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Towards a new EU regulatory law on residential mortgage lending

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Abstract

Purpose – The measures enacted so far at European level to address the global financial crisis are likely to have limited effects as they are still market efficiency oriented. Accordingly, this study aims to explore how the EU Charter on Fundamental Rights may be useful to achieve a more human right dimension in EU regulatory law.

Design/methodology/approach – The work departs from the current commodification of housing worldwide and the limited capacity of EU to tackle new housing challenges. The work takes the link already established by the CJEU between EU consumer law and the EU Charter on Fundamental Rights one step further and addresses the potential implications concerning residential mortgage lending.

Findings – The main finding is the potential influence that the EU Charter of Fundamental Rights may have on EU regulatory mortgage lending, as there are indicators of a bifurcation of mortgage law regimes at the EU level, separating home loans from other mortgages.

Social implications – The influence of the Charter of Fundamental Rights on EU regulatory law, mainly consumer law treated in a human rights dimension, could be a first step to treat housing as a social good and not as a commodity in the EU. This could lead to a completely new approach concerning the traditional rules governing residential mortgage loans.

Originality/value – The potential constitutionalisation of consumer law and the impact of the CJEU cases on national procedural rules have already been addressed by scholarship. The present work goes one step further as it addresses the potential implications of the EU Charter of Fundamental Rights on EU regulatory law in terms of the potential bifurcation of EU rules on mortgage lending.

Keywords Housing rights, EU law, Human rights, Mortgages, Consumer law

Paper type Research paper

Introduction

The economic and social basis of European property law has changed dramatically since the eighteenth century, but traditional notions of property and contract law remain rooted in these earlier times. Agricultural land has been replaced by housing as the main source of wealth (Piketty, 2014). This can partly be traced to the broadening of property ownership through national housing policies, organised around mortgage lending from the early nineteenth century, and the expansion of mortgage lending following global financial deregulation in the 1980s (Rolnik, 2013). Property markets have encompassed housing

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markets and exchange of homes, building on traditional property, contract and mortgage law (Kenna, 2010). In many countries, State policy has focussed on advancing homeownership to promote political conservatism, along with asset-based welfare approaches (Ronald, 2008; Rolnik, 2012)[1]. The process of commodification and financialisation of housing has been enormous[2]. Real estate (which largely relates to housing and commercial property) has become the main store of wealth for European households, and a key source of collateral for mortgage lending and complex financial products. Indeed, mortgage debt to outstanding private loans ratio increased from around 30 per cent in 1960 to 60 per cent in 2010 and mortgage loans rose to account for 64 per cent of EU GDP in 2010 (it accounted 20 per cent in 1914) (Aalbers, 2017b), and outstanding residential loans in Europe amounted to €7tn in 2016 (European Mortgage Federation, 2017). Significantly, home loan mortgage lending practices were an integral element creating the global financial crisis in USA (following the collapse of Lehman Brothers) – unsustainable expansion of home-ownership to those on low and precarious incomes coupled with lack of regulation on irresponsible sub-prime lending (Nasarre-Aznar, 2014). This has had major consequences for some European Member States[3] and cast doubt on the efficacy of the EU governance of mortgage markets. But in some ways, this might have prompted developments in EU consumer and mortgage law, towards a new "regulatory" mortgage law.

This article examines some of these developments, exploring how EU law transcends traditional and strict public/private law divides in land and mortgage law. It considers recent developments in the interpretation of EU consumer law in the context of mortgage enforcement actions in Member States, as well as the likely impact of the Directive 2014/17/EU, of 4 February 2014, on credit agreements for consumers relating to residential immovable property (MCD)[4], on the private law of mortgages. This synthesis of consumer and mortgage regulation has created a new form of EU regulatory law, which we argue needs an added human rights dimension. The gradual integration of the EU Charter of Fundamental Rights (The Charter)[5] and such principles as LifeTime contracts can address that deficiency. Finally, we consider how the mix of all these influences could develop this EU regulatory law on mortgages, and whether there is indeed a new formula for reforming traditional national land law rules and procedures.

EU law and the traditional public/private law divide

Land, property and housing legislative competence in the EU remains with Member States. Housing and property competences relate to areas of society jealously preserved by Member States at national level, largely due to their inherent links with local economic and political power structures. EU legislative power is limited due to the lack of an express competence on housing and property law (Art. 5 of the Treaty of the European Union[6] and Art. 345 of the Treaty on the Functioning of the European Union, TFEU)[7].

