



Provided by the author(s) and NUI Galway in accordance with publisher policies. Please cite the published version when available.

| | |
|-----------------------------|--|
| Title | Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights |
| Author(s) | Kenna, Padraic; SimónMoreno, Héctor |
| Publication Date | 2019-12-17 |
| Publication Information | Kenna, Padraic, & Simón-Moreno, Héctor. (2019). Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights. <i>European Law Journal</i> , 25(6), 608-622. doi: 10.1111/eulj.12348 |
| Publisher | Wiley |
| Link to publisher's version | https://doi.org/10.1111/eulj.12348 |
| Item record | http://hdl.handle.net/10379/15776 |
| DOI | http://dx.doi.org/10.1111/eulj.12348 |

Downloaded 2022-05-22T01:33:54Z

Some rights reserved. For more information, please see the item record link above.



Kenna, P., Simón-Moreno, H. Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights, (2019) *European Law Journal*, 25 (6), pp. 608-622.

Pre-publication draft.

Abstract: The trend towards the financialisation of housing since the 1980s and the global financial crisis exposed a dramatic lacuna in the legal protection of the right to housing. Yet, the right to housing features not only in national and international human rights instruments, but also in the EU Charter of Fundamental Rights. Charter rights are increasingly finding expression in the case law of the Court of Justice of the European Union (CJEU). In particular, drawing on the Charter, the CJEU's interpretation of EU consumer law is moving towards a recognition of housing rights as inherent components of consumer protection. On the basis of such developments, this article examines whether there is scope to extend this human rights approach to new areas – namely, to the Mortgage Credit Directive (2014) – a major EU harmonising measure – and to the work of EU institutions now responsible for banking supervision. The article concludes that, if guided by the Charter of Fundamental Rights, the case law of the CJEU and the practice of supranational banking supervision could significantly enhance the protection of the right to housing, both at EU and Member State level.

Keywords: Housing rights; EU law; Human rights; Mortgages; consumer law

Introduction

One of the consequences of wider home ownership, has been the penetration of property law into disputes on home ownership, mortgage default and housing rights. This has occurred in tandem with State policies advancing homeownership to promote political conservatism and asset-based welfare approaches.¹ Despite major social policy developments linking access to housing with involuntary participation in an unregulated financial services industry, with weak consumer protection, the law relating to homes and mortgages has been largely excluded from supra-national EU legislation, with each European country cherishing its own property law regime, operating on the *lex rei sitae* principle.² National property law systems are very closed, and the development of European harmonised standards has been slow and indirect.³ Indeed, Article 345 Treaty on the Functioning of the European Union (TFEU), specifically precludes Treaty law primacy over national systems of property ownership, and the principles of subsidiarity

¹ See R. Ronald, *The Ideology of Home Ownership: Homeowner Societies and the Role of Housing* (Palgrave Macmillian, 2008), 29 and 81, and R. Rolnik, *The right to adequate housing* (United Nations General Assembly, 10 August 2012), 3 et seq. Available at: <<http://www.ohchr.org/Documents/Issues/Housing/A-67-286.pdf>> (last visited 29 September 2018). There are significant variations in the level of homeowners with or without mortgages throughout Europe. At one extreme is the Netherlands, where 60% own their home with a mortgage, and on the other is Romania where 96% own their home without having a mortgage –see European Mortgage Federation, *Hypostat 2017 - A Review of Europe's Mortgage and Housing Markets*. Available at: <https://hypo.org/app/uploads/sites/3/2017/09/HYPOSTAT-2017.pdf> (last visited 28 January 2019).

² P. Kenna, 'Mortgage Law Developments in the European Union', 4 *Journal of Law, Property and Society* 45 (2019). See I. Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Hart Publishing, 2017), 9, where she points out that the retreat of the welfare state from housing in social democratic and socialist States since the 1980s has impacted on access to housing for large sections of the population, and when combined with low interest rates and an explosion of credit globally, created a major risk for households who are vulnerable to loss of home.

³ S. Van Erp, and B. Akkermans, *Cases, Materials and Text on Property Law* (Ius Commune Casebooks for the Common Law of Europe, Hart Publishing, 2012), Ch 10.

and proportionality are highly significant.⁴

The global financial crisis changed everything in Europe, although it impacted on European countries in different ways. The recession, after 2008, led to a reduction in wages in the public and private sectors, a sharp rise in unemployment rates (reaching dramatic levels in Greece and Spain), collective redundancies, a rise in part-time and precarious employment,⁵ while ‘austerity’ measures imposed by Member States at the instigation of EU institutions led to a reduction in welfare state expenditures.⁶ Under such circumstances, households in many peripheral EU Member States became the “shock absorbers” of the crisis, and many were unable to repay their mortgages.⁷ This led to a wave of home loan mortgage arrears and associated evictions in those Member States where a mortgage lending and property price boom had taken place.⁸ In the case of Spain, for instance, the financial crash in 2007 led to major household over-indebtedness and to an increase in the number of evictions of mortgage debtors and tenants, empty dwellings, bad banking practices, homelessness and problems of access to housing, as well as to the lack of sufficient social housing and social benefits.⁹ In some countries, the failure of governments to act led to the development of social movements combatting evictions,¹⁰ and also to judicial activism in relation to mortgage enforcement, described as ‘Robinprudence,’ in an effort to protect the poor from homelessness.¹¹

⁴ S. Van Erp, ‘Article 345 TFEU: A framework for European property law’, in J. Tarabal Bosch and E. Lauroba Lacasa (eds.), *El derecho de propiedad en la construcción del derecho privado europeo* (Tirant lo Blanch, 2018). The existence of a public core that characterise all property law rules, the *erga omnes* application of the rules of ownership, the connection between property and authority, the importance of land as a source of national fiscal revenues and the link of property with politically sensitive interests such as housing, demographics, rent control, taxation and urbanisation, may explain why the EU has adopted saving clauses in the EU Treaties concerning the law of property and not in other areas of private law, such as the law of contract or tort law, see D. Caruso, ‘Private Law and Public Stakes in European Integration: the Case of Property’, (2004) 6 *European Law Journal* 10, 751 et seq.

⁵ See A. Beka, ‘The Protection of the Primary Residence of Mortgage Debtors: Embedding a ‘Basic Needs’ Principle in Mortgage Repossession Proceedings’, in L. Ratti (ed), *Embedding the Principles of Life Time Contracts* (Eleven Publishing, 2018).

⁶ See A. I. Tamamović, (2015) *The impact of the crisis on fundamental rights across Member States of the EU Comparative analysis*, European Parliament, PE 510.021; C. O’ Cinneide, ‘Austerity and the faded dream of a ‘social Europe’, in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014). See UN Doc. A/67/286, Report by Rolnik, op cit n. 1 supra.

⁷ I. Ramsay, ‘Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU’, in H. W. Micklitz and I. Domurath (Eds.), *Consumer Debt and Social Exclusion in Europe*, (Abingdon Oxon, Routledge, 2015), 191.

⁸ See P. Kenna, L. Benjaminsen, V. Busch-Geertsema and S. Nasarre-Aznar, *Pilot Project – Promoting Protection of the Right to Housing – Homelessness Prevention in the Context of Evictions* (VT/2013/056). Final report (2016). European Union: European Commission, Directorate-General Employment, Social Affairs and Inclusion.

⁹ See S. Nasarre-Aznar and R. M. Garcia Teruel, ‘El acceso a la vivienda en España’, in Adicae (ed.), *Vivienda y Financiación. La oferta del crédito en el nuevo mercado hipotecario y otras formas de acceso a la vivienda* (ADICAE Servicios Centrales, 2016), 31 et seq.; and K. Casla, ‘The rights we live in: protecting the right to housing in Spain through fair trial, private and family life and non-retrogressive measures’, (2016) 3 *The International Journal of Human Rights* 20, 287 et seq.

¹⁰ See M. Anderson and H. Simón-Moreno ‘The Spanish Crisis and the Mortgage Credit Directive: Few Changes in Sight’ in M. Anderson and E. Arroyo i Amayuelas (eds), *The Impact of the Mortgage Credit Directive in Europe* (Europa Law Publishing, 2017), 55. *Plataforma de Afectados por la Hipoteca* (Platform for People Affected by Mortgages) in Spain was one of these social movements.

¹¹ For a fuller discussion on these developments see S. Nasarre Aznar, ‘Robinhoodian’ courts’ decisions on mortgage law in Spain’ (2015) 2 *International Journal of Law in the Built Environment* 7, 127 et seq.

