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# Protecting homeloan borrowers in the emerging EU secondary market for non-performing loans

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## Abstract

**Purpose** – This paper aims to explain the provisions of the New Directive on Secondary Mortgage Markets, in particular it considers consumers protection issues and whether the principles of Life Time Contracts epitomise the proper balancing of principles underlying European law, now set out in the EU Charter of Fundamental Rights.

**Design/methodology/approach** – The present work outlines first the legacy of the European financial and mortgage crisis and the need for new rules on cross-border sales of non-performing loans (NPLs). Then it provides an overview of the Directive, analyses the complexity of the cross-border supervision and addresses consumer protection issues and the potential role the Life Time Contracts and the EU Charter of Fundamental Rights may play to protect consumers in this field.

**Findings** – The current paper shows that the provisions of the Directive, the Mortgage Credit Directive and the Consumer Credit Directive fail to protect consumer borrowers when NPLs are sold to third parties. Advancing this human rights protection could transcend the regulatory, legislative and consumer protection approaches of the Union in this area.

**Social implications** – The Directive establishes the regulatory and operational structures for the sale of NPLs. However, some important issues have been raised, including how the cross-border supervision will operate to protect consumers. Accordingly, the research may help to increase consumer protection in this field.

**Originality/value** – This paper explains the provisions of the New Directive on Secondary Mortgage Markets and its complex and unique cross-border regulatory framework, as yet untested. This work may serve as an inspiration for the EU to improve existing consumer rules at the EU level.

**Keywords** European law, Non-performing loans, Consumer rights, EU Charter of Fundamental Rights, Life Time Contracts, Right to housing

**Paper type** Research paper

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## Introduction

Mortgages on homes are often the only way people can secure adequate housing. Banks provide much mortgage lending. Housing and banking have therefore long been bedfellows, because the security in housing forms a significant part of bank assets. However, in the past 20 years, this relationship has become strained because lending on housing caused a near collapse of the global financial and banking system. Now, banking supervision across the world includes careful monitoring of non-performing loans (NPLs), house prices and mortgage lending, as well as the range of consumer and human rights measures, which prevent arbitrary evictions in cases of arrears. The European homeloan mortgage crisis exposed gaps in the procedural protection of homeloan mortgage debtors. It revealed major imbalances in the respective positions of the parties in the contractual and post-signing contractual processes, deeply rooted in the unlimited right of the mortgagee to repossess (Beka, 2018). While it was obvious that unemployment, relationship breakdown, loss of a family member or illness were the key determinants of mortgage arrears and even eviction, EU Member States did not have a clear idea on how to address the problem. This paper seeks to chart this development in Europe, culminating in Directive (EU) 2021/2167, of 24 November 2021, on credit servicers and credit purchasers [1] (hereinafter, the Directive) which aims to address NPLs by creating a secondary market in these loans. Novel EU-wide supervisory arrangements and the potential to sell distressed homeloans on internet platforms are associated with this development. The Directive also creates the new legal actors of "credit servicers" and "credit purchasers" in EU law. This paper considers how consumer protection has been strengthened on one hand, although perhaps not as much as was possible.

The potential for policy makers and courts to interpret these developments in the context of Life Time (relational) contracts, and the EU Charter of Fundamental Rights (EUCFR), as part of growing jurisprudence and EU policy measure, is considered. The impact on national property and housing law from EU law developments on banking supervision and consumer protection is also raised, in the context of this Directive being merely one of a suite of measures to ensure financial stability and borrowers' protection.

## Life Time Contracts and human rights

Across the world, the explosion of credit and debt associated with purchase of essential housing, healthcare, education and utilities has placed consumer rights at the centre of human rights debates. Mortgages on homes are often the only means by which people can acquire housing – which is regarded as an essential element for the enjoyment of all human rights and participation in society. Any termination of this contract which is secured on a home can result in homelessness for either the borrower, or in some cases, a tenant. Mortgage and tenancy contracts have already been accepted in EU law as consumer contracts, and the termination procedures for these must comply with the EUCFR.

