997 seeks to align the taxation of certain Islamic and conventional property financing products.⁷⁷ It does this by allowing the Islamic finance products to be taxed in a way that reflects their economic substance, as alternatives to an interest-based mortgage.⁷⁸ As a result of deeming a loan relationship to exist when legally there is no such relationship, the periodic returns paid by the customer to a financial institution pursuant to a credit transaction will be treated under Irish tax law as if it were interest paid on a loan.⁷⁹ Effectively, the Finance Act Amendments seek to bring “credit transactions” within the scope of the existing rules applying to loans and interest. From the perspective of the parties involved in an Islamic mortgage-alternative based on a *murabaha* contract, this means that the amount of the customer’s periodic payments above the consideration paid for the property will be treated for tax purposes as interest paid on a loan (even though legally they are payments of profit on a sale).⁸⁰ In the case of a diminishing *musharaka*-based contract, the rental portion of the customer’s periodic payments will be treated for tax purposes as interest paid on a loan (even though legally they are in the form of rent).⁸¹

⁷³ Paragraph (a) of the definition of “credit transaction”, TCA 1997, s 267N – covers transactions where the financial institution disposes of the full interest of the asset / property to the customer in return for a higher than cost-price payment, all or part of which may be deferred. Paragraph (c) of the definition of “credit transaction”, TCA 1997, s 267N – covers transactions where the financial institution and another person jointly acquire an asset, or the financial institution purchases an asset owned by the customer in circumstances where the customer retains an interest in that asset (refinancings). The customer then agrees to make payments to the financial institution which equal the amount paid by the financial institution for the asset as well as payments for the use of the asset (i.e. rent).

⁷⁴ Definition of “credit transaction”, TCA 1997, s 267N and TCA 1997, s 267O.

⁷⁵ *Global Islamic Finance Report 2011*, Humayon Dar and Mufti Talha Ahmad Azami (eds) (BMB Islamic UK Limited, 2011) 208-209; T. Woods and K. Jahanjiri, “Islamic Financial Transactions”, in *Taxing Financial Transactions*, Kenneth Byrne (ed.), 3rd edn. (Irish Taxation Institute, 2010), 209-241, [9.7.2].

⁷⁶ Chapter 5 Part 2 Finance Act 2005, as updated in Finance Act 2006 and Finance Act 2007 (now provided for in Corporation Tax Act 2009, Part 6, Chapter 6 and Income Tax Act 2007 Part 10A).

⁷⁷ K. Conway, J. Taylor and M. Krismanek, “Rules Refined to Ensure Shari’ah Compliance” (2010) 21 *International Tax Review* 42-44, 44.

⁷⁸ Irish Revenue Commissioners, *Notes for Guidance - Taxes Consolidation Act 1997 - Finance Act 2019 edition*, “PART 8A Specified Financial Transactions” (December 2019), 2, <https://www.revenue.ie/en/tax-professionals/documents/notes-for-guidance/tca/part08a.pdf> [Accessed 12 July 2020].

⁷⁹ TCA 1997, s 267O(1).

⁸⁰ *Global Islamic Finance Report 2011*, Humayon Dar and Mufti Talha Ahmad Azami (eds) (BMB Islamic UK Limited, 2011) 208-209.

⁸¹ *Global Islamic Finance Report 2011*, Humayon Dar and Mufti Talha Ahmad Azami (eds) (BMB Islamic UK Limited, 2011) 208-209.

While Part 8A TCA 1997 is a positive step towards the creation of a level playing field between some Islamic and conventional mortgages, certain tax hurdles remain. These hurdles arguably go some way towards explaining why, some ten years after the accommodations were first introduced, Islamic mortgage-alternatives have failed to develop in Ireland. For example, the Finance Act Amendments do not cover *ijarah wa-iqtina* contractual structures. The Tax Briefing 2009 outlined the tax treatment of *ijarah* leasing arrangements that resemble an *ijarah wa-iqtina* structure, including “[i]jarah used for a finance lease”.⁸² However, both the Tax Briefing 2009 and the November 2018 update of the Tax and Duty Manual (Part 08A-01-01) (the Tax and Duty Manual)⁸³ specifically limit the application of the relevant leasing arrangements to “the leasing of plant and machinery and other chattels”,⁸⁴ rather than leases of immovable property. As a result, without an expansion of the definition of “credit transaction” in Part 8A TCA 1997 to include transactions where a financial institution acquires *sole* ownership of property and then leases it to a customer, it remains unclear how the Irish authorities will tax returns paid to a financial institution in the form of rental payments under an *ijarah wa-iqtina* contract.⁸⁵ It is also unclear what portion of these payments would be treated as profit.

The accommodation of Islamic finance products introduced into Irish tax law has also failed to adequately clarify the stamp duty position of all forms of Islamic mortgage-alternatives. Unlike a conventional mortgage, which typically only involves one property sale (from the vendor to the customer), *murabaha*, diminishing *musharaka* and *ijarah wa-iqtina*-based transactions are all frequently structured to involve at least two sales of the underlying property, the first when the financial institution acquires ownership of the property from the original vendor, and the second when the financial institution transfers ownership of that property to the customer.⁸⁶ These multiple property transfers within the same financial arrangement may result in multiple impositions of stamp duty,⁸⁷

⁸² Irish Revenue Commissioners, “Islamic Finance, Tax Briefing Issue 78” (Irish Revenue Commissioners, October 2009), <http://www.revenue.ie/en/tax-professionals/historic-material/tax-briefing/2009/tax-briefing-78-2009.pdf> [Accessed 12 July 2020].