However, the primary objective of the overall European integration process has been the establishment of a common market (Micklitz, 2014). In this, the EU has respected the rules on subsidiarity and national competence in areas of private law such as property, tort and contract. Indeed, the sharp division between private law and public law developed over many years[8] remain very sensitive in such areas as property rights. Private law rules regulate legal transactions among private parties, i.e. horizontal relationships, while public law concerns vertical relationships between the state and private parties – its main function was the protection of the common good and the public interest. The distinct and separate jurisprudence has served to maintain a clear line of protection of property rights, with public law interfering in the private law sphere within very narrow and prescribed paths[9].

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The impact of EU law is different. There is no clear distinction between private law and public law as the EU does not classify the Treaty provisions according to their public or private nature. They have been created on the basis of issues and policies (Semmelmann, 2012; Rosenfeld, 2013). Indeed, many EU law principles transcend established national law rules, such as Art. 5 TEU which establishes the principles of conferral, proportionality and subsidiarity in EU law. Member States courts and administrations are under an obligation to interpret national law harmoniously, i.e. in a way that will not conflict with EU law (principles of indirect effect and sincere cooperation)[10]. The line between EU law and purely national or Member State law has been the subject of much case law, and it is not always distinct[11]. Contemporary writers (Beka, 2018) suggest that the application of the principles of effectiveness and effective judicial protection results in a progressive and indirect Europeanisation of procedural law, despite the lack of harmonisation of domestic enforcement on Union rights.

While Art. 114.1 TFEU does not set a priori any limitation regarding the matters that may fall under the EU competence (Schütze, 2014), the EU may harmonise a particular field of law, insofar as the measures taken contribute to the establishment and functioning of the internal market[12]. This reinforces the fact that EU regulatory law is market efficiency oriented. However, this approach has called into question the role of the EU as a mere market regulator, without fairness and distributive justice being addressed properly in the EU regulatory law (Mattei, 2004). While solidarity and social justice are values to be achieved by the EU (e.g. Art. 3 TEU states that the EU "shall promote economic, social and territorial cohesion, and solidarity among Member States"), the EU legal order does not provide much guidance on how this is to be advanced (Rutgers, 2016).

The EU goal of achieving a common market and freedom of movement of goods, services, capital and persons has created the so-called European regulatory law. This set of rules, which ultimately influence national private law, directly or indirectly, are embedded in the concept of social justice. In Europe, this initially related to the redistribution of wealth from the richer to the poorer part of society, and was implemented gradually through the social labour movement at the end of the nineteenth century, consumer law after the Second World War, and later through the concept of equal treatment. The European model of "access justice" implies that the EU has the duty to grant access to those who are excluded from the market for essential goods or services, or are facing difficulties in making use of the market freedoms. It is a "market driven European' integration through (regulatory) law" (Micklitz, 2011). Indeed, European citizens require access to market provision of healthcare, employment, food, utility services and housing to meet their socio-economic needs (Kenna, 2017; Ondersma, 2015). Many provisions of EU regulatory law aim to protect the interests of citizens as consumers, and to ensure a high level of consumer protection (on the basis of Arts. 169 and 114 TFEU) in the field of product safety, digital market, financial services, food safety and labelling, gas or electricity (Simón-Moreno, 2017)[13], energy and travel, leisure and transport (Manko, 2015; Valant, 2015)[14]. However, as Beka describes it – EU consumer law pursues "market-function" goals and the underlying rationale is an economic one (Beka, 2018). Yet, there are significant developments arising from the curial development of consumer and mortgage credit "regulatory" law.

Recent developments in EU consumer law and mortgages

The global financial crisis which emanated from US sub-prime lending for home-ownership, following a concentrated period of global "financialisation" of housing, impacted in Europe in different ways (Kenna, 2014; Rolnik, 2012). Reductions in wages and welfare supports, unemployment rates reaching dramatic levels in Greece and Spain, collective redundancies,

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and a rise in part-time and precarious employment became the norm (Beka, 2018). Households became the "shock absorbers" of the crisis, and many were unable to repay their mortgages (Ramsay, 2015). The European Central Bank (ECB) accentuated the crisis by offering support to beleaguered Governments in Greece, Ireland, Portugal and Spain on condition of reducing public services known as "austerity" measures[15]. At the same time banks received unprecedented levels of State support to protect their "assets" in the face of large-scale collapse of the mortgage system. Between 2008 and 2011, European countries spent €4.5tn or 37 per cent of the EU's economic output on financial industry bailouts (UN Office of the High Commission for Human Rights, 2012)[16].