In the context of the developing EU law on secondary markets for NPLs, it is now time to recognise to mortgages as Life Time Contracts. Life Time Contracts are promoted by the European Social Contract Group (EUSoCo) [2].

Life Time contracts are 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.

Life Time Contracts are essential for human flourishing and should be governed by a number of principles, such as 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) and protection from unfair or premature termination (it must be transparent, accountable and socially responsible). The rules describing and governing contract formation and interpretation must recognise evolving relationships between the parties, including their continued cooperation – particularly in housing related areas (Bargelli, 2014). Solidarity between the parties, good faith and longer timeframes is more important than the notion of a "magical contract-formation instant" (White, 2018). This approach incorporates many of the contemporary methods for the enjoyment of human rights (Fineman, 2008-2009) [3]. The integration of consumer and mortgage law with the Life Time Contract approach can offer a more comprehensive rhetorical framework and a fundamental floor of protection for European financial and mortgage consumers [4]. International housing advocacy organisations have also addressed the protection of the right to housing in the context of these sales of NPLs, [5] and *The Shift Directives on Housing Rights* has made a set of recommendations to States to protect the right to housing in these situations.

The Life Time Contract model offers a valuable addition to our study of the law on mortgages, particularly as the avenue for its integration through the EUCFR has been established by the CJEU and through various Directives outlined below. Indeed, the principles of Life Time Contracts resonate with the human rights protections on housing set out in the EUCFR. For instance, Article 7 EUCFR states that "'Everyone has the right to respect for his or her private and family life, home and communications". This corresponds to Article 8 of the European Convention of Human Rights [6]. The development of ECtHR jurisprudence on Article 8 in relation to housing rights has led to significant standards and positive obligations [7].

## The EU response to non-performing loans

In January 2002, when the euro was adopted as the common currency for the 300 m citizens of 12 EU Member States few anticipated how this would impact on European housing systems. The elimination of (nominal) exchange risk and the European Central Bank (ECB) anti-inflationary credibility brought a decline in the perceived country risk for the so-called periphery Member States (Greece, Ireland, Italy, Portugal, Spain), generating a drop in mortgage and other interest rates to the level of the so-called core Member States (Austria, Germany, The Netherlands). Along with Treaty rules on freedom of movement of capital, this led to a major flow of funds into peripheral EU Member States – channelled through national banks into enormous levels of lending on housing and associated developments. While such credit expansion also took place in many countries outside Europe, as an expression of the global savings glut (Aalbers, 2016; Tooze, 2018), the consequent banking and mortgage crisis, and the EU and Member State responses to it, were unique and historically significant.

It is generally accepted that the global financial crisis after 2008 was triggered by the deficiencies in the US homeloan mortgage market, and its sub-prime lending model. Major weaknesses in the underlying security of US homeloan mortgages, and the original borrower's ability to repay the mortgage, became obvious by 2007, leading to major defaults and the breakdown of interbank lending and credit markets (Nasarre-Aznar, 2014, 2020). This led first to a crisis in the US banking system, which heavily affected European banks, and later to a contraction of the economy, an increase of lending standards and a decline in household wealth (European Parliament, 2019). Unemployment and the recession after 2008 resulted in mortgage arrears and defaults in many EU peripheral countries. Many Eurozone banks were confronted with an accumulation of NPLs on their balance sheets [8]. There was a risk of widespread evictions of distressed borrowers, with very limited public data on the extent of legal evictions across EU Member States (Kenna *et al.*, 2016).

The EU Member State governments, the European Commission and the ECB took concerted action to counter the risks to the euro arising from the housing related financial crises in the peripheral Member States. Between 2008 and 2011, European countries spent €4.5tn. or 37% of the EU's economic output on financial industry bailouts (Ramsay, 2015; UN Office of the High Commission for Human Rights, 2012). This political intervention did not focus on individual homeloan mortgagors in distress, although some national governments introduced mitigating measures, such as moratoria on mortgage repossessions (Kenna *et al.*, 2016). In July 2012, President of the ECB Mario Draghi announced that the ECB would do "whatever it takes" to preserve the euro. Major EU institutional reform took place through the establishment of the Single Supervisory Mechanism (SSM)(2014) setting up the centralised prudential supervision of the "significant" eurozone banks by the ECB in Frankfurt, covering 82% of banking assets in EU Member States [9]. Consequently, high levels of NPLs (mainly due to mortgage arrears following the crash of 2008–2009), in Eurozone banks, became an object of interest for EU economic governance and banking supervision policy. Meanwhile, the Mortgage Credit Directive (MCD)(2014) had created a new EU harmonized approach to homeloan mortgage lending and consumer protection in the area of credit agreements relating to immovable property [10].