⁸³ Irish Revenue Commissioners, “Tax Treatment of Islamic Financial Transactions”, *Tax and Duty Manual* (Part 08A-01-01) (Irish Revenue Commissioners, 2018).

⁸⁴ Irish Revenue Commissioners, “Tax Treatment of Islamic Financial Transactions”, *Tax and Duty Manual* (Part 08A-01-01) (Irish Revenue Commissioners, 2018), [3.3.1].

⁸⁵ The amendments to the UK’s corporation and income tax laws similarly focus on *murabaha* and diminishing *musharaka* - HMRC Internal Manual, *Corporate Finance Manual (CFM44020)* (published 16 April 2016, updated 21 May 2020), <https://www.gov.uk/hmrc-internal-manuals/corporate-finance-manual/cfm44020> [Accessed 12 July 2020], however, the UK’s VAT guidance acknowledges that “[t]his product will be treated in the same way as a Hire Purchase/Conditional Sale...except that the normal rules for property will apply for the sale of the asset”, HMRC Internal Manual, *VAT Finance Manual*, “Islamic products: Lease and lease plus purchase: Lease and purchase (Ijara-wa-Iqtina)” (published on 8 April 2016, updated on 5 May 2020), <https://www.gov.uk/hmrc-internal-manuals/vat-finance-manual/vatfin8360> [Accessed 12 July 2020].

⁸⁶ F. Uz-Zaman, *Shariah-Compliant Financial Services: A Guide to Products, Markets and Trends* (VRL KnowledgeBank Ltd 2006) 37; R.L. Klarmann, *Islamic Project Finance; a Legal Study with Particular Reference to the Laws of Switzerland and the United Arab Emirates* (Schulthess, 2003), 252.

⁸⁷ SDCA 1999, s 2. Finance Act 2007, s 100 abolished the duty on mortgages and other security documents, the Act also abolished stamp duty on deeds of release.

increasing the tax cost of the Islamic mortgage-alternative.⁸⁸ Compounding this increased stamp duty liability, in the case of *ijarah wa-iqtina* and diminishing *musharaka*-based transactions where the rent charged to the customer under the leasing arrangement is over €40,000 a year, the customer may also be liable to pay stamp duty on that annual rent.⁸⁹ Yet the Revenue has confirmed that “stamp duty will arise under normal rules on the documentation executed in connection with [credit] transactions.”⁹⁰ Addressing multiple impositions of stamp duty was amongst the first accommodations of Islamic finance activity introduced by the UK government when it eliminated the double stamp duty land tax imposed on *murabaha*-based transactions in 2003⁹¹ and on diminishing *musharaka* and *ijarah wa-iqtina*-based transactions in 2005.⁹² With these accommodations, UK authorities have limited the imposition of stamp duty land tax to only one of the property transfers involved in an Islamic mortgage-alternative.⁹³ Modifying tax legislation in this way to reduce double taxation is, of course, open to exploitation.⁹⁴ Indeed, in refining its legislative accommodations of Islamic mortgage-alternatives, the UK government has had to close a number of tax loopholes.⁹⁵ In the recent case of *Project Blue Limited v Commissioners for Her Majesty’s Revenue and Customs*,⁹⁶ the UK Supreme Court also had to consider the relationship between stamp duty land tax relief for an *ijarah wa-iqtina*-based transaction⁹⁷ and stamp duty land tax relief for sub-sales⁹⁸ when the two reliefs were used in the same transaction to reduce stamp duty land tax liability to zero.⁹⁹ However, the potential for exploitation should not be used to

⁸⁸ In a small-scale or one-off commercial property finance context, existing stamp duty reliefs may be of use to reduce (but not eliminate) the impact of multiple stamp duty liabilities in *murabaha*-based property transactions. However, no similar relief is available for high volume retail Islamic mortgage-alternatives. See section V below for further discussion of use of this relief in a property financing product launched by Community Finance Ireland.

⁸⁹ SDCA 1999, Schedule 1.

⁹⁰ Irish Revenue Commissioners, *Guidance Notes on the Tax Treatment of Islamic Financial Transactions* (Irish Revenue Commissioners, 2010), 29.

⁹¹ Finance Act 2003, s 73, and expanded by the Finance Act 2006, s 168.

⁹² Finance Act 2003, s 71A, inserted by the Finance Act 2005, s 94, Schedule 8 [1]-[2].

⁹³ The first transaction is exempt from charge if the vendor is (a) the person concerned, or (b) another financial institution by whom the interest was acquired under another Islamic finance transaction entered into between it and the person. The second transaction is exempt from stamp duty land tax if stamp duty land tax is paid on the first transaction) – Finance Act 2003, ss 71A and 73. *Project Blue Limited v Commissioners for Her Majesty’s Revenue and Customs* [2018] UKSC 30 [91] (Lord Hodge).

⁹⁴ T. Powley, “Search is on for stamp duty loopholes”, *Financial Times* (23 March 2011), <http://www.ft.com/intl/cms/s/2/b91eabb8-5582-11e0-a00c-00144feab49a.html#axzz1TFPI908J> [Accessed 12 July 2020].

⁹⁵ See generally, J. Rossiter, “Chancellor Alistair Darling to close loophole in finance deals based on Sharia”, *The Times* (5 March 2008), <https://www.thetimes.co.uk/article/chancellor-alistair-darling-to-close-loophole-in-finance-deals-based-on-sharia-sh0g9xg7dm6>, [Accessed 12 July 2020]. Anonymous, “Sharia SDLT loophole closes”, (12 March 2008), *Taxation*, <http://www.taxation.co.uk/taxation/articles/2008/03/12/6165/sharia-sdl-t-loophole-closes> [Accessed 12 July 2020]. See also, K. Conway, J. Taylor and M. Krismanek, “Rules Refined to Ensure Shari’ah Compliance” (2010) 21 *International Tax Review* 42-44, 44.