The EU and Member State primary legislative and policy responses were to protect the banking system, and more particularly the integrity of the Euro as a global currency, developing stronger EU institutional economic governance,¹² and creating a harmonizing directive on mortgage lending.¹³ Alongside the creation of centralised system of banking supervision,¹⁴ the so-called ‘pillar’ or ‘significant’ banks and securitized lenders received unprecedented levels of State support to protect their “assets” in the face of large-scale collapse of the mortgage system.¹⁵ But there was no similar EU institutional response to individual home loan mortgagors in distress,¹⁶ although some national governments introduced mitigating measures, such as moratoria on mortgage repossession.¹⁷ Traditional human rights approaches did not feature in the European and national responses to the crisis.¹⁸ The most advanced national legal approaches to adjusting distressed mortgage contracts were not incorporated into the new EU measures.¹⁹

The absence of an express EU competence on housing has rendered specific actions in this area largely marginal, although housing emerges as an issue in State aid, competition law, public procurement and some fundamental rights citizenship issues. A number of disparate measures pertaining to housing have been adopted on migration, energy efficiency, anti-discrimination, product safety, environmental protection, banking and financial services.²⁰ However, it was the link between home loan mortgages and EU consumer protection legislation which seriously engaged the Court of Justice of the European Union (CJEU) in the housing field. The CJEU found itself dealing with the social dimensions of the crisis through its preliminary reference system under Article 267 TFEU. Arising from the initiative of some national courts (particularly Spanish),²¹ the CJEU engaged in a progressive interpretation of EU consumer protection legislation on

¹² See F. Fabbrini, *Economic Governance in Europe – Comparative Paradoxes and Constitutional Challenges* (Oxford University Press, 2016).

¹³ Directive 2014/17/EU of the European Parliament and of the Council, of 4 February 2014, on credit agreements for consumers relating to residential immovable property -MCD- [OJ L 60, 28.2.2014, p. 34–85].

¹⁴ See European Commission, *A Roadmap towards a Banking Union*, COM(2012) 510 final 12.9.2012.

¹⁵ Between 2008 and 2011, European countries spent €4.5tn. or 37% of the European Union’s economic output on financial industry bailouts. See UN Office of the High Commissioner for Human Rights (2012). *Report on austerity measures and economic and social rights*, 7. Available at: https://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf (last visited 28 January 2019).

¹⁶ According to L. E. Perriello, ‘Right to Housing and Unfair Contract Terms’, (2018) 7 *Journal of European Consumer and Market Law* 3, “Notwithstanding several statements of principle in the Treaties and in the EU Parliament’s resolutions, EU institutions have thus far failed to provide assistance to those who have been evicted from their homes”, 98.

¹⁷ Ramsay, op cit n. 7 supra, 191. One area identified in the crisis was the inadequacy of person insolvency arrangements for personal borrowers in distress and there has now been coordinated EU action to modernize these.

¹⁸ See A. Nolan, ‘Not Fit for Purpose; Human Rights in Times of Financial and Economic Crisis’, (2015) 4 *European Human Rights Law Review*, 360 -where she points out that human rights did not form a central—or even a significant—part of national and supranational policymakers’ post-crisis analyses or remedies. Nor did they serve as barriers in terms of protecting the socially vulnerable from the negative impacts of the crises and measures taken in response to them; See also Nolan (ed.), op cit n. 6 supra.

¹⁹ I. Domurath, ‘Mortgage Debt and the Social Function of Contract’, (2016) 6 *European Law Journal* 22, 768, has shown that in most continental EU countries unforeseen circumstances can trigger a modification of contract terms—either through re-negotiation or a court ruling, if the change was unforeseen by the parties, and has caused a material change (Germany), an excessive burden or imbalance in the rights and obligations of the parties (excessive onerousness: Italy, Spain), or a ‘radical’ or ‘fundamental’ change in the contractual equilibrium (France, Belgium), or has the effect that the contract no longer complies with the parties’ expectations (Slovenia).

²⁰ An overview of the EU legislation on housing may be found at The Foundation Abbé Pierre and Feantsa, *An overview of housing exclusion in Europe*, 2015, 81. Available at: http://www.fondation-abbe-pierre.fr/sites/default/files/content-files/files/chapter_3_-_european_union_legislation_relating_to_housing.pdf (last visited 24 May 2019).

²¹ See H. Micklitz, ‘Mohamed Aziz – sympathetic and activist, but did the Court get it wrong?’, in V. Colaert

unfair contracts terms in non-negotiated contracts. Following these cases, scholars have highlighted the development by the CJEU of a ‘active consumer court’ doctrine,²² the importance of the CJEU’s autonomous understanding of EU law in this field,²³ the potential constitutionalization of consumer law on the basis of the link between consumer law and fundamental rights provisions,²⁴ the impact of these cases on national procedural rules on mortgage enforcement proceedings and on the right of the parties,²⁵ and the potential effects of the application of human rights to consumer relationships.²⁶ These developments led to an emerging link between mortgage law, consumer law and human rights within EU law.

This article analyses the potential advancement of the European matrix of housing rights through the application of the EU Charter of Fundamental Rights to EU consumer law.²⁷ By ‘matrix’ we mean all conditions and rights related to housing set out in a number of European and international instruments (Section 1). In this sense, it is submitted that the fundamental rights enshrined in the EU Charter may help to reinforce consumer rights, (Section 2). We argue that substantive EU consumer law, in particular the MCD, should be enacted, formulated and interpreted by national courts in compliance with such fundamental rights standards. The links between housing rights, the Charter and EU consumer law (see sections 3 to 5) provide the normative ground to extend a human rights approach to banking supervision, binding both EU and Member State institutions to the protection of a right to housing.

1. The European matrix of housing rights

and E. Terryn (eds.) *Landmark Cases of EU Consumer Law – in Honour of Jules Stuyck* (Intersentia, 2013), 615 et seq.

²² See A. Beka, *The Active Role of Courts in Consumer Litigation* (Intersentia, 2018). The ‘active consumer court’ doctrine requires national courts to raise of their own motion mandatory rules of EU consumer contract law, notably those relating to unfair terms, resulting in increased procedural protection in mortgage possession proceedings involving the primary family residence of the mortgage debtor, and the development of human rights issues in this context. Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346, and Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi (Pannon GSM)*, ECLI:EU:C:2009:350, paras. 31 and 32 have established clearly the obligation on a national court to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance that exists between the consumer and the seller or supplier.

²³ H. Micklitz and N. Reich, ‘The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)’, (2014) *Common Market Law Review* 51, 771 et seq.

²⁴ F. Della Negra, ‘The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: *Sánchez Morcillo and Kušionová*’, (2015) *Common Market Law Review* 52, 1009 et seq. The Actiones Platform, a Project implemented with financial support of the Fundamental Rights & Citizenship Programme of the EU, has published a *Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter* (2017), available at <<https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/ACTIONES/ACTIONESplatform>>, last visited 29 September 2018), in which points out that “More recently, consumer protection has begun to develop a strong connection with fundamental rights, as a result of the perception that consumers are vulnerable vis-à-vis the consequences of wider market failures emerging in particular in areas such as finance, the environment, telecommunication and transport” (Module 4, Consumer Protection, 7). The study explains the most relevant cases in this regard. Some of them are analysed later in the present work.

²⁵ E. Raemekers, ‘Mi Casa es Su Casa? Parties Rights in Mortgaged Property after CJEU Rulings on Mortgage Enforcement Proceedings’, in J. Tarabal Bosch and E. Lauroba Lacasa (coords.), *El derecho de propiedad en la construcción del derecho privado europeo* (Tirant lo Blanch, 2018).

²⁶ S. Nield, ‘Article 8 Respect for the Home: A Human Property Right?’, (2013) 2 *King’s Law Journal* 24, 162-163.

²⁷ *Charter of Fundamental Rights of the European Union*, Art. 34(3) OJ 2010/C 83/02.

All EU Member States have a complex blend of international, constitutional, legislative and procedural norms in relation to housing rights.²⁸ Central to these rights is the recognition of housing as ‘home’ under Article 8 of the European Convention of Human Rights (ECHR).²⁹ Although not creating a stand-alone right to housing (except in limited circumstances), Article 8 (right to respect for private and family life, including home and correspondence) prescribes levels of ‘interference’ through which it protects those who have a home from arbitrary eviction. Thus, any person whose home is at risk of an interference is entitled to have the proportionality of the measure assessed by an independent tribunal, as the loss of one’s home is a most extreme form of interference with one’s right.³⁰ While the range of issues to be considered in this proportionality assessment is quite broad, Article 8 is only enforceable ‘vertically’ ie. an individual claim against State interference.