Yet, the legacy of pre-crash lending and debt remained visible as NPLs on the balance sheets of European banks (European Commission, 2019). Council Conclusions of 2017 in the *Action Plan to Tackle Non-Performing Loans in Europe* had called upon various institutions to take appropriate measures to further address the high number of NPLs in the Union and prevent their possible future accumulation (Council of the EU, 2017). Some EU institutions had placed the blame for the non-resolution of NPLs on the slow pace, poor procedures and lack of determination of national judges to order evictions (ECB, 2017a). The European Banking Authority (EBA) expressed similar sentiments that the main impediment to resolving NPLs was the judicial process, with 75% of banks which responded to a survey describing it as lengthy and expensive [11]. ECB *Guidance to banks on non-performing loans* in 2017, building on Article 28 of the MCD, set out clear guidance on NPLs strategies for banks, including a review of the most common forbearance measures and write-offs (ECB, 2017b) [12].

Alongside EU institutional regulatory changes, the Court of Justice of the European Union (CJEU – formerly European Court of Justice - ECJ) had also began to develop some semblance of a European social justice response to the mortgage crisis (Beka, 2018). A number of ECJ decisions had found that unfair contract terms in mortgage contracts were not just a national issue, but were subject to the EU Directive on unfair terms in consumer contracts (UCTD) (Micklitz and Reich, 2014; Kenna and Simón-Moreno, 2019), regardless of whether a judicially or non-judicially supervised mortgage enforcement proceeding is involved [13]. Thus, what had previously been viewed solely as matters of private contract and property law developed along the *lex sitae* lines, in closed national systems, were faced with development of European harmonised mortgage law interpretations drawing on a nexus between EU consumer and human rights law (Kenna, 2019) [14].

In 2017, a new EU strategy of developing secondary markets for NPLs, including sales of NPLs at a discount to non-banks (i.e. outside the ECB supervisory framework of SSM) was advanced (European Commission, 2017). The establishment of State backed Asset Management Companies (AMCs) or "bad banks" in Ireland (NAMA), [15] Spain (SAREB) [16] and Slovenia (DUTB) [17] which had reduced the level of NPLs on so-called "pillar" or significant bank balance sheets, had also introduced US equity funds to the market for distressed property loans, often at "fire sale" prices (European Banking Authority, 2019). The detailed Impact Assessment on the proposed Directive on Credit

Servicers showed that among the largest 10 investors in global distressed debt, nine were domiciled in the US and one in Canada. Steps were taken to broaden the potential investor base for European NPLs. The Summary Impact Assessment on the original draft of the Directive on credit services [18] and suggested that cross-border NPL sales could amount to €103-5bn. The Impact Assessment also found that there were at least 47 loan servicers with assets under management of €508bn in the EU, and that loan servicers were well established in EU Member States, except Cyprus and Malta.

However, even at the time the level of NPLs was reducing, and in absolute terms the highest levels were not just in peripheral countries. ECB Banking Supervisory Statistics showed that at end of 2021 the highest absolute levels of NPLs were in France (€110.9bn.), Spain (€82.43bn.), Italy (€61.21bn.), Germany (€30.63bn.) and The Netherlands (€28.9bn). Yet, somehow most commentary was focused on the highest ratios of NPLs to bank lending in Greece (7%), Cyprus (4%), Portugal (3.8%), Italy and Spain (3%). The majority of NPLs were with non-financial corporations (€209bn) and households (€149.9 bn) (Q4 2021) (European Central Bank, 2022). Most of these NPLs were historic and an EU Regulation in 2019 required Eurozone banks to write off 70% of any NPLs occurring after April 2019, within six years [19] (European Central Bank, 2019).

