Towards a new EU regulatory law on residential mortgage lending

1. Preliminary ideas

1.1. The commodification and financialisation of housing as the main drivers of the global financial crisis

The European economic and social context of property law has experienced a remarkable change since the 18th and 19th centuries. Agricultural land has been replaced by housing and other industrial and financial capital as the main source of wealth since the 1980s (Pikkety, 2014). This can partly be traced to the broadening of property ownership through national housing policies, organised around mortgage lending from 1920s and later to the expansion of mortgage lending following deregulation in the 1980s (Rolnik, 2013). Property markets and contracts have encompassed housing markets and exchange of homes, building on existing property, mortgage and other legal structures (Kenna, 2010). In many countries, State policy has focussed on advancing homeownership with the aim to provide 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 in fact 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. This has also led to the capitalisation of consumption (Nogler and Reifner, 2014), i.e. the increased use of credit to acquire houses, which has substituted renting of homes and inherited housing (Fahra, 2017). Indeed, mortgage debt to outstanding private loans ratio increased from around 30% in 1960 to 60% in 2010 and mortgage loans rose to account for 64% of EU GDP in 2010 (it accounted 20% in 1914) (Aalbers, 2017). Outstanding residential loans in Europe amounted to €6,981,540m. in 2016 (European Mortgage Federation, 2017). Significantly, home loan mortgage lending practices were an integral element creating the global financial crisis in US (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 governance of mortgage markets, consumer law and housing law, at both European and national level. The perspective from EU law is analysed below.

1.2. The current EU regulatory law: ¿enough to counter the crisis?

Art. 5 of the Treaty of the European Union (TEU)[4] establishes the principles of conferral, proportionality and subsidiarity. EU legislative power is limited due to the

[1] The housing wealth, however, varies from one country to another as housing policies highly depend on national socio-economic contexts (Wind, Lersch and Dewilde, 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, 2017 and 2018; Aalbers and Rodrigo 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 C 326, 26.10.2012, p. 13–390.

lack of an express competence on housing and property law (Art. 5 TEU and Art. 345 of the Treaty on the Functioning of the European Union, TFEU).[5] 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.

As the overall project of the European integration process has been the establishment of a common market (Micklitz, 2014), the EU has never been concerned with the adoption of private law rules (i.e. property, tort and contract law rules based on the private autonomy or freedom of contract), as national legal orders have done. Indeed, the French approach concerning the protection of individual rights[6] helped to establish a sharp division between private law and public law. Private law became the body of rules in charge of regulating those legal transactions among private parties, i.e. horizontal relationships. On the contrary, public law concerned vertical relationships between the state and private parties and its main function was the protection of the common good and the public interest. As a result, public law was prevented from interfering in the private law sphere. This distinction is still present today, broadly speaking, in both civil law and common law systems, so private law governs the law of contract, tort and property, whereas public law governs constitutional, administrative and criminal law. Nevertheless, as pointed above, the approach 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 as they have been created on the basis of matters and policies (Semmelmann, 2012; Rosenfeld, 2013).

Accordingly, the goal to achieve a common market has prompted the creation of the so-called European regulatory law, which surrounds (and it is different to) the core of traditional national private law as it does not aim to ensure the principle of freedom of contract and private autonomy, but regulated autonomy, thus moving from autonomy to functionalism in competition and regulation. This set of rules, which influence in the end national private law either directly or indirectly, are embedded by the concept of social justice, which initially related to the redistribution of wealth from the richer to the poorer part of society and has been implemented gradually through the social labour movement at the end of the 19th century, consumer law after the Second World War and later through the concept of equal treatment. Thus, the European model of "access justice" would imply that the EU has the duty to grant access to those who are excluded from the market or are facing difficulties in making use of the market freedoms, being the result a "*market driven European' integration through (regulatory) law*" (Micklitz, 2011). This lead in the end to the existence of an enforceable right of access to services

[5] OJ C 326, 26.10.2012, p. 47–390. See about the scope of Art. 345 TFEU, Van Erp and Akkermans, 2010.