The UN International Covenant on Economic, Social and Cultural Rights (ICESCR)³¹ and the European Social Charter of the Council of Europe (ESC)³² constitute further layers of housing rights protection. Both have been adopted by all EU Member States and both are pillars of advanced normative standards for housing rights based on regular monitoring and complaints systems.³³ In relation to mortgage repossessions, the UN has reiterated State obligations to ensure the accessibility of legal remedies for persons facing mortgage enforcement procedures for failure to repay loans. States must adopt appropriate legislative measures to ensure that mortgage enforcement procedures contain appropriate safeguards before evictions take place, in accordance with the ICESCR and General Comment No 7.³⁴ The revised version of the European Social Charter (RESC)

²⁸ See P. Kenna, S. Nasarre-Aznar, P. Sparkes and C.U. Schmid, *Loss of Homes and Evictions across Europe – A Comparative Legal and Policy Examination* (Edward Elgar, 2018).

²⁹ Available at <https://www.echr.coe.int/Documents/Convention_ENG.pdf> (last visited 14 December 2018). See FEANTSA/Abbe Pierre Foundation, *Third Overview of Housing Exclusion in Europe 2018* (FEANTSA 2018), 91/92.

³⁰ P. Kenna, ‘Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights’, 2008 *European Human Rights Law Review* 2, 193. P. Kenna and D. Gailiute, ‘Growing coordination: in housing rights jurisprudence in Europe?’, 2013 *European Human Rights Law Review* 6, 606. Housing Rights: The Duty to Ensure Housing for All, Comm DH/Issue Paper (2008)1, Strasbourg, 25.IV.2008; *Marzari v. Italy* (Application No. 36448/97), ECHR, 4 May 1999; *Botta v. Italy* (Application No. 21439/93), ECHR, 24 February 1998.

³¹ Art. 11 International Covenant on Economic, Social and Cultural Rights (1966) UN Doc. A/6316.

³² Council of Europe, European Treaty Series – No 35: European Social Charter, Turin, 18 October 1961. (Revised) Council of Europe, Strasbourg 3 May 1996. Available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp (last visited 28 January 2019).

³³ See Office of the United Nations High Commissioner for Human Rights, The Right to Adequate Housing, Fact Sheet No. 21/Rev.1, 2009. Available at: https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf. The European Committee on Social Rights of the Council of Europe (ECSR) has developed a significant jurisprudence on housing rights - see Council of Europe (COE), Digest of the Case Law of the European Committee of Social Rights (December 2018) Available at: <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80> (last visited 22 May 2019). The Reports of the ICESCR (and each UN Treaty Monitoring Body) are easily accessible for each country (and for each UN Treaty) at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en (last visited 28 January 2019).

³⁴ See UN Doc. E/C.12/61/D/5/2015, Committee on Economic, Social and Cultural Rights, Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No. 5/2015 (21 July 2017). Adopted by the Committee at its sixty-first session (29 May–23 June 2017). In this case, also known as *Mohamed Ben Djazia and Naouel Bellili v Spain*, the UN Committee on Economic, Social and Cultural Rights, in charge of monitoring the implementation of the ICESCR, set out the horizontal nature of UN protection against

contains several articles which have corresponding provisions in the EU Charter (e.g. the Charter's Article 33(1) corresponds with Articles 16 and 31 ESC).³⁵ Article 31 RESC on the right to housing offers an extensive set of protections, but has only been ratified by eleven EU Member States.³⁶ In the Collective Complaint of *FEANTSA v France*³⁷ the European Committee of Social Rights pointed out that although not based on an "obligation of results", housing rights measures must be practical and effective, rather than purely theoretical.³⁸ In some limited cases, national courts are giving legal effect to these international human rights instruments in constitutional, legislative, administrative law and policy measures.³⁹

Among the EU Member States, some eleven countries make specific reference to housing in their constitutions.⁴⁰ The 'inviolability' of the home is specifically protected in the constitutions of most EU Member States.⁴¹ This is often juxtaposed with the universally recognized right to property, enabling expropriation and regulation of property rights for public purposes, with compensation required in some cases.⁴² Article 30 of the Polish Constitution, on the obligation to respect and protect the inherent and inalienable dignity of the person, was invoked by the Polish Constitutional Court in 2001 to rule that, 'evictions to nowhere' (in the absence of alternative temporary

forced eviction, i.e. States have a duty to ensure that protections extends to relations between private individuals in eviction proceedings.

³⁵ Articles 11, 12 and 14, but most remarkably Article 30 on the protection against social exclusion) or as a component of the protection granted to specific vulnerable groups (families and children: articles 7; 8, 16, 17 and 27; disabled persons: article 15; migrant workers: article 19; the elderly: article 23; right to social and medical assistance for "anyone without adequate resources": article 13.

³⁶ Article 31: Part 2 states; "With a view to ensuring the effective exercise of the right to housing, the Parties undertake; 1. to take measures designed to promote access to housing of an adequate standard; 2. to take measures designed to prevent and reduce homelessness with a view to its gradual elimination; 3. to take measures designed to make the price of housing accessible to those without adequate resources". See <https://rm.coe.int/1680630742> (last visited 10 January 2019).

³⁷ Decisions on the merits on complaints 39/2006 European Federation of National Organisations Working with the Homeless (*FEANTSA*) v France) paras 159-162.

³⁸ Collective Complaint No. 39/2006, paras 55-56. "Adequacy" in housing was defined in *ERRC v Italy* (Collective Complaint No. 27/2004).

³⁹ See, for instance, Order of the Court of First Instance No. 39 of Madrid 6/3/2013 (ECLI:ES:JPI:2013:13), which suspended the eviction (by the Municipal Housing Company of Madrid) of a tenant with three minor children in charge, on the basis of both the Convention on the Rights of the Child of 20 November 1989, and the relationship between the right to housing and other constitutional rights enshrined in the Spanish Constitution such as the personal and family privacy (Art. 18.2), the freedom of residence (art. 19), the right to education (Art. 27) and the right to health (Art. 45). Furthermore, the decision of the Spanish Supreme Court 23 December 2017 (ECLI:ES:TS:2017:4211) ruled that an eviction was not compatible with the legal protection of the rights and interests of minors, as recognized in articles 11 and 12 of Organic Law 1/1996, of March 15, on the Legal Protection of Minors, and in article 27 of the Convention on the Rights of the Child of 20 November 1989, in relation to the guarantees established in articles 18.2 and 24 of the Spanish Constitution.

⁴⁰ Kenna, Benjaminsen, Busch-Geertsema and Nasarre-Aznar, op cit n. 8.

⁴¹ While the Constitution of the Czech Republic, the Constitution of the Fifth Republic of France (1958), and the Constitution of Sweden do not specifically refer to this, the protections in Arts 6 and 8 ECHR apply in these countries, providing similar protection. The Human Rights Act 1998 incorporates these ECHR provisions into UK law, adding the requirement for the principles of fair procedures, due process and the rule of law to be taken into account in evictions, as well as court rules, since there is no single written constitutional document.

⁴² In Poland, there is also a constitutional commitment to protecting the rights of tenants; see Art 75 Constitution of Poland 1997.

housing) were unconstitutional.⁴³ Nevertheless, express terms on housing rights in constitutions or laws are not always an indicator of stronger protection from eviction.

Finally, the EU has adopted the European Pillar of Social Rights (2017),⁴⁴ a policy-oriented restatement of rights for EU citizens in the social protection and inclusion⁴⁵ that goes one step further than current Article 34.3 of the EU Charter (e.g. it recognises not only the housing assistance but also the access to social housing for those in need). However, the Pillar is just a soft law instrument adopted by the EU Commission (on the basis of Article 292 TFEU), with no binding force over Member States (Article. 288 TFEU). Yet, it is being integrated into the European Commission Semester process, and could potentially impact on the EU legislative process.⁴⁶

Despite the international and constitutional relevance of housing rights, the development of EU-wide harmonising measures giving effect to such established national and international housing rights has been slow. The fact that the EU Charter codifies housing rights offers the potential to integrate these into the EU institutional framework. The housing rights contained in the EU Charter could have a powerful, and as yet, underdeveloped impact on EU law, as shown in section 2. Sections 3 to 5 explore how the EU Charter has been progressively engaged by the CJEU to interpret EU consumer and mortgage law, in a creative and succinct way. They show, in addition, how the provisions of the MCD must be interpreted in a Charter compliant way so as to achieve better protection of consumers in residential mortgage lending. This could serve as a basis for wider discussion on the potential role of the Charter in the protection of EU citizens' interests. Indeed, this line of reasoning may lead to a new body rules be passed within the EU regulatory law in order to govern residential mortgage loans, as well as new consumer protection rules interpreted according to the Charter.