⁹⁶ *Project Blue Limited v Commissioners for Her Majesty’s Revenue and Customs* [2018] UKSC 30.

⁹⁷ Finance Act 2003, s 71A.

⁹⁸ Finance Act 2003, s45(3).

⁹⁹ The majority of the UK Supreme Court held that the two stamp duty land tax reliefs could be used together (as Lord Hodge noted (*Project Blue Limited v Commissioners for Her Majesty’s Revenue and Customs* [2018] UKSC 30, [27]): “there is nothing within section 71A which suggests that the exemption [from stamp duty land tax liability] will not apply when the sale by the customer to the financial institution is a sub-sale which takes place contemporaneously and in connection with the customer’s purchase of the major interest in land”. However, this

justify inaction on the Revenue and Irish government's behalf. Safeguards have already been put in place within Ireland's tax legislation to minimise abuse of the accommodations introduced by the Finance Act Amendments. As a result, parties must actively elect to have their transaction classified as a "specified financial transaction" for Irish tax purposes¹⁰⁰ and any such transactions should be undertaken "for bona fide commercial reasons" and not for the avoidance of tax, including stamp duty.¹⁰¹

As things stand, the multiple imposition of stamp duty in the context of Islamic property financing structures in Ireland remains a large tax hurdle for these transactions and could arguably undermine the level playing field that Part 8A is trying to achieve.¹⁰² As a result, without further legislative amendments to clarify the stamp duty liability of those involved in Islamic mortgage-alternatives in Ireland, any such transaction that is structured to include multiple property transfers risks being subject to a higher level of stamp duty than an economically comparable conventional mortgage.

b. Regulation of Islamic mortgage-alternatives

The question of how an Islamic mortgage-alternative (and any financial institution that offers such product) is regulated in Ireland will depend on whether the particular product is considered to be a "mortgage" under the existing legislative and guidance framework. In Ireland, the Land and Conveyancing Law Reform Act 2009 (the LCLRA 2009) defines a mortgage as including "any charge or lien on any property for securing money or money's worth."¹⁰³ It then goes on to restrict legal mortgages over real property in Ireland to those created by means of a charge by deed on the land.¹⁰⁴

conclusion allowed the anti-avoidance mechanism in the Finance Act 2003, s 75A to apply to conclude that there was a chargeable interest acquired under the second transaction, thereby requiring that stamp duty land tax be paid with respect to that transaction, *Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 30, [46]-[49].

¹⁰⁰ TCA 1997, s267U.

¹⁰¹ TCA 1997, s267V.

¹⁰² The Department of Finance noted in an impact assessment of Part 8A that; the "parity of treatment [created by the Part] will remove a tax barrier to a business based on Islamic principles setting up in Ireland." Department of Finance, *Section 1 of Finance Act 2010, Report on Tax Expenditures, PRN A10/0776* (Department of Finance, July 2010), [9.10].

¹⁰³ LCLRA 2009, s 3. Irish courts have defined "money's worth" as not simply "something for which people are willing to pay money but something for which they are able to get money," *The Attorney General (at the Prosecution of Superintendent J.P. Hynes) v Casino Amusement Theatres Limited* [1957] 91 ILTR 41 (SC) 49-50 (Kingsmill Moore J). N. Maddox, *Mortgages: Law and Practice*, 2nd edn. (Round Hall, 2017) [5-04] et seq.

¹⁰⁴ LCLRA 2009, s 89(1). From a strictly legal point of view it is acknowledged that a charge and a mortgage remain distinct structures under which a mortgage operates by way of conveyance of the estate in land to the lender whereas there is no passing of any estate in the land with a charge, but rather the granting of contractual and statutory rights to execute that become exercisable on default. Mokal has suggested that this difference may have a practical impact in liquidation, R. Mokal, "Liquidation Expenses and Floating Charges-the Separate Funds Fallacy" [2004] *Lloyd's Maritime and Commercial Law Quarterly* 387. Nevertheless, the LCLRA 2009, amongst others, now establishes a confluence in terminology with mortgage and charge often used interchangeably and the conceptual difference between the two concepts normally matters little to the substance of the arrangement. This

Complementing this regime, consumer protection in the context of mortgages arises from the Consumer Credit Act 1995 (the CCA 1995)¹⁰⁵ and related soft law codes of conduct.¹⁰⁶ The CCA 1995 defines a “housing loan” as an agreement for the provision of credit or refinancing credit to a person “on the security of a mortgage of a freehold or leasehold estate or interest in land”¹⁰⁷ to enable that person to construct, improve or purchase a house, to purchase land on which a house is constructed, or where that person is a consumer.¹⁰⁸ This credit includes a “deferred payment, cash loan or other similar financial accommodation”¹⁰⁹ and a mortgage in this context includes a charge.¹¹⁰ Drawing on this definition in the CCA 1995, then, the LCLRA 2009 defines a “housing loan mortgage” as a mortgage to secure a housing loan.¹¹¹ In order to ensure that Ireland’s property and consumer protection regimes apply consistently to Islamic mortgage-alternatives, therefore, the structures used in the Islamic finance products must be brought within these regulatory provisions.