While some national governments introduced moratoria on mortgage repossessions (Ramsay, 2015), the European home loan mortgage crisis exposed gaps in the procedural protection of mortgage debtors, especially in the contractual and post-signing contractual processes involved in the unlimited right of the mortgagee to repossess (Beka, 2018). In this scenario, alongside EU institutional regulatory changes, the CJEU also began to develop some semblance of a European social justice response (Micklitz, 2013). This has been described as the "activist court" which began to use the Directive 93/13/EEC, of 5 April 1993, on unfair terms in consumer contracts (UCTD)[17], to examine mortgage cases referred from Spain[18]. This minimum harmonising consumer law measure has now become a significant element in mortgage law jurisprudence in a number of EU Member States (Micklitz and Reich, 2014). 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 Art. 7(1) and Recital 24 UCTD.

From 2000, the CJEU had decided that national courts should have the power to raise the unfairness of consumer contract terms of their own motion[19]. In the *Aziz*[20] case, the CJEU held that the UCTD precluded national Spanish legislation which limits the power of the court to stay mortgage enforcement proceedings, pending a decision on whether the mortgage contained unfair terms. The EU law principle of effectiveness required that such national laws or procedures must not make it impossible or excessively difficult to invoke the protection of the UCTD. Further cases introduced principles of fair procedures and access to justice into the national law benchmarks of EU consumer law[21]. Terms in Spanish mortgage contracts which have been examined for compatibility with the UCTD include default interest rates, acceleration clauses, interest rate floors and ancillary expenses borne by the borrower (Anderson and Simón-Moreno, 2018).

The CJEU has also scrutinised many European national mortgage law and procedural systems for compatibility with these consumer rights[22]. It has clearly established that implementation of the UCTD requires courts in EU Member States to carry out own motion assessments for unfair terms[23] and this process must also consider the impact of the Charter. Art. 7 of the Charter states that "Everyone has the right to respect for his or her private and family life, home and communications." In a Slovakian case the CJEU held that "Under EU law, the right to accommodation is a fundamental right guaranteed under Art. 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13"[24].

Indeed, there are signs of a nascent European standard, linking between mortgage law, consumer law and human rights law, with the UCTD providing the nexus between all three areas[25].

The new mix of EU consumer and mortgage credit "regulatory" law

Following the financial crash, the political landscape in Europe was conducive for the adoption of the MCD. This impacts on the classical property and contract law principles

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regarding residential mortgage loans both common law and civil law jurisdictions[26]. The principles governing the classical liberal mortgage contract were individual contract with negotiated terms, to which the general principles of contract law were applied, and the right of lenders to enforce security in default with limited remedies available to mortgage debtors. However, the MCD has influenced such classical approach in the following manner:

- The lending institution must provide some pre-contractual information to consumers (e.g. the amount of the interest rates) before the conclusion of the contract (a duty arising from Art. 13 MCD), a clear exception to the well-established duty of the buyer to take care of his own interests (*caveat emptor*).
- The MCD also prevents lending institutions from granting the mortgage loan if consumers are likely to be unable to repay, and a creditworthiness assessment is required before mortgages are granted (Art. 18 MCD), even if both parties agree to bear the risk of such potential non-performance, thus impacting on the principles of freedom of contract.
- The lending institution may be forced either to accept the mortgaged property in *lieu* of the repayment of the loan on the basis of the interpretation by Member States of Art. 28.1 (according to which Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated), or be prevented from claiming the outstanding debt, e.g. if the court renders void the contractual term related to the principle of universal liability of the debtor (this was the case in the Decision of the Commercial Court of Barcelona, 7 December 2016)[27].
- The lending institution may be prevented from using the standard enforcement procedure due to the existence of unfair contractual terms, such as the acceleration clause (as took place in the Decision of the Commercial Court of Barcelona 5 May 2014)[28].
- In the worst-case scenario, the lending institution can lose the security right if the court renders the whole loan contract void due to the existence of unfair contract terms[29].

Yet, it is questionable whether this new EU regulatory law effectively addresses the underlying commercial view of consumer credit. Indeed, it is debatable whether the MCD is really a consumer protection norm, or an instrument to protect the banking system against its own reckless behaviour (Anderson and Simón-Moreno, 2018). Many questions whether consumers are really going to be benefited from its provisions as they focus mainly on the sale and marketing side of consumer credit[30]. Indeed, the purpose could also be viewed as step towards the EU Capital Markets Union[31].