2. The EU Charter, housing rights and consumer law

Notwithstanding the general lack of justiciability of the internationally protected housing rights, most are enshrined in the EU Charter. The Charter offers a truly significant opportunity to advance housing rights in Europe, particularly through its interpretative application to EU secondary law and to Member States' actions when implementing EU law. While the Charter does not contain any direct supra-national provision granting stand-alone directly enforceable rights to housing, it can act indirectly, informing the interpretation of EU law measures.

Many Charter Articles are worded similarly (in some cases identically) to Articles in other human rights instruments.⁴⁷ The *Explanations Relating to the Charter of Fundamental*

⁴³ Polish Constitutional Court Decision of 4 April 2001, K 11/00, OTK-ZU [Official Journal of the Constitutional Court; Polish: *Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy*] 2001, No 3, item 54.

⁴⁴ Available at <https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf> (last visited 29 September 2018).

⁴⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions Establishing a European Pillar of Social Rights (COM(2017) 250 final), 26 April 2017, 6.

⁴⁶ See O. De Schutter, Council of Europe, FRA, ENNHRI, Equinet- Platform on Economic and Social Rights, *The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order*, 2018. Available at: <https://rm.coe.int/study-on-the-european-pillar-of-social-rights-and-the-role-of-the-esc-/1680903132> (last visited 28 January 2019).

⁴⁷ P. Kenna, 'Housing Rights after the Treaty of Lisbon - Are they Minimum Core Obligations?', (2014) 1

Rights (The Explanations) set out these links in detail, establishing the ground for using institutional instruments as interpretative standards.⁴⁸ Some articles of interest are Article 7 of the Charter, which corresponds to Article 8 of the ECHR (it is noteworthy that the developing jurisprudence of the European Court of Human Rights (ECtHR) on Article 8 has led to procedural and substantive obligations on eviction from ‘home’ and repossession proceedings by landlords and lenders);⁴⁹ Article 17 of the Charter on the right to property, which includes similar (though not identical) wording to Article 1 of Protocol 1 of the ECHR; and Article 34(3) on the right to social and housing assistance,⁵⁰ which draws on Article 13 of the European Social Charter and on Articles 30 and 31 of the Revised Social Charter.⁵¹

The interaction between these Articles of the EU Charter with other legal instruments show the basis for considering the existence of housing rights in the EU Charter beyond Article 34.3. The interpretation of the rights enshrined in the Charter in the light of other legal instruments may help to extend the ordinary scope attributed to such rights. In this line, ECtHR jurisprudence on Article 8 ECHR must be applied to the interpretation of Article 7 of the Charter. What is suggested here is that Article 7 of the Charter may have procedural implications through the judicial application of the proportionality principle (Article 8 ECHR), as interpreted by the ECtHR. Access to justice is a key issue in home possession proceedings, and in some EU Member States up to 70% of those facing eviction through mortgage arrears are unrepresented in court proceedings.⁵²

In this reading, the Charter contains a powerful catalogue of housing rights, but they can only be engaged where there is a nexus with EU law. Thus, aside from the actions of EU institutions, the application of the Charter depends on a link to the application or interpretation of EU law at Member State level. It is precisely through this link, especially with EU secondary consumer law, that the CJEU advanced housing protection. As pointed above, there is an increasingly complex EU law framework within which housing and housing markets operate within EU Member States, covering areas such as social

The Cyprus Human Rights Law Review 3, 13-35.

⁴⁸ *Explanations relating to the Charter of Fundamental Rights* (OJ 2007/C 303/02). However, the Charter also states that in relation to the Explanations: “Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.” The equality provisions of Articles 21 and 23 the Charter were invoked in Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL v Council*, ECLI:EU:C:2011:100, paras 32-34.

⁴⁹ *Yordanova and Others v Bulgaria* (Application No. 25446/06), ECHR, 24 September 2012; *Ćosić v Croatia* (Application No. 28261/06), ECHR, 15 January 2009; *Stankova v Slovakia* (Application no. 7205/02), ECHR 9 October 2007; *Connors v UK* (2004) 40 EHRR 9; *Chapman v UK* (2001) 33 EHRR 18. See *McCann v UK* (Application No. 19009/04), ECHR, 13 May 2008, para. 50: “The loss of one’s home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.”

⁵⁰ ‘In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices’.

⁵¹ See *Digest of the Case Law of the European Committee of Social Rights* at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f>

⁵² See P. Kenna, *Access to Justice and the ECB – A Study of ECB Supervised and other Mortgage Possession Cases in Ireland* (Centre for Housing Law, Rights and Policy, NUI Galway, 2018). Available at: <https://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Access-to-Justice-and-the-ECB-Report-CHLRP-2018.pdf> (last visited 28 January 2019)

protection, equality, public procurement, financial regulation, mortgage markets, consumer protection, fire safety and environmental standards, State aid and competition law rules, as well as other areas.⁵³ The Charter's full impact is only beginning to be realised in the limited number of cases reported,⁵⁴ but there is significant integration of EU law Charter rights into the mortgage enforcement proceedings, even though such arrangements are largely governed by national law and procedure.⁵⁵

Charter housing rights are informing the interpretation of consumer rights. This approach resonates with the European Social Contract Group⁵⁶, which advocates that the EU should take action to regulate Life Time contracts,⁵⁷ such as mortgage loans, to guarantee a minimum of social dignity and moral values when individuals enter into contractual relationships. Life Time contracts are essential for human flourishing and should be governed by a number of principles, such universal access to essential resources and services (without discrimination in terms of the personal and social characteristics of consumers at all stages of the contract), establishment of a fair price, adaptation of the contract to changes over time (to address the needs of the consumer), protection from unfair or premature termination (it must be transparent, accountable and socially responsible).⁵⁸ New standards could apply to the information and communication rules throughout the life of the contract, and the recognition of collective interests and collective participation in negotiation and administration of the contract.

The question is whether the rights and values set out in the EU Charter could be engaged to interpret mortgage loans from a human rights perspective. Such an approach would ensure that mortgage loans are interpreted in a more human rights dimension so that physical, social and psychological considerations of consumers are taken into consideration, as well as the social risks of unemployment, homelessness and over-indebtedness. This approach is missing from the current provisions of the MCD and, generally speaking, from EU consumer law, which focus mainly on the sale and marketing side of consumer credit leaving such considerations aside.⁵⁹

⁵³ Benöhr focuses on financial services and electronic communication and the cross-cutting topic of access to justice so as to show the increasing influence of fundamental rights in consumer law, see Benöhr, op cit n. 56 supra, 109 et seq.

⁵⁴ See L. Bojarski, D. Schindlauer and K. Wladasch, *The Charter of Fundamental Rights as a Living Instrument - Manual* (CFREU), 2014. Available at: http://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_manual_0.pdf (last visited 28 January 2019).

⁵⁵ See F. Della Negra, op cit n. 26 supra, 1027, where it is suggested that the "incorporation" of the principle of effective judicial protection in article 47 of the Charter into the principle of effectiveness of EU law is of particular importance in the cases concerning the legal protection of over-indebted consumers.

⁵⁶ <https://www.eusoco.eu>.

⁵⁷ L. Nogler and U. Reifner (eds.), *Life Time Contracts. Social long-term contracts in labour, tenancy and consumer credit law* (Eleven International Publishing, 2014), 37 et seq. See about the concept of life time contracts L. Nogler and U. Reifner, 'The contractual Concept of Life Time Contracts under Scrutinity', in L. Ratti (ed.), *Embedding the Principles of Life Time Contracts* (Eleven International Publishing, 2018), 3 et seq. These contracts are defined as "long-term social relationships providing goods, services and opportunities for work and income-creation. They are essential for the self-realisation of individuals and their participation in society at various stages in their life" (see <https://www.eusoco.eu/?p=1012>).

⁵⁸ See, further, <https://www.eusoco.eu/?p=1012>.