[6] Art. 544 of the French Civil Code 1804 (last version available at https://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). Some principles of this model, such as the *numerus clausus*, may also be found in the common law, in which feudalism still play a role in land law. Since the implementation of feudalism in England with the Norman conquest (1066), the relative title, based on possession, was introduced in order to know who had more rights (estates) on land (Clarke and Kohler, 2005). This system began to change with the enactment of the Law of Property Act (LPA) of 1925 (Chapter 20, available at www.opsi.gov.uk, last accessed 22 June 2018), which limited the estates in land to two (freehold and leasehold, s. 1), and later with the Land Registration Act (LRA) of 2002 (Chapter 9), which established an electronic constitutive system of property rights that has displaced to some extent the doctrine of relative title (Gray and Gray, 2009).

of general economic interest, being Member States the addresses of such right. Indeed, access to market provision determines today the protection of essential socio-economic rights, such as healthcare, employment, food, utility services and housing, so access to housing (as consumers) enables them to meet their socio-economic needs (Kenna, 2017).

As a result, the main provisions that have been enacted within the EU regulatory law aim to protect the interests of 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, energy and travel, leisure and transport (Manko, 2015; Valant, 2015).[7] Also a number of proprietary-related rules have been adopted, such the ones concerning the retention of title, timesharing, collateral arrangements, trade marks (this one on the basis of Art. 118 TFEU), gas or electricity (Simón-Moreno, 2017).[8] Even though Art. 114.1 TFEU does not set a priori any limitation regarding the topic that may fall under the EU competence (Schütze, 2014), there are a number of conditions to be complied with, i.e. the EU may harmonise a field insofar as the measures taken contribute to the establishment and functioning of the internal market.[9] 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). Indeed, it is true that 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"), but they need to be embedded into the EU regulatory law, i.e. consumer law, and the EU legal order does not provide guidance on how to do this (Rutgers, 2016).

In this vein, the EU has passed legislation after the global financial crisis so as to protect consumer interests, such as the Directive 2014/17/EU, of 4 February 2014, on credit agreements for consumers relating to residential immovable property (MCD).[10] The Directive 93/13/EEC, of 5 April 1993, on unfair terms in consumer contracts (UCTD),[11] must also be taken into consideration. These rules have influenced the classical property and contract law principles regarding residential mortgage loans. Indeed, the mortgage is a security right used as collateral in both common law and civil law jurisdictions regardless of its name and its legal nature.[12] The principles governing the classical liberal mortgage contract were individual contract with negotiated terms, to

[7] See: https://ec.europa.eu/info/strategy/consumers/consumer-protection_en.

[8] A holistic approach concerning primary and secondary law of the EU private law may be found in Hartkamp, A. S. *et al*., 2010.

[9] 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.

[10] OJ L 60, 28.2.2014, p. 34–85.

[11] OJ L 95, 21.4.1993, p. 29–34.

[12] 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 https://www.gesetze-im-internet.de/bgb/index.html). For its part, in common law countries the mortgagor used to transfer the fee simple to the creditor, who has the duty to transfer the property back to the mortgagor once the debt is fully repaid. The property of the mortgagor was recognised thanks to the equity of redemption. With the approval of the LPA and the LRA, it is possible to create a charge by way of legal mortgage in UK (sections 23.(1).a) y b) LRA 2002), which 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).

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. The financialisation of housing and commodification of mortgage lending across Europe have transformed this model. The MCD and the UCTD have influenced such classical approach:

a) 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*);

b) The MCD also prevents lending institutions from granting the mortgage loan if consumers are not likely to pay it back according to the result of the creditworthiness assessment (Art. 18 MCD), even if both parties agree to bear the risk of such potential non-performance, thus restricting the freedom of contract;

c) 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);[13]

d) 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);[14]

e) 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.[15]

However, in our opinion the current EU regulatory law has not effectively addressed the underlying commercial view of consumer credit. Indeed, it is debatable whether the MCD is really a mere consumer protection norm, in the line of so many other EU enactments, or rather an instrument to protect the banking system against its own reckless behaviour (Anderson and Simón-Moreno, 2018) and whether consumers are really going to be benefited from its provisions as they focus mainly on the sale and marketing side of consumer credit.[16] In addition, it seems that the EU is not fully

[13] European Case Law Identifier (ECLI): ES:JMB:2016:4780. The ECLI may be used at: http://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).