Into this, complex EU and Member State response to NPLs the Credit Servicers Directive was introduced. The Impact Assessment on the proposed Directive had pointed out that expanding NPLs secondary market required a robust third-party servicing industry to support investment funds participation (European Commission, 2018).

### The credit servicers and purchasers Directive

The Directive, which came into force on 29th December 2021, aims to foster the development of secondary markets for NPLs in the EU. It seeks to remove impediments to the transfer of NPLs by credit institutions to credit purchasers, while at the same time safeguarding borrowers' rights. Member States that previously had different rules for dealing with the sales of NPLs and the servicing of these must now conform to a harmonised procedure for any NPLs transferred under this Directive [20].

The Directive's common framework and requirements for credit servicers and credit purchasers, [21] and authorisation under uniform conditions across the EU, [22] applies only to non-performing credit agreements – it does not apply to sales of performing loans [23]. NPLs sales will be to "credit purchasers", defined as "any natural or legal person that purchases a creditor's rights under a non-performing credit agreement or the non-performing credit agreement itself, in the course of its trade in accordance with applicable Union and national law" [24]. Member States must ensure that credit institutions provide information on creditors, non-performing credit agreements and their collateral to prospective credit purchasers [25]. This information will then inform prospective credit purchasers as to the risks associated with the loan, and how likely they are to recover the security [26].

The EBA has produced a set of technical standards templates for this purpose, which covers data fields on the enforcement status of NPLs to help the prospective buyers estimate time to recovery and recovery value. The templates require information related to jurisdiction of court, currency of enforcement, court appraisal and other relevant information about the "court auction for the specific collateral that may have taken place" [27]. Information is required on mortgage guarantees, including the mortgage amount, higher ranking loan and lien position, information on the contractual loan agreement, including any lease agreement or forbearance measure granted. Other information required includes the asset class to which the loan belongs to, the type of instrument, the legal balance at the cut-off date, loan currency, loan amounts split in principal amount, accrued interest and other balances, days in past-due, date of the default status of the loan. The EBA template also covers information on any legal proceedings at loan level, the stage reached in the legal proceeding and the date of initiation of the legal proceeding [28]. Some indication of how homeloan NPLs might be sold on secondary markets is discernable from the EBA Final Report on the Technical Standards (European Banking Authority, 2022):

> The extended use of the NPL transaction data templates is also expected to widen the investor base and facilitate the work of the existing and emerging NPL electronic auction or transaction platforms […] [29]. Given the level of application of the draft ITS, the transfer of NPL may happen as bilateral transaction between two parties, where the parties may agree on the channels that are most suitable to their needs. Whereas, where credit institutions use electronic auction platforms or electronic transaction platforms to organise the sale or transfer process of NPL, further requirements for the electronic and machine-readable format may be set out by such platforms [30].

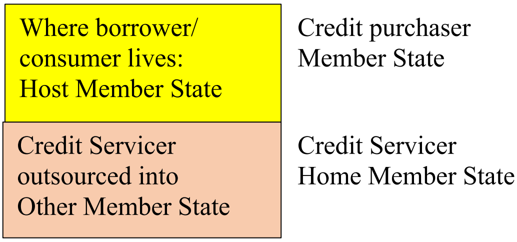
One of the key players from the perspective of consumer and human rights protection in this new framework is the "credit servicer" - defined as "a legal person that, during its business, manages and enforces the rights and obligations related to a creditor's rights under a non-performing credit agreement (or to the non-performing credit agreement itself), on behalf of a credit purchaser" [31]. Credit servicers are required to be authorised by the competent authority [32] (usually Central Bank) of the Member States in which they plan to carry out their activities [33] Where a credit purchaser does not carry on the activities of credit servicing itself, it must appoint a credit servicer through a credit servicing agreement [34]. This contractual relation between credit servicer and credit purchaser is central to the servicing of these NPLs once sold, and must include detailed borrower information [35].