⁵⁹ Nogler and Reifner, op cit n. 67 supra, 41, argue that the MCD and other EU regulation in the field of financial services, such as the Consumer Credit Directive or the MIFID I and II Directives, "focused on the marketing and 'sale' of such services providing cooling-off periods, extensive pre-contractual information and a technical harmonisation of products and supervision. Questions concerning the life time of those who use these services (access, exploitation, cancellation, usury, debt enforcement, adaptation, continuity) have

The following sections will examine how the proposed approach could unfold, by applying the Charter to private law transactions (e.g. business to consumer transactions). We will examine which role the Charter may play, if any, to achieve better protection of the right to housing at the EU level through consumer law provisions. To that end, the successive steps in the evolution of the application of the Charter to consumer transactions are explained. Particular focus will be given to the CJEU decisions on unfair contractual terms in the cases *Aziz*, *Sánchez Morcillo* and *Kušionová*, in which the CJEU strengthened consumer rights thanks to the interpretation of EU consumer law (mainly of the UCTD), in line with the provisions of the Charter. This evolution could significantly enhance in the end the protection of the right to housing, both at EU and Member State level.

3. The first step: the Unfair Contractual Terms Directive

The UCTD protects consumers from those contractual terms that have not been individually negotiated, and which cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The UCTD aims to assist individual consumers by ensuring that unfair terms are not enforceable against them, and there is also a dissuasive principle contained in Article 7(1) and Recital 24 UCTD.

Applying for the first time in relation to consumer home-loan mortgages, in *Aziz* (2013)⁶⁰ the CJEU ruled that Spanish procedural law did not comply with the principle of effectiveness, in so far as, in mortgage enforcement proceedings initiated by sellers or suppliers against consumer defendants, it made the application of the protection which the Directive seeks to confer on those consumers, impossible or excessively difficult. Spanish consumers were not able to defend themselves from the existence of unfair contractual terms within the procedure,⁶¹ in particular from those related to the acceleration clauses in mortgage contracts, the setting of default interest rates, and the agreement on quantification of the outstanding debt. This legal framework undermined EU consumer rights, as these would be limited to the payment of damages and interest without preventing the definitive and irreversible loss of the dwelling.

The novel features were, firstly, the recognition that the consumer contract related to mortgages on “home”,⁶² and secondly, the duty of Spanish authorities to amend the

expressly been left to the National Legislator, which in fact was based on the neo-liberal assumption that functioning markets would render protective regulation superfluous”.

⁶⁰ Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona and Manresa (Catalunyacaixa)*, EU:C:2013:164.

⁶¹ According to the original wording of Art. 695 of the Spanish Procedural Law 1/2000 (Spanish Official Gazette -BOE- 8 January 2000, num. 7, last version available at <https://www.boe.es/buscar/act.php?id=BOE-A-2000-323>, last visited 29 September 2018), a challenge to the enforcement proceeding was possible only if based on the extinction of the security or the obligation guaranteed or on the existence of an error in determining the enforceable amount. Other issues, such as the nullity of the title or the existence of unfair contractual terms, had to be challenged in a separate procedure that did not preclude the ongoing enforcement proceeding from continuing.

⁶² The CJEU held that the legal reasoning why the national procedural regime is contrary to Art. 7(1) UCTD (as it enables the consumer to obtain only subsequent protection of a purely compensatory nature, which would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term) and “applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed,

procedural law on the basis of the principle of effectiveness, a matter that falls outside the ordinarily scope the UCTD.⁶³ It also showed the inherent difficulty in separating the mortgage enforcement procedure rules from the provisions of the contract in assessing compliance with the UCTD. It was precisely the UCTD that allowed the CJEU to look at the Spanish procedural law in more detail. As Micklitz⁶⁴ has pointed out, the CJEU has developed more oversight on national procedural remedies in this way. The Charter, however, was not quoted at all in *Aziz*, even in the human rights dimension of the case.⁶⁵ But this was really a first step: this was the first moment where the UCTD, as interpreted by the CJEU, started to have an increasing importance beyond the contractual (consumer) relationship established between the parties, in particular in relation to national procedural rules.

4. The second step: the link between the UCTD and the Charter

After the *Aziz* case, in recent years the CJEU has dealt with Spanish mortgage law issues. In *Sanchez Morcillo* (I)(2014)⁶⁶ the CJEU held that the revised Spanish procedural system (Act 1/2013) was incompatible with Article 47 of the Charter as it empowered a mortgage creditor seeking enforcement of the security the right to bring an appeal against a decision declaring an unfair clause inapplicable, but did not permit, by contrast, the consumer to exercise a right of appeal against a decision dismissing an objection to enforcement. It should be noted that contrary to the *Aziz* case, in *Sanchez Morcillo (I)* the “CJEU, for the first time, strengthened the principle of effectiveness through fundamental right of effective judicial protection laid down in Article 47 CFR”.⁶⁷ In addition, it is worth highlighting that the Order of the President of the Court⁶⁸ granting the request of the preliminary ruling stated that “the risk, for the owner, of losing his main dwelling puts him and his family in a particularly fragile situation”,⁶⁹ thus introducing considerations of a social nature.

In the same year, in *Kušionová* (2014)⁷⁰ the referring Slovakian court sought to establish whether the term relating to extrajudicial enforcement of the charge on immovable property provided as security by the consumer was unfair, as the national court could not assess the contractual terms for unfairness. Significantly, the CJEU held that “Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the

since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling”, para 61.

⁶³ This importance has been pointed out by Micklitz and Reich, op cit n. 23 supra, 771 et seq. See also S. Iglesias Sánchez, ‘Unfair terms in mortgage loans and protection of housing in times of economic crisis: *Aziz v. Catalunyaacaixa*’, (2014) *Common Market Law Review* 51, 955 et seq.

⁶⁴ See H. Micklitz, op cit n. 21 supra, 641.

⁶⁵ As pointed out by O. Gerstenberg, ‘Constitutional Reasoning in Private Law: The role of the CEU in Adjudicating Unfair Terms in Consumer Contracts’, (2015) 5 *European Law Journal* 21, 7 concerning the *Aziz* case.

⁶⁶ Case C-169/14, *Morcillo and Abril García v Banco Bilbao*, EU:C:2014:2099, para 51.

⁶⁷ Della Negra, op cit n. 26 supra, 1026-1027. See also J. van Duin, ‘Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures Under Directive 93/13/EEC’, (2017) *Amsterdam Law School Research Paper* 37; 11. Available at SSRN: <https://ssrn.com/abstract=3034205> or <http://dx.doi.org/10.2139/ssrn.3034205> (last visited 28 January 2019). The autor argues that *Kušionová and Sánchez Morcillos cases shows that* “Article 47 Charter may function as a correction mechanism when national civil procedure is deemed to offer incomplete or insufficient protection in light of EU law.

⁶⁸ Case C-169/14, *Morcillo and Abril García v Banco Bilbao*, EU:C:2014:1388.

⁶⁹ See Della Negra, op cit n. 26 supra, 1101 et seq.

⁷⁰ Case C-34/13, *Monika Kušionová v SMASmart Capital, a.s.*, EU:C:2014:2189.

Charter that the referring court must take into consideration when implementing Directive 93/13”.⁷¹ This expressly linked the application of the UCTD with Charter rights requiring the future interpretation of the obligations of the UCTD in a wider human rights complaint way. The Explanations⁷² state that “*The rights guaranteed in Article 7 [of the Charter] correspond to those guaranteed by Article 8 of the ECHR*”. The CJEU did not really elaborate on the complexity of the ECHR jurisprudence on Article 8 beyond reciting the iconic passage on proportionality,⁷³ so the CJEU did not balance consumer rights/interests/needs vs. creditor’s right to property/enforcement.⁷⁴

Rutgers suggests that the effect of the CJEU’s consideration that a national court must consider Article 7 CFR in addressing the judicial protection offered by the UCTD has less impact than appears at first sight.⁷⁵ However, the proportionality test in ECHR jurisprudence may result in a court suspending, delaying or refusing a possession order,⁷⁶ and the implication is that this option would be also open to national courts interpreting the Charter, acting, of course, within binding EU law rather than ECHR law.

In any case, these “proportionality” issues arising from Article 8 ECHR housing-related cases were more elaborately defined in *Yordanova and Others v Bulgaria*.⁷⁷ In fact, the ‘proportionality’ issues to be considered are wider than those addressed in *Kušionová*.⁷⁸ Indeed, one part of the ‘proportionality’ assessment on the protection of Article 8 rights is an examination of whether the measure is ‘necessary in a democratic society’. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued.⁷⁹ There is a margin of appreciation left to the national authorities, but this “margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions.”⁸⁰ As the court explained:

Since Article 8 concerns rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and

⁷¹ See Case C-34/13 paras 63-65.