[14] ECLI: ES:JMB:2014:85.

[15] According to the Case C-453/10, *Jana Pereničová, Vladislav Perenič v SOS financ spol. s. r. o,.* Judgement 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."

[16] 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" (N. Nogler and U. Reifner, 2014).

concerned about the debate on housing financialisation: whereas the MCD has been passed to protect consumers from bad banking practices, the EU is encouraging at the same time securitisation as a building block of the Capital Markets Union.[17]

How can the EU regulatory law be adapted to new challenges? In our opinion, what is lacking in the EU approach to residential mortgage lending is the human rights dimension. In a similar sense, the European Social Contract Group,[18] which has elaborated a definition of life time contracts[19] (in which mortgage loans may be included) (Nogler and Reifner, 2018). Thus, 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.[20] 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). 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 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.[21]

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 of Fundamental Rights of the EU (2012) (The Charter),[22] 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)[23] 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

[17] 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).

[18] See https://www.eusoco.eu.

[19] 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".

[20] Available at https://www.eusoco.eu/?p=1012.

[21] 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. They 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).

[22] OJ C 326, 26.10.2012, p. 391–407.

[23] 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.

recognition of consumer rights as human rights on the basis of human dignity (Deutch, 1995).[24] Consumer rights would also help to implement human rights, such as the right to housing (Ukwueze, 2013).[25]

Accordingly, section 2 explores how consumer law and human rights may influence European regulatory law and to what extent it may lead to a bifurcation of mortgage law regimes within the EU.

2. The bifurcation of mortgage law regimes in the EU

2.1. Fundamental rights as the legal driver

The European regulatory law, e.g. consumer law, must be interpreted through the Charter, as we are currently in the era of constitutional law (Kennedy, 2006).[26] To that end, the values (such as the prohibition of discrimination on grounds of sex, race, colour, ethnic or social origin, Art. 21 of the Charter) and rights set out by the Charter (i.e. the relevant provisions of the Charter related to housing rights),[27] coupled with dignity, freedoms, equality and solidarity, should be considered above all to treat mortgage loans in a more human rights dimension (Nogler and Reifner, 2014) thus ensuring that physical, social and psychological considerations of consumers are taken into consideration. This would mean treating housing as a social good and not as a commodity as takes place currently in the EU, which takes a commercial approach concerning mortgage loans as a starting point (Fahra, 2017).

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[24] The suggested approach in the present work could be the first step towards such recognition.

[25] 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: http://www.un.org/en/universal-declaration-human-rights/, last accessed 20 June 2018) includes the right to housing.

[26] The author distinguishes among three globalizations of legal though eras: the first one (1850-1914, classical legal thought) is characterised by individual and property rights, being the private law the legal core and right, will and fault the normative ideas; the second one (1900-1968, the social) focused on social rights and social justice, being social law the legal core and the social welfare the main ideas; and the third one (1945-2000) focused on human rights, nondiscrimination, democracy, rule of law and pragmatism as legal idea and constitutional law as the legal core, being human rights and social policies the normative ideas. Despite what Kennedy says mirror Micklitz's approach, public law rules, such as the fundamental rights laid down in the Charter, may force the EU regulatory law to go one step further than the current social justice upon which EU law is based.

[27] 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 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."

As a matter of fact, the link between EU regulatory law and the Charter has already been established by the CJEU, which has been the main driver behind the current constitutionalisation of EU regulatory law. Examples are *Sanchez Morcillo* (I)(2014)[28] and *Kušionová* (2014),[29] in which the CJEU has strengthened consumer rights through the interpretation of EU consumer law, mainly the UCTD, in line with the provisions of the Charter, e.g. in *Kušionová* it was held that Article 7 of the Charter (right to respect for private and family life) must be interpreted in conformity with Article 8 ECHR.[30] Taking a broader approach of such interpretation, Article 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)[31] 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. Furthermore, the Charter, as primary 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 (*Chatzi*, 2010).[32] EU secondary law must consequently be interpreted in accordance with housing rights related Articles of the Charter.