Adding a human rights dimension

In our opinion, what is lacking in this developing EU regulatory approach to residential mortgage lending is the human rights dimension. This could be advanced by a more specific recognition that the EU Charter must be respected and promoted in the interpretation and promulgation of EU laws. New standards should 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. To reach these goals, it has been suggested that the rights and values set out in the Charter could be engaged to interpret mortgage loans

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in a more human rights dimension, thus ensuring 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 line of reasoning, in our view, could help to further develop the concept of social justice in contract law[32].

As consumer law is the main driver behind the harmonisation of EU regulatory law (consumer rights are deemed to be a policy objective enshrined in Art. 38 of the Charter, also in Art. 169 TFEU), any change to adapt property and consumer law rules at EU level must emanate from this piece of legislation. In our opinion, the increasing importance of fundamental rights in this field of law (Benöhr, 2013)[33] raises the question of whether the rights enshrined in the Charter may help EU regulatory law to have a more human rights dimension within the EU. In this vein, there is increasing literature advocating the recognition of consumer rights as human rights on the basis of human dignity (Deutch, 1995). Consumer rights would also help to implement human rights, such as the right to housing (Ukwueze, 2016)[34].

In a similar sense, the European Social Contract Group[35] has elaborated a definition of life time contracts[36] (in which mortgage loans may be included) (Nogler and Reifner, 2018). Contract law, such as mortgage loans, must be interpreted as contracts which 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[37]. These include 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).

Putting it all together – fundamental rights as the legal driver

European regulatory law relating to mortgages could be better interpreted through the Charter. To that end, Charter values (such as the prohibition of discrimination on grounds of sex, race, colour, ethnic or social origin) and its housing related rights,[38] coupled with dignity, freedom, equality and solidarity, could be applied in the enforcement of mortgage loans. This would add a human rights dimension (Nogler and Reifner, 2014) to EU regulatory law, thus ensuring the physical, social and psychological considerations of consumers. It could involve the treatment of housing as a social good and a human right as the starting point (Farha, 2017).

Indeed, in the link between EU regulatory law and the Charter has already been established by the CJEU, in its development of this EU regulatory law, such as in *Sanchez Morcillo* (I) (2014)[39] and *Kušionová* (2014)[40]. Here, the CJEU has strengthened consumer rights through the interpretation of the UCTD through the provisions of the Charter. In *Kušionová* it was held that Art. 7 of the Charter (right to respect for private and family life) must be interpreted in conformity with Art. 8 ECHR[41]. Taking a broader approach of such interpretation, Art. 51.1 of the Charter establishes that its provisions are addressed to institutions and bodies of the EU with due regard for the principle of subsidiarity and to the Member States when they are implementing EU law. Thus, the Charter must be applied by the European Commission, by the European Central Bank (ECB) in its role within the Single Supervisory Mechanism (Perassi, 2016; Roth, 2015) (the ECB is empowered to adopt guidance and opinions within such framework),[42] and by the European Banking Authority (EBA), an EU agency which works to ensure effective and consistent prudential

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regulation and supervision across the European banking sector. Furthermore, the Charter, as primary EU law, is fully applicable to Member States when implementing EU law (unless specific rules are in force to preserve some core issues such as the national sovereignty) and also to national courts when interpreting secondary legislation already in existence, this also affecting the way the CJEU interprets EU law[43]. EU secondary law must consequently be interpreted in accordance with housing rights related Articles of the Charter.

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. The horizontal application of the fundamental rights in the Charter (i.e. between private parties),[44] can also be extended to the duty of national legislators to pass legislation in a Charter-compliant way, and, subsequent judicial interpretations. This means, for instance, that the measures of the MCD (e.g. the duty of creditors to exercise reasonable forbearance before initiating foreclosure proceedings and the duty of creditors to facilitate repayment after the foreclosure proceedings) must be interpreted in a Charter compliance way (Art. 7), which leads to the application of the proportionality test (Art. 8 ECHR). This requires that any person at risk of an interference with the right to home 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 Art. 8 ECHR[45]. Charter obligations might also be used by national courts to benchmark all enforcement proceedings involving consumers where loss of home is at issue, and to the implementation of measures to allow households' over-indebtedness.