In the case of Islamic mortgage-alternatives based on a *murabaha* contract, bringing these financial structures within the regulatory regime applying to mortgages would seem to be relatively straightforward. A similar conclusion was reached in the UK, where it has been confirmed that *murabaha*-based transactions fall within the definition of a regulated mortgage contract and so have been regulated under the same framework as conventional mortgages since October 2004.¹¹² As is the case for a conventional property financing transaction,¹¹³ *murabaha*-based arrangements allow the relevant property’s title to be transferred to the customer almost immediately at the outset of the transaction.¹¹⁴ The customer then repays the purchase price plus mark-up on a deferred basis to the financial institution. This structure allows the customer to grant a charge over the property in favour of the financial institution and to secure the deferred amount payable by the customer under the transaction.¹¹⁵

article assumes that any Islamic mortgage-alternative would be created after 1 December 2009 (the date from which the regime set out in the LCLRA 2009 applies - Land and Conveyancing Law Reform Act 2009 (Commencement) Order 2009, SI No. 356/2009).

¹⁰⁵ CCA 1995, No. 24/1995.

¹⁰⁶ Including the Consumer Protection Code 2012 and the Code of Conduct on Mortgage Arrears, discussed below. Padraic Kenna and Karen Lynch-Shally, *Comparing mortgage law in England and Ireland* (2014) 4 *Conveyancer and Property Lawyer* 294-316 at 295.

¹⁰⁷ CCA 1995, “Interpretation” as amended by the Central Bank and Financial Services Authority of Ireland Act 2004 (21/2004), s 33 and sch 3 pt 12 item 1(b), (ba), (d), SI 455/2004.

¹⁰⁸ CCA 1995, “Interpretation” as amended by the Central Bank and Financial Services Authority of Ireland Act 2004 (21/2004), s 33 and sch 3 pt 12 item 1(b), (ba), (d), SI 455/2004.

¹⁰⁹ CCA 1995, s 2(1), as amended by European Communities (Consumer Credit Act, 1995) (Amendment) Regulations 1996, SI 277 of 1996, reg. 2(a).

¹¹⁰ CCA 1995, s 2(1), as amended by the Central Bank and Financial Services Authority of Ireland Act 2004 (21/2004), SI 455/2004, s 33 and sch 3 pt 12 item 1(b), (ba), (d).

¹¹¹ LCLRA 2009, s 3.

¹¹² See M. Ainley et. al., *Islamic Finance in the UK: Regulation and Challenges* (Financial Services Authority, 2007), 20.

¹¹³ K. Gray and S. Frances Gray, *Land Law* (Oxford University Press, 2007), 216.

¹¹⁴ M. El-Gamal, *Islamic Finance; Law, Economics and Practice* (Cambridge University Press, 2006), 67.

¹¹⁵ Reflecting this, in the UK, HM Land Registry notes that one of the required documents needed to complete a *murabaha*-based arrangement is a charge in favour of the bank, see HM Land Registry, “Guidance Practice Guide

By contrast, Islamic mortgage-alternatives based on *ijarah wa-iqtina* and diminishing *musharaka* contracts are potentially less straightforward from a regulatory perspective.¹¹⁶ In *ijarah wa-iqtina* mortgage-alternatives, the financial institution is typically transferred legal title to the property.¹¹⁷ This allows the financial institution to assume full ownership of that property.¹¹⁸ In the case of diminishing *musharaka*-based transactions, although ownership of the property is shared between the customer and the financial institution, the progressively altering ownership shares of the parties are likely to make legal shared ownership of the property difficult and cumbersome to manage.¹¹⁹ As a result, the financial institution (or a third party trustee) is more likely to acquire full legal ownership of the property and then to enter into a trust to hold the property for both the customer and the financial institution as beneficial tenants in common of unequal shares.¹²⁰

In the case of both *ijarah wa-iqtina* and diminishing *musharaka* contracts, it is only at the end of the contractual term that full legal title to the property is transferred to the customer.¹²¹ Concurrently with this, the customer does not undertake to repay credit advanced by the financial institution but, rather, undertakes to make periodic rental payments and, in the case of a diminishing *musharaka*, to purchase the financial institution's share of the property. As security for the customer's obligations to pay rent under the lease and (in the case of a diminishing *musharaka*) to acquire the financial institution's share in the property over time, the customer may grant a charge in favour of the financial institution over the customer's interest in the property under the lease and any co-ownership agreement.¹²² There is, however, no "credit" advanced and no "housing loan" made.¹²³

Other than in the case of structures based on a *murabaha* contract, therefore, Islamic mortgage-alternatives risk not falling clearly within Ireland's existing property and consumer protection regimes for mortgages. As a result, these products could be categorised as leases, or at least as including a lease,

69: Islamic financing" (updated 9 September 2019), <https://www.gov.uk/government/publications/islamic-financing/practice-guide-69-islamic-financing> [Accessed 12 July 2020].

¹¹⁶ Although variations in the contractual structures used may exist between individual products.

¹¹⁷ S. Alamad, *Financial and Accounting Principles in Islamic Finance* (Springer, 2019), 211.

¹¹⁸ HM Land Registry, "Guidance Practice Guide 69: Islamic financing" (updated 9 September 2019), <https://www.gov.uk/government/publications/islamic-financing/practice-guide-69-islamic-financing> [Accessed 12 July 2020].

¹¹⁹ G. Gretton, "Islamic Mortgages", in Frankie McCarthy, James Chalmers and Stephen Bogle (ed.) *Essays in Conveyancing and Property Law* (Open Book Publishers, 2019), [19].

¹²⁰ J. Barry, "Islamic property financing" (2007) 15 Australian Property Law Journal 66. In the UK, the regulatory provisions dealing with diminishing *musharaka*-based transactions note that the interest acquired in the property is to be "held on trust for the home purchase provider and the individual...as *beneficial* tenants in common" rather than as joint legal owners, s 63F(3)(ii) Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544.