This would not imply prima facie individuals being empowered with actions based on the Charter (even though this could be achieved through the horizontal application of the fundamental rights enshrined thereof),[33] but the duty of national legislators to pass legislation in a Charter-compliant way, and, in lack of such legislative action, judges would be obliged to interpret the law in such a way. This means, for

[28] *Morcillo and Abril García* v *Banco Bilbao*, Case C-169/14, judgement of 17 July 2014, EU:C:2014:2099, para 51.

[29] *Monika Kušionová* v *SMART Capital, a.s*., Case C-34/13, judgement of 10 September 2014, EU:C:2014:2189, para 65.

[30] 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, 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.

[31] 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*)*.

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

[33] Indeed, another way for the proportionality principle to be applied is by making the provisions of the Charter directly enforceable, even between individuals. 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).

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 application of the proportionality test (according to which 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, as the loss of one's home is a most extreme form of interference with the right to respect for the home)[34] by national courts in all enforcement proceedings involving consumers and where loss of home is at issue, and to the implementation of measures to allow households' over-indebtedness. The application of 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.[35] This approach has currently some difficulties from the perspective of national courts, for instance its successful application depends to a large extent on a more active role being played by national judges (it must be recall the lack of any reference thereof in existing laws) and the fact that the legal foundation and the ambit of the *ex officio* principle in consumer law seem to be unclear for them (Max Planck Institute, 2017). Furthermore, it is under discussion whether fundamental rights may justify an *ex officio* judicial intervention in a contractual relationship. German case law shows, however, that "*interests safeguarded by fundamental rights may outweigh interests that only find protection in rules of contract law*" (Mak, 2008). These are the reasons why another approach may be more convenient to better protect consumers' interests.

Even though the Charter must also be applied when an EU institution pass legislation, currently its application is limited: the EU Commission proposals have to be compatible with the Charter, so the impacts of initiatives on fundamental rights must be taken into consideration in the impact assessments (European Commission, 2009); however, the rights enshrined in the Charter are not integrated in EU regulatory law. EU institutions should 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*" (Schutter, 2016).

As a result, the EU regulatory law emanating from the EU Commission is not merely a body rules that may restrict some contractual and property law rules to protect consumers, instead it must be a body of rules that should follow and respect the provisions of the Charter from the very beginning of the legislative process. By doing so, EU regulatory law would be enacted in compliance with human rights standards, thus profoundly affecting the way this law is applied. Following the example of the MCD, the implementation of the proportionality test into EU secondary legislation

[34] 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*, (Application No. 3925/10), judgement of 10 July 2014. See also *Bjedov* v. *Croatia*, Appl. No. 42150/09, judgement of 29 May 2012, para 66.

[35] 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, p. 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). This is the reason why EU Member States, generally speaking, prioritise the protection of lending institutions and the realisation of the security right over debtor's interests (Luckow, 2014).

would have implied the possibility of lending institutions being prevented from taking possession of the mortgaged property for a definite or indefinite period of time on the basis of the proportionality test (Art. 8.2 ECHR), applied by the CJEU (on the basis of Art. 7 of the Charter and the interpretation of Art. 8.2 ECHR by the ECtHR) taking into account the interests at stake (right to property -Art. 17 CFEU- and the right to respect for private and family life -Art. 7 of the Charter).[36] This would have integrated the Charter into EU law and would have taken into account, for instance, the social risks of unemployment, homelessness and over-indebtedness of mortgage debtors to which the principles of life time contracts refer.

2.2. Towards new EU regulatory law on residential mortgage lending

In light of the foregoing, a new body rules should be passed within the EU regulatory law in order to govern residential mortgage loans. This would be consistent with the current evidence: housing has become the main store of value and a key source of collateral throughout Europe, and the current capitalisation of consumption has led to the increase use of credit to acquire houses. If the main aim of the so-called EU regulatory law is the achievement in the end of a common market (with the "access justice" as the underlying driver, along with the provisions of the Charter), residential mortgage lending should the main area to start with taking into account the EU competence on this area (Art. 169.1 TFEU). Furthermore, residential mortgage loans are essential for consumers to become part in society and to have access to the essential socio-economic rights (e.g. healthcare, employment, housing or utility services) that are increasingly provided by the market (European model of "access justice"), and it is the duty of the EU, within the EU regulatory law, to protect such rights so as to guarantee a minimum of social dignity and moral values when individuals enter into contractual relationships.