The application of Charter rights including the proportionality test affects the most important creditor's right: the possibility to liquidate the asset in case of non-performance of the mortgage debt[46]. This approach however, is not applied uniformly as it depends on a more active role being played by national judges, and the legal foundation and the ambit of the ex officio principle in consumer law seem to be unclear in many countries (Max Planck Institute, 2017). Even at EU level there is inconsistency and while EU Commission proposals have to be compatible with the Charter, and the impact of initiatives on fundamental rights must be assessed (European Commission, 2009), the rights enshrined in the Charter are not institutionally integrated into EU regulatory law. EU institutions must go one step further as the Charter "is not merely a set of prohibitions. It also should serve as a tool to guide action, ensuring that the institutions of the Union exercise their competences with a view to fulfilling the provisions of the Charter" (De Schutter, 2016).

Yet, there are mixed signs that Charter influences are having effect within the architecture of EU regulatory law. The Proposal for an EU directive on credit servicers, credit purchasers and the recovery of collateral, of 14 March 2018,[47] which aims to enhance the ability of secured creditors to recover value from collateral in a swifter manner through extrajudicial enforcement procedures for collateral does not apply in its entirety to primary residences of debtors[48]. But the approach taken by EU institutions in other measures; however, is far from being consistent. Table I summarises the measures related to residential mortgage loans adopted by EU institutions and agencies instruments.

The main aim of the EBA Guidelines on arrears and foreclosure (EBA, 2015) is to provide assistance to Member States in the transposition of Art. 28 MCD as to residential mortgage loans concluded after 21 March 2016. This contains no references to the Charter. Neither does the ECB Guidance on dealing with non-performing loans (NPL) (ECB, 2017). Similarly, the EU Commission, following the EU Council Action plan

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to tackle NPLs in Europe, presented the Second Progress Report on the Reduction of NPLs in Europe (March 2018),[49] but this does not reference the Charter. While the Communication from the Commission "A new deal for consumers" (2018)[50] concluded that European consumer laws passed so far have provided a high level of protection for both consumers and businesses, and that there are still challenges to be addressed (such as the, there is widespread use by lending institutions of unfair contract terms in mortgage contracts), there is no reference to the Charter.

Conclusion

The global financial crisis revealed the limited capacity of EU regulation, due the lack of an express competence on housing and property law. But the CJEU has developed advances is consumer protection of borrowers at risk of losing their homes through EU consumer law. However, EU consumer law remains largely market efficiency oriented, i.e. aims to restore the balance between creditors and consumer rights within the business to consumer relationship. To achieve a more human rights dimension, the current EU law "access justice" model must go one step further and incorporate the Charter fully into its interpretations. The influence of the Charter in EU regulatory law, could lead to a new body of rules on residential mortgage lending within EU regulatory law, particularly if applied to the interpretation of obligations of lenders under the MCD. Further progress could be made through the adoption of the principles of Life Time contracts.

In the strongly enforced division of property and mortgage law between national and EU law competence, the conventional approach has been that rights were defined in EU law, while remedies were established by national legal orders (Cafaggi and Iamiceli, 2017). But this is changing, and the principle of national procedural autonomy is being altered by the principles of effectiveness, proportionality and equivalence of EU law. Indeed, where legal disputes are judged to be within the scope of EU law, consumer and mortgage regulation will also be interpreted through the Charter, adding a layer of human rights elements to national property law procedural rules. As Beka points out – the principle of effectiveness has provided forceful impetus to the creation of the private legal order within the EU in such areas a mortgage law (Beka, 2018).

Table I. Measures related to residential mortgage loans adopted by EU institutions and agencies

Documents	Scope of application	MCD	Effects
1. EU Council Action plan to tackle NPL in Europe (July 2017)[a]	All mortgages, pre and post 2016	Art. 3	Not yet measured
2. ECB Guidance on dealing with non-performing loans (2017)	All mortgages, pre and post 2016	Art. 3	Not yet measured
3. ECB – First and second Stocktake of national supervisory practices and legal frameworks related to NPLs (ECB,2016 and 2017)	All mortgages, pre and post 2016	Art. 3	Not yet measured
4. EBA Guidelines on arrears and foreclosure (EBA,2015)	Post 2016 residential mortgage loans	Art. 28	Not yet measured

Note: [a]See www.consilium.europa.eu/en/press/press-releases/2017/07/11/conclusions-non-performing-loans/ (last accessed 20 June 2018)
Sources: Own elaboration