¹²¹ See for example, the Islamic mortgage alternatives offered by Al Rayan Bank in the UK, the terms and conditions of which provide that "legal ownership of the property [is] transferred to you following settlement of the finance", Al Rayan Bank, Home Purchase Plan, Product Information, 7, <https://www.alrayanbank.co.uk/media/284789/hpp-product-information.pdf> [Accessed 12 July 2020].

¹²² T. Hameed, "Diminishing Musharaka reflects the spirit of Sharia" (2007) 138(1690) Mortgage Finance Gazette 39-41.

¹²³ *Secretary of State for Work and Pensions v UP* [2011] AACR 12.

rather than as “housing loan mortgages”.¹²⁴ This would alter the protections offered to consumers participating in the Islamic finance transactions.

Unlike market participants involved in leasing real estate, residential mortgage lenders¹²⁵ and mortgage intermediaries¹²⁶ in Ireland are subject to regulatory oversight by the Central Bank.¹²⁷ Residential mortgage lenders are also subject to the consumer protection standards set by the CCA 1995 and the conduct standards established by the Consumer Protection Code 2012¹²⁸ and the Central Bank's Code of Conduct on Mortgage Arrears.¹²⁹ The Consumer Protection Code 2012, for example, sets out policies, practices and procedures that are relevant to the provision of mortgage credit,¹³⁰ while the Code of Conduct on Mortgage Arrears introduces extensive guidelines on the behaviour of mortgagees when a housing loan borrower fails to keep up payments under the mortgage.¹³¹ However, the legal structure of *ijārah wa-iqtina* and diminishing *mushāraka* arrangements may mean that the customer's ongoing relationship with the financial institution and the financial institution's reaction on default in payment by the customer are treated by that financial institution in a manner that is more consistent with a lease than a conventional mortgage.¹³² If the legal form of some Islamic mortgage-alternatives means that these products and their participants simply fall outside the scope of Ireland's property and consumer

¹²⁴ A “housing loan mortgage” is defined in the LCLRA 2009 as “mortgage to secure a housing loan”, LCLRA 2009, s 3.

¹²⁵ CCA 1995, s 2(1) as amended by the Central Bank and Financial Services Authority of Ireland Act 2004 (21/2004), s 33 and sch 3 pt 12 item 1(b), (ba), (d), SI 455/2004 defines a “mortgage lender” as a person who carries on a business that consists of or includes making housing loans.

¹²⁶ CCA 1995, s 2(1) as amended by the Central Bank and Financial Services Authority of Ireland Act 2004 (21/2004), s 33 and sch 3 pt 12 item 1(c), SI 455/2004 defines a “mortgage intermediary” as “any person (other than a mortgage lender or credit institution) who, in return for commission or some other form of consideration - (a) arranges or offers to arrange the provision of a housing loan by a mortgage lender, or (b) introduces a consumer to an intermediary who arranges, or offers to arrange, for a mortgage lender to provide the consumer with such a loan.”

¹²⁷ Either as a credit institution, building society, credit union or retail credit firm. Central Bank Act 1997, s 28 as amended by Markets in Financial Instruments and Miscellaneous Provisions Act 2007, s 19. See also, CCA 1995, s 116(1). In certain circumstances, if they are classified as a “Property Services Providers”, certain entities involved in the lease of any estate or interest in land may need to be licensed and regulated by the Property Services Regulatory Authority pursuant to the Property Services (Regulation) Act 2011.

¹²⁸ Central Bank of Ireland, Consumer Protection Code (2012), <https://www.centralbank.ie/docs/default-source/regulation/industry-market-sectors/brokers-retail-intermediaries/guidance/consumer-protection-code-v4.pdf?sfvrsn=4> [Accessed 12 July 2020].

¹²⁹ Central Bank of Ireland, Code of Conduct on Mortgage Arrears (2013), <https://centralbank.ie/docs/default-source/Regulation/consumer-protection/other-codes-of-conduct/24-gns-4-2-7-2013-ccma.pdf?sfvrsn=4> [Accessed 12 July 2020].

¹³⁰ P. Kenna and K. Lynch-Shally, “Comparing mortgage law in England and Ireland” (2014) 4 *Conveyancer and Property Lawyer* 294-316, 306.

¹³¹ Chapter 1 sets out the scope of the Code as follows: “[t]his Code sets out how mortgage lenders ... must treat borrowers in or facing mortgage arrears, with due regard to the fact that each case of mortgage arrears is unique and needs to be considered on its own merits. This Code sets out the framework that lenders must use when dealing with borrowers in mortgage arrears or in pre-arrears. All such cases must be handled sympathetically and positively by the lender, with the objective at all times of assisting the borrower to meet his/her mortgage obligations.” Code of Conduct on Mortgage Arrears (2013), 1.

¹³² M. Damak, *Risk Management for Islamic Financial Institutions: A Rating Perspective*, (Standard & Poor's, 15 January 2008), 2-3, http://www2.standardandpoors.com/spf/pdf/media/Risk_Management_For_Islamic_Financial_Institutions_15-Jan-08.pdf [Accessed 12 July 2020].

protection regimes applicable to conventional mortgages, there is a risk of divergence between the protections offered to customers of what are economically comparable finance products. In light of legislative attempts to establish a level playing field between Islamic and conventional finance customers in terms of taxation, it seems arguable that Islamic customers should also be entitled to a comparable level of information, protection and safeguards as conventional customers. Yet without further legislative amendments, such comparable treatment would not be available. This could restrict the extent to which Islamic mortgage-alternative products can be offered in Ireland.