This should lead to a sort of bifurcation of mortgage law legislation in Europe. Although this seems far-fetched as it sounds, this approach has been confirmed by the Proposal for an EU directive on credit servicers, credit purchasers and the recovery of collateral, of 14 March 2018,[37] which aims to enhance the ability of secured creditors to recover value from collateral in a swifter manner through extrajudicial enforcement procedures for collateral.[38] 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 in order to protect consumers (Recital 43).

The approach taken by EU institution in other measures, however, is far from being consistent. 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. On the contrary, the ECB Guidance on dealing with non-performing loans (NPL) (ECB, 2017) adopt a broad scope as it makes reference to the general concept of NPLs (residential mortgage lending, in fact, is quoted only as an example of national specificities), so it falls under

[36] Furthermore, it would have implied the implementation of fresh start measures that could have implied households being release to greater or lesser extent from the outstading debt after the forced sale of the property.
[37] COM(2018) 135 final.
[38] 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.).

its scope all credit agreements established in Art. 3 MCD. It is not clear however the relationship between both.[39] Furthermore, the EU Commission, following the EU Council Action plan to tackle NPLs in Europe, presented the Second Progress Report on the Reduction of NPLs in Europe (March 2018),[40] which does not distinguish between pre- and post-2016 residential mortgage loans either, as it just makes a broad reference to NPLs. The same takes places in the First and Second Stocktake of national supervisory practices and legal frameworks related to NPLs (ECB, 2016 and 2017). Table 1 summarises the measures related to residential mortgage loans adopted by EU institutions and agencies instruments.

Be that as it may, it is expected the EU to pass more legislative measures in the field of residential mortgage loans in the near future, which will probably distinguish between residential and commercial mortgage loans. As a matter of fact, the Communication from the Commission "A new deal for consumers" (2018)[41] concluded that European consumer laws passed so far have provided a high level of protection for both consumers and businesses, but there are still challenges to be addressed such as the widespread use by lending institutions of unfair contract terms in mortgage contracts, which undermine consumer confidence.

This new EU regulatory law, adopted on the basis of the provisions of the Charter, may help to avoid some externalities. Scholars refer to *Kušionová* and other court decisions related to mortgage enforcement procedures in Spain (which distorted the rules to favour the weak party, the consumer) to point out the external effects the generalisation of these resolutions may have as for the origination costs of mortgage loans and the legal security of owners. It could also lead to a distortion of private law rules, in the sense that rather than being applied directly, are filtered by judges through fundamental rights (Nasarre-Aznar, 2017 and 2015). The suggested approach could be a first step to treat housing as a social good and not as a commodity in the EU and would provide more legal certainty to the parties involved, as both creditors' and debtors' rights will be taken into account by the EU when passing legislation (Ondersma, 2015).

3. Conclusions

The global financial crisis has revealed the limited capacity of the European Union to adapt its housing legislation to new challenges due the lack of an express competence on housing and property law. Financial stability is the main field in which the EU may legislate, which has led to the creation of an own EU regulatory law, the current measures adopted so far, such as the Mortgage Credit Directive, are likely to have limited effects as they are still market efficiency oriented, i.e. they just aim to restore the balance between creditors and consumer rights within the business to consumer relationship. In order secondary law to achieve a more human rights dimension, the current social justice upon which EU law is based must be go one step further and be tackled through other legal instruments, such as the Charter.

The influence of the Charter in EU regulatory law, mainly consumer law be treated in a human rights dimension, may lead to a new body of rules on residential

[39] Following the ECB Guidance (ECB, 2017), it "does not intend to substitute or supersede any applicable regulatory or accounting requirement or guidance from existing EU regulations or directives and their national transpositions or equivalent, or guidelines issued by the European Banking Authority (EBA)", so it is not clear whether the credit institutions to which the Guidance is addressed must follow only the EBA Guidelines or also the ECB Guidance.

[40] 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).

[41] COM(2018) 183 final.

mortgage lending within the EU regulatory law, i.e. new consumer protection rules interpreted according to the Charter. This should lead to a bifurcation of mortgage legislation in Europe, which should focus on achieving a regulation more in line with recent proposals concerning life time contracts. It could be a first step to treat housing as a social good and not as a commodity in the EU.

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