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Notes

1. The housing wealth, however, varies from one country to another as housing policies highly depend on national socio-economic contexts (Wind *et al.*, 2017).
2. This term has been defined as "the increasing dominance of financial actors, markets, practices, measurements and narratives, at various scales, resulting in a structural transformation of economies, firms (including financial institutions), states and households" (Aalbers, 2017a and 2018; Aalbers and Fernandez, 2017).
3. In the case of Spain, for instance, the burst of the housing bubble in 2007 led to households' 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 enough social housing and social benefits (Nasarre-Aznar and Garcia Teruel, 2016).
4. OJ L 60, 28.2.2014, pp. 34-85.
5. OJ C 326, 26.10.2012, pp. 391-407.
6. OJ C 326, 26.10.2012, pp. 13-390.
7. OJ C 326, 26.10.2912, pp. 13-390. See about the scope of Art. 345 TFEU, Van Erp and Akkermans, 2010.
8. Art. 544 of the French Civil Code 1804 (last version available at: www.legifrance.gouv.fr, last accessed 22 June 2018) took as a starting point an individual and liberal conception of ownership, which influenced later other European legal systems. Freedom and equality became the principles governing what has been coined as "classical model of property law" (Van Erp, 2009). This helped to establish a sharp division between private law and public law.
9. The distinction is broadly speaking, in both civil law and common law systems, that private law governs the law of contract, tort and property, whereas public law governs constitutional, administrative and criminal law.
10. *Sabine Von Colson and Kamann v Land Nordrhein-Westfalen*, Case 14/83, judgement of 10 April 1984, ECLI:EU:C:1984:153, para 26; see also Schütze, 2015.
11. See *Aklagaren v Hans Akerberg Fransson*, Case C-617/10, Judgement of 26 February 2013, ECLI:EU:C:2013:105, para 19, where the CJEU equated 'implementation' of EU law with 'falling within the scope of' EU law for the purposes of the application of the EU Charter of Fundamental Rights. For a detailed examination of this point, see Fontanelli, 2014.
12. This was established by the CJEU in the landmark Case C-380/03, *Federal Republic of Germany* v *European Parliament and Council of the European Union*. Judgement of 12 December 2006, EU:C:2006:772, para 80.
13. A holistic approach concerning primary and secondary law of the EU private law may be found in Hartkamp, 2010.
14. See: https://ec.europa.eu/info/strategy/consumers/consumer-protection_en
15. For an economic commentary on the crisis of the Eurozone see Wolf, 2014.
16. UN Office of the High Commission for Human Rights (2012). *Report on austerity measures and economic and social rights*.
17. OJ L 95, 21.4.1993, pp. 29-34.
18. Beka (Beka, 2018) highlights the 'active consumer court' doctrine developed in the CJEU which 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.