⁷² (2007/C 303/02).

⁷³ ‘In that regard, the European Court of Human Rights has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed (see the judgments of the European Court of Human Rights in *McCann v United Kingdom*, application No 19009/04, paragraph 50, ECHR 2008, and *Rousk v Sweden*, application No 27183/04, paragraph 137).’ (para 64).

⁷⁴ Perriello, op cit n. 16 supra, 98 et seq.

⁷⁵ J. Rutgers, ‘The right to housing (article 7 of the Charter) and unfair terms in general conditions’, in H. Collins (ed.), *European Contract Law and the Charter of Fundamental Rights* (Intersentia, 2017), 132 et seq.

⁷⁶ *Manchester City Council v Pinnock* (2010), para. 62. UKSC 45, [2011] 1 All ER 285.

⁷⁷ *Yordanova and Others v Bulgaria*.

⁷⁸ On the relationship between of Art. 8 ECHR and housing in the jurisprudence of the ECtHR see Council of Europe and European Court of Human Rights (2017). *Guide on Article 8 of the Convention – Right to respect for private and family life*, 52-58. Available at: https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf (last visited 28 January 2019).

⁷⁹ *Yordanova and Others v Bulgaria*, para. 117.

⁸⁰ *Yordanova and Others v Bulgaria*, para. 118. In *F.J.M. v United Kingdom* (Application No 6202/16), ECHR, 29 November 2018, the ECtHR applied this principle to refuse an application for a proportionality test in situations where UK legislation provided for speedy eviction procedures at the end of tenancy contracts.

a settled and secure place in the community, where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant (see, among many others, Connors, cited above, § 82);⁸¹

This, indeed, offers a wider range of issues to be considered in eviction proceedings, than compliance with Article and the UCTD *per se*. Of course, it is important to note that the ‘margin of appreciation’ as a concept, does not exist in the Charter where the effectiveness and equivalence of EU law are primary considerations.⁸²

Article 7 of the Charter is especially relevant in the context of mortgage repossessions. As it may have more to do with economic issues and policies (such as EU policies on maintaining the asset base of financial corporations) than individual consumer rights, corporate property interests involved in EU mortgage markets will seek to draw on property rights to counteract the development of a harmonised standard of consumer and human rights protection. In this sense, some writers suggest that if the Charter had been considered in *Aziz*, this would have involved “*the need to balance competing EU fundamental rights against each other in order to ensure respect for such rights*”. Consequently, the CJEU would have needed to take into consideration, on the creditor’s side, the creditor’s right to judicial protection (Article 47 EUCFR) in conjunction with the right to property (Article 17(1) EUCFR), and, on the consumer’s side, the debtor’s right to judicial protection (Article 47 EUCFR) in conjunction with the right to a home (Article 7 EUCFR) and the principle of consumer protection (Article 38 EUCFR).⁸³

One outcome of these legal developments is that ECHR rights can now be applied horizontally -via the Charter- to the relations between private contracting parties.⁸⁴ This marks a major enhancement in the protection of borrowers against mortgage lenders.⁸⁵ The horizontal application of the fundamental rights in the Charter (i.e. between private parties)⁸⁶ can also be extended to the duty of national legislators to pass legislation in a Charter-compliant way, and, to subsequent judicial interpretations. The Charter overcomes many of the limitations of other human rights instruments, such as the ECHR, which are interpreted as granting only vertical sets of rights, *i.e.* private parties against State action. Indeed, the interest protected by Article 8 ECHR is the privacy of the person

⁸¹ *Yordanova and Others v Bulgaria* No 25446/06, para. 118 (ii).

⁸² See F. Cafaggi, and P. Iamiceli, ‘The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions’, (2017) *European Review of Private Law* 3, 575 et seq.

⁸³ O. Cherednychenko, ‘Fundamental Rights, European Private Law, and Financial Services’, in H. Micklitz (ed.), *Constitutionalization of European Private Law*, XXII/2 (Oxford University Press, 2014), 203-204.

⁸⁴ Even though the ECJ has been reluctant to acknowledge the direct effect of fundamental rights in private parties (see Perriello, op cit n. 16 supra, 102), the horizontal application of the Charter – ie. enforceability of Charter rights between private entities has more recently been approved in such cases as C-414/16, *Egenberger*, EU:C:2018:257, para. 76); Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Bauer and Willmeroth v Broßonn*, ECLI:EU:C:2018:871.

⁸⁵ H. Collins, ‘The Challenges Presented by the Fundamental Rights to Private Law’, in K. Barker, K. Fairweather and R. Grantham (eds.), *Private Law in the 21st Century* (Bloomsbury, 2017), 215.

⁸⁶ As pointed out by Cherednychenko, “it cannot be excluded that the CJEU will also grant direct horizontal effect to other EU fundamental rights in the form of general principles or under the EUCFR in cases that fall within the scope of EU law. This would circumvent the need for private parties to invoke fundamental rights against public authorities in order to ensure respect for such rights in the private sphere. In particular, it would become unnecessary to search for and rely on an interpretation of national law of EU origin which would strike a fair balance between competing EU fundamental rights” (Cherednychenko, 2014).

or family at home against the unlawful interference by a public authority. This means that individuals may only lodge complaints against the State, so the horizontal application of the ECHR is a controversial issue. As a matter of fact, the case *F.J.M. v. the United Kingdom* (2018)⁸⁷ refused such application, so it may be inferred therefrom that horizontality should not be applied in cases where statutory provisions govern the contractual relationship. In relation to the Charter, the CJEU has accepted the horizontal application of EU Charter rights in the cases *Egenberger* (2018)⁸⁸ and *Wuppertal* (2018).⁸⁹

As a result, where legal disputes are judged to be within the scope of EU law, consumer and mortgage regulation will also be interpreted in light of the Charter, adding a layer of human rights elements to national property law procedural rules.

5. Potential third step: the link between the Mortgage Credit Directive and the Charter

The MCD was introduced to address the excesses of irresponsible lending and protect the EU banking system from further risks. It also sought to restore consumer confidence by promoting sustainable lending and borrowing and financial inclusion. To that end, the MCD aims to limit the risks to the lender and, possibly, to protect consumers at the initiation and enforcement of the mortgage. At the pre-contractual stage, the creditor is obliged to provide consumers with some pre-contractual information and to carry out a creditworthiness assessment (Arts. 13 et seq.). In the event of default, a number of measures are activated.

Art. 28 MCD establishes a number of measures on arrears and foreclosure, in the event of debtor's default, e.g. the national law cannot prohibit the *datio in solutum* to be agreed by the parties.⁹⁰ In addition, Art. 28.5 MCD establishes that “*Where after foreclosure proceedings outstanding debt remains, Member States shall ensure that measures to facilitate repayment in order to protect consumers are put in place*”. The MCD aims therefore to ensure that Member States introduce some debt relief schemes so as to avoid consumers still being liable for the outstanding debt after the foreclosure proceeding, such as the partial or total cancellation of the debt. These measures, however, are so broad that leave considerable discretion as to the methods of applying the Directive to Member States.⁹¹ Indeed, while the MCD has been in force since 2016 and transposed into the national law of many EU Member States,⁹² the European Commission is taking infringement procedures against Belgium, Cyprus, Malta, Netherlands, Poland, Portugal, Slovenia and Spain, due to the lack or delay of the notification of national transposition

⁸⁷ *F.J.M. against the United Kingdom*. Application N° 6202/16, paras 41-46.

⁸⁸ Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257.

⁸⁹ Case-569/16 and, *Stadt Wuppertal. v. Maria Elisabeth Bauer* and Case-570/16, *Volker Willmeroth v Martina Broßonn*, EU:C:2018:871.

⁹⁰ I.e. the national law cannot prohibit the *datio in solutum* to be agreed by the parties.

⁹¹ M. J. Rivas Velasco, ‘Artículo 28 directiva 2014/17/UE: hacia una ejecución hipotecaria diferenciada por el uso del inmueble’, (2016) *Revista Doctrinal Aranzadi Civil-Mercantil* 1, 1; and T. Josipovic, ‘Consumer Protection in EU Residential Mortgage Markets: Common EU Rules on Mortgage Credit in the Mortgage’, (2014) *Cambridge Yearbook of European Legal Studies* 16, 251-252.