The risk of a similar imbalance in regulatory oversight in the UK led to the development of a regulatory regime designed specifically for Islamic mortgage-alternatives.¹³³ In doing so, UK authorities created a new category of regulated activity covering the arrangement of,¹³⁴ advising on,¹³⁵ entering into and administering¹³⁶ “home purchase plans” (HPPs).¹³⁷ HPPs, as specified investments, cover (in religiously-neutral language) the structures used in *ijārah wa-iqtina* and diminishing *mushāraka* arrangements and accommodate the aspects of these products that distinguish them from conventional retail mortgages (such as the financial institution’s ownership of the property).¹³⁸ *Murabaha*-based structures will continue to fall within the existing definition of a regulated mortgage.¹³⁹ The UK Financial Conduct Authority has also amended its Mortgage and Home Finance: Conduct of Business Sourcebook (MCOB) to provide for Islamic mortgage-alternatives.¹⁴⁰ This has resulted in amendment of the MCOB rules relating to arrears and repossession so as to incorporate HPPs, to exclude references to mortgage “loans” and “debt” and to replace these with terms that account for the fact that HPPs do not involve indebtedness. As is the case for standard mortgages, the MCOB rules then sets out how the financial institution should act in the event of customer arrears, advocating, fairness and, only as a final resort, repossession of the property.¹⁴¹

Through these specific amendments to the existing legal framework for conventional mortgages, UK authorities have expanded the scope of that legal framework to include the distinct contractual structures commonly used in Islamic mortgage-alternatives. This has not changed the definition of a mortgage

¹³³ M. Ainley et. al., *Islamic Finance in the UK: Regulation and Challenges* (Financial Services Authority, 2007), 21.

¹³⁴ Article 25(c) Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

¹³⁵ Article 53(c) Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

¹³⁶ Article 63(f) Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

¹³⁷ Financial Services Authority (now the Financial Conduct Authority) *Regulation of Home Reversion and Home Purchase Plans* (London, 2006), 6.

¹³⁸ Article 88(b) Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. See also, Financial Services Authority, *Home Purchase Plans, Factsheet*, (FSA, London, March 2007), 3-4.

¹³⁹ FCA Handbook, *The Perimeter Guidance Manual (PERG)*; PER14.4 *Activities relating to home purchase plans*, Q25 noting that “Murabaha arrangements ... will be regulated mortgage contracts assuming that they meet the necessary conditions including that there is a first legal charge over the property”.

¹⁴⁰ See generally, MCOB 2.6A *Protecting customer’s interests: regulated mortgage contracts, home purchase plans, home reversion plans and regulated sale and rent back agreements*.

¹⁴¹ MCOB 13 *Arrears, payment shortfalls and repossessions: regulated mortgage contracts and home purchase plans*.

under English law. Instead, it has expanded the range of property transactions that will be subject to the same regulatory and consumer protection regimes as mortgages.¹⁴² If the Irish government decides to accommodate structures used in Islamic mortgage-alternatives into Ireland's regulatory framework, a similar tailored adjustment to the scope of established legislative provisions and codes of conduct would be needed. As has been the case in the UK, this would not require an amendment to the definition of a mortgage or housing loan under Irish law, but rather the addition of a new category of retail home purchase arrangement that incorporates *ijarah wa-iqtina* and diminishing *musharaka*-based transactions into the existing regime. Expanding Ireland's regulatory and consumer protection frameworks applicable to mortgages and housing loans to include the structures commonly found in Islamic mortgage-alternatives would be proportionate to the comparatively small size of the potential market, yet would confer on these transactions a level of oversight and protection that reflects their economic substance.¹⁴³

V. *Islamic Property Financing in Ireland – Availability and Recent Developments*

In the responses to the 2019 Survey, 81.06 percent of respondents who answered the question indicated that they rented their home, compared to just 16.55 percent of respondents who owned their home. A similarly low level of home ownership amongst Ireland's Muslim community was also highlighted by McGinnity et al in 2018 who noted that "it is a cause for concern that in 2016, 64 per cent of Muslims are tenants in the private rented sector (compared to just 18 per cent for the total population), especially in the current rental market in Ireland."¹⁴⁴ While there are many reasons why someone may choose to rent rather than own their home, narrative responses to the 2019 Survey indicate that the absence of Islamic mortgage-alternatives in Ireland was a significant reason why respondents were renting or did not own their own home. Reflecting this interest in Islamic alternatives to a mortgage, 98.07 percent of those who responded to the question in the 2019 Survey confirmed that if there was a religiously compliant alternative finance product available, this would at least influence their intention to purchase a home in Ireland.¹⁴⁵

Despite this, ten years after the Finance Act Amendments, no retail Islamic mortgage-alternatives are available in Ireland. Anecdotal evidence suggests that money received from informal sources, such as a co-operative model implemented within the Muslim community, is being used to provide capital to

¹⁴² MCOB 1.2.1 (1) *General application: who? what?* noting that: MCOB applies to every firm that "(a) carries on a home finance activity (subject to the business loan and loans to high net worth mortgage customers application provisions); or (b) communicates or approves a financial promotion of qualifying credit, of a home purchase plan, of a home reversion plan or of a regulated sale and rent back agreement." (emphasis added).

¹⁴³ M. Ainley et. al., *Islamic Finance in the UK: Regulation and Challenges* (Financial Services Authority, 2007), 21.

¹⁴⁴ F. McGinnity et. al., *Monitoring Report on Integration 2018* (ESRI / Department of Justice and Equality 2018), 95.