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19. *Oceano Grupo*, Joined Cases C-240/98, C-244/98, judgement of 27 June 2000, ECLI:EU:C:2000:346, para 29.
20. *Aziz v Caixa d'Estalvis de Catalunya*, Case C-415/11, judgement of 14 March 2013, ECLI:EU: C:2013:164, para 77.
21. *Morcillo and Abril García* v *Banco Bilbao*, Case C-169/14, judgement of 17 July 2014, EU: C:2014:2099, para 51.
22. For Spain see *Aziz v Caixa d'Estalvis de Catalunya*, Case C-415/11; *Barclays Bank SA v Sara Sánchez García and Alejandro Chacón* Barrera, Case C-280/13, judgement of 20 April 2014, ECLI: EU:C:2014:279; *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA*, Case-169/14, judgement of 17 July 2014, ECLI:EU:C:2014:2099; *BBVA SA v Pedro Peñalva López and Others*, Case C-8/14, judgement of 29 October 2015, ECLI:EU: C:2015:73; *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others*, Case C-49/14, judgement of 16 February 2016, ECLI:EU:C:2016:98; *Banco Primus SA v Jesús Gutiérrez García*, Case C-421/14, judgement of 26 January 2017, ECLI:EU:C:2017:60; for Slovakia, see *Monika Kušionová* v *SMART Capital, a.s.*, Case C-34/13, judgement of 10 September 2014, EU: C:2014:2189; for Czech Republic see *Ernst Georg Radlinger and Helena Radlingerová v Finway a. s.*, Case C- 377/14, judgement of 21 April 2016, ECLI:EU:C:2016:283; for *Romania see Horaţiu Ovidiu Costea v SC Volksbank România SA*, Case C-110/14, judgement of 3 September 2015 ECLI: EU:C:2015:538, and *Horaţiu Ovidiu Costea v SC Volksbank România SA*, Case C-110/14, judgement of 3 September 2015, ECLI:EU:C:2015:538; for France, see *Jean-Claude Van Hove contra CNP Assurances SA*, Case C-96/14, judgement of 23 April 2015, ECLI:EU:C:2015:262; for Hungary see *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, Case C-26/13, judgement of 30 April 2014, ECLI:EU:C:2014:282.
23. *Pannon GSM Zrt v Erzsébet Sustikné Győrfi (Pannon GSM)*, Case C-243/08, judgement of 4 June 2009, ECLI:EU:C:2009:350, paras. 31 and 32.
24. *Monika Kušionová* v *SMART Capital, a.s.*, Case C-34/13, para 65.
25. Beka points out that the MCD also provides a link in European legislation between credit default, indebtedness and the family home (Beka, 2018).
26. The Spanish mortgage is deemed to be a limited right on another's asset and it is legally accessory to the secured loan, whereas in the German *Grundschuld* the connection between the loan and the security right takes place through a contract (contractual accessoriness), so it may be created and registered independently from any secured loan (*Eigentümergrundschuld*, see § 1196 Bürgerliches Gesetzbuch, available at www.gesetze-im-internet.de/bgb/index.html, last accessed 20 June 2018). In common law countries, in relation to unregistered land, the mortgagor was required to transfer the fee simple to the creditor, who would then transfer the property back to the mortgagor once the debt was repaid. The property of the mortgagor was recognised through the equity of redemption. Through the Law of Property Act 1925 and the Land Registration Act 2002, in England and Wales and the Land and Conveyancing Law Reform Act 2009 in Ireland, a charge by way of legal mortgage in now required to create a mortgage. This resembles, more than ever, to a continental mortgage despite the existing reminiscenses of its classical conception (e.g. the right of the mortgagee to possess the mortgaged property as it was a 3000 years lease) (Watt, 2007). It has been stated that the charge is the functional equivalent of a civil law hypothec (Sagaert, 2012).
27. ECLI:ES:JMB:2016:4780. The ECLI may be used at: www.poderjudicial.es/search/indexAN.jsp. According to Art. 1911 of the Spanish Civil Code 1889 (last version available at https://boe.es/buscar/act.php?id=BOE-A-1889-4763&p=20151006&tn=1, last accessed 20 June 2018), the debtor is liable for the performance of his obligations with all present and future assets. Scholars have criticised the approach of this court decision (Almeida, 2017).
28. ECLI:ES:JMB:2014:85.

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29. According to the Case C-453/10, *Jana Pereničová, Vladislav Perenič v SOS financ spol. s. r. o.*, Judgment of 15 March 2012, EU:C:2012:144, para 35, "Directive 93/13 does not therefore preclude a Member State from laying down, in compliance with European Union law, national legislation under which a contract concluded between a trader and a consumer which contains one or more unfair terms may be declared void as a whole where that will ensure better protection of the consumer".

30. It has been stated in relation to 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, that the "Questions concerning the life time of those who use these services (access, exploitation, cancellation, usury, debt enforcement, adaptation, continuity) have expressly been left to the National Legislator, which in fact was based on the neo-liberal assumption that functioning markets would render protective regulation superflous" (Nogler and Reifner, 2014).

31. This is reflected in the Regulation (EU) 2017/2402, of 12 December 2017, laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (OJ L 347, 28.12.2017, p. 35–80). It has been stated that "The goal of the EU Commission is not to create a safer primary or secondary mortgage market for borrowers and lenders, but rather to rollout the technique of securitization across the EU, thereby pushing housing-centred financialization onto countries with hitherto relatively low levels of mortgage debt or securitization" (Aalbers and Fernandez, 2017).

32. Mak, quoting Wilhemsson's work, distinguishes six types of "welfarism" (i.e. social justice) in contract law, e.g. market-rational welfarism; market-correcting welfarism; internally redistributive welfarism; externally redistributive welfarism; need-rational welfaris and public values welfarism. The first ones relate for instance to equality rules, information rules and substantive fairness rules, and the last one to the protection of human rights (Mak, 2008).

33. The author 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.

34. The author argues that "The primary basis of consumer protection is to assist people in reaching an adequate standard of living. It is concerned with the protection of the consumer's health and, as such, is intented to enhance the standard of living and the well-being of the individual as consumer. Although the UDHR and the derivative regional instruments do not mention consumer rights, their goals and objectives are synonymous with those underlying the basic rights of the consumer, particularly the right to the standard of living that ensures the good health and well-bein of the individual". The right to a standard of living enshrined in Art. 25.1 of the Universal Declaration of Human Rights 1948 (UDHR, available at: www.un.org/en/universal-declaration-human-rights/, last accessed 20 June 2018) includes the right to housing.