⁹² See M. Anderson and E. Arroyo i Amayuelas (eds), *The Impact of the Mortgage Credit Directive in Europe* (Europa Law Publishing, 2017).

measures or their incompleteness.⁹³ Criticism of the effectiveness of the MCD has been raised, however, on the grounds that it does not fully oblige mortgage lenders to ensure that the mortgage product is suitable for the borrower, does not extend other housing options (than mortgages borrowing), does not shift the risks to the lender, or does not enhance effective government safety nets against the risk of economic shocks.⁹⁴

The binding force of the Charter is set out in Article 51.1, which establishes that its provisions are binding on institutions and bodies of the EU with due regard for the principle of subsidiarity, and to the Member States only when they are implementing Union law.⁹⁵ This means that all EU institutions and agencies come within the scope of Article 51(1) of the Charter, and “*it is incontrovertible that any act produced by it having legal effects vis-à-vis third parties must comply with the Charter*”.⁹⁶ As a result, they must respect and promote the Charter and various rules have been adopted by the EU institutions to give effect to this obligation, although these could be improved.⁹⁷ Thus, the Charter must be respected and promoted not only in the EU legislative process⁹⁸, but also by the European Commission, the European Central Bank (ECB) in its role within the Single Supervisory Mechanism⁹⁹ (within which the ECB is empowered to adopt guidance and opinions)¹⁰⁰ and by the European Banking Authority (EBA), an EU agency which works to ensure effective and consistent prudential regulation and supervision across the European banking sector.

Both the ECB and the EBA have published a range of guidelines for mortgage lenders in the context of dealing with non-performing loans. The EBA Guidelines on arrears and

⁹³ See https://ec.europa.eu/info/publications/mortgage-credit-directive-transposition-status_en; See also Case C-569/17 *Commission v. Spain*.

⁹⁴ S. Nield, ‘Secured Consumer Credit in England’, chapter 5, M. Anderson and E. Arroyo i Amayuelas (eds), 194-199. The MCD has led to some changes in the rights covered by the UK Consumer Credit Act 1974.

⁹⁵ See Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, 7 May 2013; and F. Fontanelli, ‘National Measures and the Application of the EU Charter of Fundamental Rights – Does *curia.eu* Know *iura.eu*’, (2014) *Human Rights Law Review*, 14, 231-265.

⁹⁶ A. Ward, ‘Article 51 – Field of Application’, in S. Peers *et al.* (eds.), *The EU Charter of Fundamental Rights. A commentary* (Hart Publishing, 2014), 1426.

⁹⁷ An example of efforts in this direction is the 2010 EU Commission’s strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, with the aim to guarantee that the rights and principles of the Charter are correctly taken into account at every step of the legislative process. Since 2015 all proposals for EU legislation must respect the Charter, and the EU funded a specific Project to assist victims of fundamental rights violations and other legal practitioners in determining whether the Charter can provide protection in a specific case (see https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/incorporating-fundamental-rights-eu-legislative-process_en).

⁹⁸ See FRA Opinion –4/2018 [Charter of Fundamental Rights] Vienna, 24 September 2018 *Challenges and opportunities for the implementation of the Charter of Fundamental Rights Opinion of the European Union Agency for Fundamental Rights*. Available at: http://www.europarl.europa.eu/cmsdata/153961/FRA-Opinion-04-2018_Charter-implementation.pdf.

⁹⁹ See M. Perassi, ‘The New Pillars of the EU Financial Architecture and the Single Supervisory Mechanism’, in F. Fariello *et al.* (ed.), *Financing and Implementing the Post-2015 Development Agenda*, Vol. 7 (World Bank Publications, 2016), 277. The fact that the ECB is subject to the Charter has also been defended by M. Roth, *Employment as a Goal of Monetary Policy of the European Central Bank*, 2015, 6 et seq. Available at SSRN: <https://ssrn.com/abstract=2656646>. See <<https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html>> (last visited 29 September 2018).

¹⁰⁰ See Art. 4.3 (Art. 4 lays down the tasks conferred to the ECB) of the Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63–89).

foreclosure (2015),¹⁰¹ which are legally binding on the financial corporations as mortgage lenders,¹⁰² set out ‘reasonable forbearance’ requirements arising from Art. 28 MCD.¹⁰³ The ECB has also issued Guidance dealing with non-performing loans (2017),¹⁰⁴ which impacts on the prudential regulation of lenders as they seek to realize the security of mortgages through possession proceedings.¹⁰⁵ The ECB has proposed a number of measures for indebted mortgages: short (e.g. interest-only payments, reduced payments, grace period or interest capitalization); long-term measures (e.g. the extension of the maturity term, rescheduled payments or new credit facilities).

Clearly, the Charter applies to any interpretation of these Guidelines and Guidance of these EU Supervisory agencies in their day to day supervision of lenders as they engage in the implementation of the MCD. This will also be applicable whenever a Member State Central Bank fulfils an obligation imposed by EU law in this area.¹⁰⁶

Thus, while the MCD leaves the determination of what reasonable forbearance means to Member States, and the fact that the MCD does not include any statement in the recitals as to the specific link between the MCD and the provisions of the Charter,¹⁰⁷ nevertheless as part of EU law, the MCD, the ECB Guidance and the EBA Guidelines must be interpreted in a Charter compliant way. Thus, in repossession proceedings arising from the guidelines or Guidance or other ECB instructions, Charter Articles, including Article 7 on respect for home and the proportionality test it postulates, will be applicable. Of course, the fact that this test is taking place in the context of Article 7 of the Charter rather than Article 8 ECHR means that the limitations of the ECHR horizontal application of protection are not relevant, and the matter will instead be examined in the context of the effectiveness and equivalence of EU law. Equally, compliance with the Charter requires Impact Assessments of proposed actions and directions on non-performing loans by EU

¹⁰¹ See EBA/GL/2015/12. EBA, *Final Report, Guidelines on arrears and foreclosure*. Available at <<https://www.eba.europa.eu/documents/10180/1092172/EBA-GL-2015-12+Guidelines+on+arrears+and+foreclosure.pdf>> (last visited 29 September 2018).

¹⁰² Art. 16(3) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (*OJ L 331, 15.12.2010, p. 12–47*).

¹⁰³ Such as the total or partial refinancing of a credit agreement or the modification of the previous terms and conditions of a credit agreement (e.g. extending the term of the mortgage; changing the type of the mortgage; deferring payment of all or part of the instalment repayment for a period; changing the interest rate or offering a payment holiday).

¹⁰⁴ ECB, *Guidance to banks on non-performing loans*, 2017, 41 et seq. Available at <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/guidance_on_npl.en.pdf> (last visited 29 September 2018). This Guidance is non-binding but subject to a comply-or-explain system in which supervised banks must explain deviations upon supervisory request, and in which non-compliance may trigger supervisory measures.

¹⁰⁵ Of course the ECB must respect and promote the Charter as part of its SSM role - According to Recital 86 of the SSM Regulation (Regulation (EU) No 1024/2013).

¹⁰⁶ Article 4 TEU states that consumer protection is a competence shared between the Union and Member States, and therefore only a small part of the consumer protection roles exercised by national authorities will not be within the scope of EU, and not bound by the Charter. Consumer rights are within the purview of the national supervisory authorities whereas prudential regulation and supervision rests with the ECB. While there is no question of the application of the Charter in prudential supervision, national supervisory authorities would be obliged to comply with the Charter when implementing EU law. <https://www.bankingsupervision.europa.eu/about/consumerprotection/html/index.en.html>.