¹⁴⁵ 407 out of 415 responses.

members of that community, thereby avoiding or reducing reliance on conventional non-Islamic mortgages.¹⁴⁶ While this informal approach may help to address the financing needs of those who do not want to engage with interest-based mortgages, such activity also operates outside of the formal banking system and the oversight of regulatory and tax authorities. The recent development of a marketed “non-interest bearing”¹⁴⁷ property financing product for social enterprises by Community Finance Ireland (CFI) is, therefore, a noteworthy step in Ireland’s domestic Islamic finance market.

CFI is a registered charity and provider of finance to social enterprises, sporting clubs, community associations and charities in Ireland (the Third Sector), rather than to individuals.¹⁴⁸ In 2017, reflecting interest and demand from Ireland’s Muslim community, a non-interest bearing property financing product was developed for CFI based on a *murabaha* structure.¹⁴⁹ This product is not available to fund property acquisitions by individuals, and so is not available as an Islamic mortgage-alternative for retail customers.¹⁵⁰ Instead, the product was designed to allow CFI to provide religiously-compliant property financing to Third Sector entities.¹⁵¹ Nevertheless, the product does stand as a recent example of Islamic property financing in Ireland. It also serves to underline the continuing difficulties of expanding this form of property financing to retail customers in Ireland without further intervention by the legislature.

Using a *murabaha* contractual structure, CFI will enter into a purchase agreement with a vendor with respect to the property whose purchase is being financed. The property is then on-sold by the financial institution to the customer at a marked-up price that is payable in instalments. The periodic payments made by the customer to CFI in these instalments will be fixed at the outset of the transaction such that cumulatively they will be sufficient to repay CFI the original purchase price of the property, plus a profit. To mitigate the asset risk involved in the financial institution purchasing the relevant property, CFI will obtain a separate unilateral undertaking or promise in the form of a pledge (*wa’d*) from the

¹⁴⁶ Based on face to face discussions between the authors and members of the Muslim community in Ireland in both 2010 and 2018-2019.

¹⁴⁷ CFI, “Social Impact and Financial Highlights 2017”, 3, <https://www.communityfinance.ie/sites/default/files/CFI-IMPACT-CARD-2017.pdf> [Accessed 12 July 2020].

¹⁴⁸ Community Finance Ireland, Registered Charity Number (RCN): 20044619, <https://www.charitiesregulator.ie/en/information-for-the-public/search-the-register-of-charities/charity-detail?srchstr=community%20finance%20ireland®id=20044619> [Accessed 12 July 2020].

¹⁴⁹ Philip Lee Solicitors, “Ireland’s First Islamic Financing Product: The First Of Many” (10 August 2018), <https://www.philiplee.ie/irelands-first-islamic-financing-product-the-first-of-many/> [Accessed 12 July 2020]. See also, CFI, “Social Impact and Financial Highlights 2017”, 3, <https://www.communityfinance.ie/sites/default/files/CFI-IMPACT-CARD-2017.pdf> [Accessed 12 July 2020]; H. Singh, “Overwhelming desire for Islamic mortgages, lending products in Ireland” (6 May 2019), <https://themalaysianreserve.com/2019/05/06/overwhelming-desire-for-islamic-mortgages-lending-products-in-ireland/> [Accessed 12 July 2020]. One of the authors of this article was involved in the development of this product and the below discussion refers, for the first time in an academic article, to aspects of the product that are not publicly available. For the purposes of this article, the product is presented simply as a step in the development of Islamic finance in Ireland.

¹⁵⁰ Philip Lee Solicitors, “Ireland’s First Islamic Financing Product: The First Of Many” (10 August 2018), <https://www.philiplee.ie/irelands-first-islamic-financing-product-the-first-of-many/> [Accessed 12 July 2020].

¹⁵¹ Philip Lee Solicitors, “Ireland’s First Islamic Financing Product: The First Of Many” (10 August 2018), <https://www.philiplee.ie/irelands-first-islamic-financing-product-the-first-of-many/> [Accessed 12 July 2020].

customer.¹⁵² Pursuant to this undertaking, the customer agrees to purchase the property from CFI following CFI's acquisition of it from the original vendor.¹⁵³ As part of the transaction and in order to reduce the credit risk faced by CFI from the fixed instalment payments due under the *murabaha*, the customer will also provide CFI with security in respect of its deferred payment obligations. Like the charge that can be granted by a customer to a financial institution in a *murabaha*-based Islamic mortgage-alternative product, the use of security in the CFI product is possible due to the deferred nature of the sale price in a *murabaha* structure and the almost immediate transfer of ownership of the property to the customer.¹⁵⁴

As a product for use in commercial property financings, the CFI product avoids the consumer protection and regulatory issues raised by retail Islamic mortgage-alternative products in Ireland. However, the taxation issues raised by all Islamic property financing products remain relevant. Use of a *murabaha* contractual structure within the scope of Ireland's accommodating tax regime therefore provides scope for mitigating some of these tax issues. As a result, if the parties elect for the transaction to be treated for tax purposes as a specified financial transaction,¹⁵⁵ the profit element of the customer's payments will be deemed for tax purposes to represent interest payments on a loan (even though in legal form no loan is made).¹⁵⁶ For stamp duty purposes, the *murabaha* structure relies on tax relief provided in s31 SDCA 1999 to reduce the full imposition of stamp duty on each transfer of the property within the transaction.¹⁵⁷ This relief provides that a contract or agreement to sell property to a person or a nominee of that person (in this case, the agreement between CFI and the vendor) where at least 25 per cent of the sale price has been paid shall be chargeable to stamp duty¹⁵⁸ *except where*, within 30 days of the date of payment, an electronic or paper return in relation to the ultimate conveyance of the property is delivered to the Revenue and the stamp duty chargeable on that conveyance is paid.¹⁵⁹ In the case of the CFI product, therefore, if the property is conveyed to the customer within 30 days of the original agreement between CFI and the vendor, stamp duty would only be chargeable on the second transfer.