35. See www.eusoco.eu

36. 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".

37. Available at: www.eusoco.eu/?p=1012

38. For instance, Art. 4 (Prohibition of torture and inhuman or degrading treatment or punishment) as interpreted by Art. 3 ECHR – where minimum housing standards and State reposnsibilities to homeless people have been established; Art. 7 (Respect for private and family life) as interpreted by Art. 8 ECHR, where standards for protection of home have established housing rights; Art. 17 (Right to property) as interpreted by Art. 1 of Protocol 1 ECHR, which has established standards in relation to mortgage repossessions; Art. 21 (Non-discrimination) as interpreted by Art. 14 ECHR; Art. 23 (Equality between men and women) as interpreted by Art. 5 ECHR; Art. 25 (The rights of the elderly) as interpreted by Art. 23 of the Revised European Social Charter on the right

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of elderly persons to social protection; Art. 26 (Integration of persons with disabilities) as interpreted by Art. 15 of the European Social Charter; and Art. 34.3 as interpreted by Arts. 30 and 31 European Social Charter, which has established a European set of standards for housing obligations on States. See in this sense the *Explanations relating to the Charter of Fundamental Rights* (OJ 2007/C 303/02) and Art. 52(7) of the Charter, according to which "The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

39. *Morcillo and Abril García* v *Banco Bilbao*, Case C-169/14, para 51.

40. *Monika Kušionová* v *SMART Capital, a.s.*, Case C-34/13, para 65.

41. Scholars have already addressed these cases highlighting the importance of the autonomous understanding of EU law in this field by the CJEU (Micklitz and Reich, 2014), the potential constitutionalization of consumer law (Della Negra, 2015), the impact of CJEU cases on national procedural rules on mortgage enforcement proocedings and on parties' rights (Raemekers, 2018) and the potential effects of the application of human rights in business to consumer relationships (Nield, 2013). In addition, 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* (Actiones Platform, 2017), in which points out such connection between consumer protection and fundamental rights (Module 4, Consumer Protection, p. 7). The study provides the most relevant cases in this regard.

42. 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).

43. *Zoi Chatzi* v *Ipourgos Ikonomikon*, Case C-149, judgement of 10 September 2010, EU:C:2010:534, para 43.

44. 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 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). In fact, the horizontal application of the Charter – i.e. enforceability of Charter rights between private entities has more recently been approved in such cases as C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V., judgement 17 April 2018 EU:C2018:257, para 76); and Joined Cases C-569/16 and C-570/16, Stadt Wuppertal v Bauer and Willmeroth v Broßonn, judgement of 6 November 2018, ECLI:EU:C:2018:871.

45. As established in the landmark case ECtHR, *Connors* v *UK*, No. 66746/01, judgment of 27 May 2004. See also ECtHR, *McCann and Others* v *United Kingdom*, No. 18984/91, judgment of 27 September 1995; *Orlic* v *Croatia*, No. 48833/07, judgment of 21 June 2011; and *Lemo and others* v *Croatia*, No. 3925/10, judgement of 10 July 2014. See also *Bjedov* v. *Croatia*, No. 42150/09, judgement of 29 May 2012, para 66.

46. From an economical point of view, the Regulation (EU) No 575/2013, of 26 June 2013, on prudential requirements for credit institutions and investment firms (OJ L 176, 27.6.2013, pp. 1-337) establishes that the funded credit protection, a credit risk mitigation technique, depends upon the lending institution to be able to liquidate or retain, in a timely manner, the assets from which the protection derives in the event of the default (arts. 4.1.(58) and 194.4). Thus, EU Member States, generally speaking, prioritise the protection of lending institutions and the realisation of the security right over debtor's interests (Luckow, 2014).

47. COM(2018) 135 final.

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48. It establishes, among other measures, an accelerated extrajudicial collateral enforcement procedure with the aim to enhance the protection of secured creditors from non-performing loans by providing them with more efficient methods of value recovery from secured credit (Arts. 23 et seq.). Art. 2.5.(ii) of the Proposal states however that it shall not apply to immovable residential property which is the primary residence of a business borrower, thus making a clear distinction between commercial and residential mortgage loans, which are excluded to protect consumers (Recital 43).
49. COM(2018) 133 final. available at: http://ec.europa.eu/finance/docs/policy/180314-communication-non-performing-loans_en.pdf (last accessed 20 June 2018).
50. COM(2018) 183 final.

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