¹⁰⁷ According to the Communication from the Commission *Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring* (COM/2005/0172 final).

institutions/agencies which could impact on Charter rights.¹⁰⁸

Ensuring compliance with the ECB Guidance (and interpretation of the MCD) comes within the ECB supervisory function under SSM and other EU law.¹⁰⁹ Although compliance with the Charter in this context has not been examined by the CJEU, the significant *Ledra* case reiterated that there is no limit to the applicability of the Charter with respect to EU institutions (compared with Member States), and there is an obligation on EU institutions to *promote* the application of the Charter.¹¹⁰ In its *Ledra* decision, the CJEU clarified that the institutions, including the ECB, have to respect the Charter even when facing a crisis, and bear in mind the consequences in terms of their liability. The CJEU can examine thoroughly an alleged breach of a fundamental right, even with regard to policy decisions that would normally require judicial restraint.¹¹¹

Since a minimum level of income is protected in almost all EU Member States, it has been argued that the EU Commission should secure a second opportunity or ‘fresh start’ for over-indebted borrowers.¹¹² Broadly speaking, in Europe the mortgage creditor may initiate enforcement measures against other assets of the debtor so as to claim the outstanding debt once the forced sale of the mortgaged property has taken place.¹¹³ In this sense, the human rights implications for debt relief schemes has recently attracted attention of some scholars. Whereas the Council of Europe has taken a narrow approach on this issue on the basis of human dignity,¹¹⁴ it has been argued that other human rights enshrined in human rights instruments are relevant for States to find responses to over-indebtedness,¹¹⁵ such as the right to adequate housing (Art. 11.1 International Covenant on Economic, Social and Cultural Rights, ICESR), the right to healthcare (Art. 12 ICESR), the right to work (Art. 23 Universal Declaration of Human Rights), the prohibition on incarceration for failure to pay debt (Art. 11 International Covenant on Civil and Political Rights, ICCPR), discrimination (Arts. 26 ICCPR and 14 ECHR) and the right to privacy (Art. 8 ECHR).

The European Union Economic and Social Committee held, in a similar vein, that “*an appropriate, uniform procedure based on Article 38 of the Charter of Fundamental Rights, Article 114 TFEU and also Article 81 TFEU must be put in place in all the*

¹⁰⁸ See Communication from the Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* COM (2010) Final Brussels, 19.10.2010. See also Communication from the Commission *Impact Assessment Guidelines*, SEC(2009) 92 of 15.1.2009; and *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of fundamental rights*, COM(2009) 205 final of 29.4.2009.

¹⁰⁹ See M. Lamandini, D.R. Muñoz and J. S. Álvarez, *Quaderni di Ricerca Giuridica della Consulenza Legale Depicting the limits to the SSM’s supervisory powers: The Role of Constitutional Mandates and of Fundamental Rights’ Protection*, Banca D’Italia Eurosysteme, 2015.

¹¹⁰ Opinion of AG Wahl in *Ledra Advertising* case (Joined Cases C-8/15 P, C-9/15 P and C-10/15 P), para. 85.

¹¹¹ See C. Zilioli, ‘Justiciability of central banks’ decisions and the imperative to respect fundamental rights’, ECB Legal Conference 2017, 101. Available at: <https://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf?4c1d780998ce84a7d49d75a6d9c8a380> (last visited 28 January 2019).

¹¹² Kenna, Benjaminsen, Busch-Geertsema and Nasarre-Aznar, op cit n. 8 supra, 92 et seq. and 199 et seq.

¹¹³ See Verband Deutscher Pfandbriefbanken, *Round Table Flexibility, Security and Efficiency of Security Rights Over Immovable Property in Europe* (VDP’s publication series, 2012), 77. Last English version available at <<https://www.pfandbrief.de/>> (last visited 29 September 2018).

¹¹⁴ Council of Europe Recommendation, CM/rec(2007)8.

¹¹⁵ C. Ondersma, ‘A Human Rights Framework for Debt Relief’, (2014) 1 *University of Pennsylvania Journal of International Law* 26, 295 et seq.

Member States".¹¹⁶ The prevention of over-indebtedness, however, not only would prevent evictions from taking place, but also would enable debtors to effectively re-engage in both economy and society. As the World Bank points out,¹¹⁷ unmanageable debt burdens lead to serious psychic and physical problems, such as depression and social withdrawal or sleep deprivation. While the accountability practices of the ECB have evolved during the crisis,¹¹⁸ the failure of the ECB to respect and promote the Charter in its banking supervision, guidance and instructions to banking corporations on dealing with non-performing is emerging as a major issue of EU law obligations.¹¹⁹

6. Conclusions

The global financial crisis revealed the limited capacity of the European Union to protect indebted home loan consumers. The EU's limited competence to legislate in this area contrasts with the EU Member States' international obligations. All EU Member States have ratified the ECHR, ESC and ICECSR, accepting obligations to develop appropriate policies and laws, which recognise, respect, protect, promote and fulfil housing rights obligations.¹²⁰ All of these are now an integral part of EU law through their incorporation into the Charter, as binding Treaty law. From this perspective, there is a human rights instrument in the EU legal architecture which reflects the most civilised values in modern societies and that should impact both EU policy and law-making.

The CJEU has begun to apply the Charter to EU secondary legislation on consumer rights law (mainly the UCTD) in the *Aziz, Sánchez Morcillo (I)* and *Kušionová* cases, in line with Articles 7, 38 and 47 of the Charter, interpreted in conformity with its corresponding ECHR Articles. The fuller development of such Charter provisions based on the interpretation of other secondary legislation, such as the Mortgage Credit Directive, offers the potential for the housing rights already accepted at international level by EU Member States (and indeed at national level in many cases) to be integrated into EU law, and in this way to ultimately inform national laws and domestic courts dealing with consumer or mortgage issues disputes. The rich housing rights jurisprudence of the ECSR has yet to be tapped in these fields.¹²¹

¹¹⁶ European Economic and Social Committee (2014). OPINION of the European Economic and Social Committee on Consumer protection and appropriate treatment of over-indebtedness to prevent social exclusion (Exploratory opinion), 2014/C 311/06 (OJ C 311, 12.9.2014, p. 38–46). Recommendations 1.9 and 1.10.

¹¹⁷ World Bank, *World Bank Report Insolvency and Creditor/Debtor Regimes Task Force*. Working Group on the Treatment of the Insolvency of Natural Persons, 2012, 24 et seq. The G20 High-level Principles on Financial Consumer Protection (OECD, 2011) mentioned the Equitable and Fair Treatment of Consumers as a principle (available at <<http://www.oecd.org/daf/fin/financial-education/g20-oecd-task-force-financial-consumer-protection.htm>>, last visited 24 May 2019), and additional protection measures for less experienced or less knowledgeable consumers and for consumers who are over indebted are considered an effective approach at the *Effective Approaches to Support the Implementation of the remaining G20 High-Level Principles of Financial Consumer Protection*" (OECD, 2014).

¹¹⁸ See N. Fraccaroli, A. Giovannini, and J. F. Jamet, *The evolution of the ECB's accountability practices during the crisis*, ECB Economic Bulletin, Issue 5/2018.

¹¹⁹ See P. Dermine, 'The End of Impunity? The Legal Duties of 'Borrowed' EU Institutions under the European Stability Mechanism Framework: ECJ 20 September 2016, Case C-8/15 to C-10/15, *Ledra Advertising et al. v European Commission and European Central Bank*', 2017 2 *European Constitutional Law Review* 13, 369-382.

¹²⁰ Kenna, Benjaminsen, Busch-Geertsema and Nasarre-Aznar, op cit n. 8 supra, 192.

¹²¹ O. De Schutter, *The European social charter in the context of implementation of the EU charter of fundamental rights* - European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, 2016. PE 536.488.

The main limitation to this development is the framing of the housing issues as falling outside the scope of EU secondary legislation. Yet, the CJEU has firmly established that mortgages are consumer contracts, and there can be no question as to the status of the Mortgage Credit Directive, with its enormous impact on national mortgage law since 2016. Housing protection, therefore, becomes an EU law matter.

Finally, while the Charter is binding on the institutions, bodies, agencies and offices of the EU, much remains to be done to ensure that the ECB and the EBA comply with their Charter housing rights obligations as they supervise mortgage lenders and implement EU regulatory law.¹²²

EU scholars have argued that the doctrine contained in *Aziz* and subsequent cases may be regarded as a hidden constitutionalisation of private law,¹²³ a process which occurs in most modern States, but in relation to which the EU is hesitant. In our view, however, such constitutionalisation is no longer hidden, as the CJEU has explicitly linked EU secondary law (UCTD) to the provisions of the Charter. It would be desirable that other EU institutions, such as the EU Commission, be influenced by this line of reasoning in the law-making process so that the rights and values set out in the EU Charter could be engaged to interpret legislation and processes relating to the financial services industry, from a human rights perspective.

¹²² O. De Schutter, *The Implementation of the Charter of Fundamental Rights in the EU institutional framework* - European Parliament's Committee on Constitutional Affairs, 2016. PE 571.397.

¹²³ Micklitz was the first to introduce the term, see Micklitz, op cit n. 21 supra, 615 et seq. See also K. Sein and K. Lilleholt, 'Enforcement of Security Rights in Residential Immovable Property and Consumer Protection: An Assessment of Estonian and Norwegian Law', (2014) 1 *Oslo Law Review*, 27.