¹⁵² See generally, I. Wisham, A. Muneeza and R. Hassan, "Special legal features of the Islamic *wa'd* or pledge: comparison with the conventional law on promise within the sphere of Islamic finance International" (2011) 53(3) *Journal of Law and Management* 221-234.

¹⁵³ S. Alamad, *Financial and Accounting Principles in Islamic Finance* (Springer, 2019), 124. This undertaking is specifically envisaged in the UK government's guidance on Islamic finance (although not explicitly in the Irish government's corresponding guidance), see HMRC Internal Manual, *Corporate Finance Manual (CFM11130)*, "Understanding corporate finance: raising finance: alternative finance: types of contract Alternative/Islamic finance: types of contract", (published 16 April 2016, updated 21 May 2020), <https://www.gov.uk/hmrc-internal-manuals/corporate-finance-manual/cfm11130> [Accessed 12 July 2020], which notes that "[t]here may be other contracts forming part of the overall transaction, for example the business will identify the asset to be purchased and will promise to purchase the asset from the finance provider."

¹⁵⁴ See section IV(a) above for further details.

¹⁵⁵ TCA 1997, s 267U, as amended by Finance Act 2012, s 37.

¹⁵⁶ TCA 1997, s 267O(1).

¹⁵⁷ SDCA 1999, s31.

¹⁵⁸ SDCA 1999, s31(1).

¹⁵⁹ SDCA 1999, s31(2).

This means that stamp duty is technically chargeable once, but on the full marked-up price to be paid by the customer (rather than on just the original purchase price of the property).

As a marketed non-interest bearing property financing product, the CFI product was the first of its kind in Ireland. As such, it is a noteworthy development in Ireland's domestic Islamic finance industry and reflects one of the first applications of the accommodating tax provisions, some eight years after they were introduced. Structured within the existing legal framework, the CFI product has used a *murabaha* structure as its contractual base. As the Islamic finance structure that is economically and legally most similar to a conventional property financing arrangement, use of a *murabaha* in the CFI product is understandable. However, the CFI product is not available to retail customers and, without further amendments to Ireland's tax and regulatory frameworks, retail Islamic property financing transactions will struggle to follow the precedent established by CFI. This is because the CFI product used stamp duty relief to reduce the stamp duty liability of the customer, but did not bring that liability to the same level as would be chargeable on a conventional property financing. It also did not face the regulatory and consumer protection issues that are likely to be relevant for many retail Islamic mortgage-alternatives in Ireland. As Islamic finance market participants around the world look to incorporate other Islamic contractual structures into their transactions, and as industry preference for *ijarah wa iqtina* and diminishing *musharaka* structures grows,¹⁶⁰ it is arguable that without further amendments to the relevant legal frameworks in Ireland, domestic retail Islamic mortgage-alternatives will simply remain unfeasible.

In light of indications from both Surveys that there is an appetite amongst Ireland's Muslim population for religiously compliant home financing products, the development of the CFI product throws into relief the continuing absence of such products for retail customers and the ongoing legal hurdles faced by Islamic mortgage-alternatives in Ireland.

E. Conclusion

Notwithstanding the issuance of relevant government guidance and amendments to existing tax laws designed to accommodate domestic Islamic finance, Ireland's Islamic finance industry remains underdeveloped. Surveys conducted nine years apart indicate that Ireland's Muslim community is interested in using finance products that comply with that community's religious beliefs. This is particularly the case with respect to Islamic mortgage-alternative products. However, a comparatively

¹⁶⁰ Al Rayan Bank in the UK, for example, only offers Islamic mortgage-alternative products based on *ijarah wa iqtina* and diminishing *musharaka* contracts. See also, A. Muneeza et. al., "House financing: contracts used by Islamic banks for finished properties in Malaysia" (2020) 11(1) Journal of Islamic Accounting and Business Research 168-178.

small Muslim population and remaining gaps in the tax and regulatory frameworks have meant that Ireland's domestic retail Islamic finance sector does not yet exist.

Within the UK, the Islamic finance sector is now an identifiable segment of the wider financial market. While the Muslim population in the UK is larger than it is in Ireland, both proportionately and in real terms, the UK's domestic Islamic finance industry has also been supported by a concerted effort on behalf of UK authorities to level the playing field between the legal treatment of Islamic and economically comparable conventional finance products. This has led to the removal of tax and regulatory barriers that may otherwise have hindered the development of Islamic finance activity. In doing so, these accommodations have sought to ensure that Islamic finance transactions and their participants are subject to the same type and level of taxation and regulation as their conventional counterparts.

Following the Finance Act Amendments, Ireland's official accommodation of Islamic finance activity has stalled. The basic elements of an accommodative tax framework have been put in place. However, legislative authorities have not taken a holistic approach to accommodation and have failed to address ancillary taxation and regulatory hurdles that continue to hinder the Islamic mortgage-alternative market in Ireland. The recent development of an Islamic property financing product by CFI highlights the fact that domestic Islamic finance products do have a market,¹⁶¹ even on a modest scale. While this may now encourage further innovation in Ireland's Islamic finance industry generally, in the Islamic mortgage-alternative sector further government intervention is still needed in order to make this sector viable.

¹⁶¹ CFI, "Social Impact and Financial Highlights 2017", 3, <https://www.communityfinance.ie/sites/default/files/CFI-IMPACT-CARD-2017.pdf> [Accessed 12 July 2020], noting that "we are actively dealing with a number of enquiries on this front, particularly from the Islamic community".