Credit servicers will take over the role of the original lender in dealing with consumers who are in arrears and who may actually be at risk of losing their homes. Because the credit purchaser, the credit servicer and the consumer could very well be in three different EU Member States the system of supervision will become critical in the protection of rights of consumers and homeowners. As shown by Figure 1, the Directive creates a complex regulatory framework relationship whereby a credit service provider may be authorised or "passported" in one Member State, the loans concerned are located in another Member State, while the offices of the credit service provider and the credit purchaser may even be in a third or fourth Member State. While consumers holding the non-performing loans in the original Member State will be protected under domestic consumer legislation, there is an obligatory, but complex, complaints system governing all of these three component Member States [36]. The Directive states that cross-border cooperation among regulatory authorities will remedy any weaknesses in consumer protection, but that arrangement is unlikely to be harmonised for all transactions [37]. Although Member States are obliged to give satisfactory powers to their competent authority to withdraw authorisation if the credit servicer fails to act upon the authorisation or is not carrying out [38], some risks remain.

Member States, through their competent authority, must ensure that authorised credit servicers may carry out servicing activities in any other host Member State by ensuring scope for adherence to relevant national law provisions on authorisation [39]. Competent authorities in home Member States are obliged to review and carry out ongoing compliance of credit servicers in host Member States which it has authorised [40].

**Consumer protection**

EU consumer protection has been developed though many Regulations and Directives and EU consumer policy, set out Article 169 TFEU. Article 12 TFEU also requires consumer protection to be taken into account when defining other EU policies (Howells, Twigg-Flesner and Wilhelmsson, 2019). Recital 56 of the Directive points out that Directives 2008/48/EC




**Source(s):** Authors' own elaboration

**Figure 1.** Potential Member States involved in cross-border regulation

and 2014/17/EU are amended by this Directive to establish that Member States should require creditors to have adequate policies and procedures so that they make efforts to exercise, where appropriate, reasonable forbearance before foreclosure proceedings are initiated. The Directive preserves all existing consumer and civil law protections for borrowers:

> With regard to credit agreements falling within its scope, this Directive shall not effect contract law principles nor civil law principles under national law with regard to the transfer of a creditor's rights under a credit agreement, or of the credit agreement itself, nor the protection granted to consumers or borrowers pursuant in particular to Regulations (EC) No 593/2008 and (EU) No 1215/2012, and Directives 93/13/EEC, 2008/48/EC, 2014/17/EU and the national provisions transposing those Directives or other relevant provisions of Union and national law relating to consumer protection and borrowers' rights. Member States are obliged to ensure ongoing compliance and adequate supervision through competent authorities for credit servicers by transposing the Directive [41].

According to Recital 57 of the Directive, the consumer (no matter the legal nature of the mortgage, i.e. contractual or statutory accessoriness [42]) is entitled to plead against the credit purchaser any defense which was available to the consumer as against the original creditor, and to be informed of the assignment, including set-off rights, where appropriate. This provision is in line with the new Directive 2023 / 2225, of 18 October 2023, on credit agreements for consumers (CCD), [43] to be transposed by 20 November 2025. It seems from the wording of both the CCD and the MCD (amended by the Directive) that the assignment of NPLs requires compulsory notification to the borrower, although it seems that this rarely occurs in actual practice (Jérusalmy, Fox and Hercelin, 2020). As a matter of fact, broadly speaking, the transfer of a security right over immovable property from one holder to another, which may also take place by transfer of the claim, does not require the consent or notification of the debtor in EU countries [44]. Furthermore, the CCD and the MCD do not shed light about whether the assignment shall be valid without such communication, which will be governed by (different) national laws. In addition, it should be noticed that the notification to the borrower does not appear in other parts of the CCD and the MCD. The borrower has the right to be informed of the eventual assignment of the credit, the consequent change in the creditor and the legal effects of the assignment prior to the conclusion of the contract. Accordingly, this possibility must be included within the precontractual information the creditor must provide the borrower before the conclusion of the contract.

Credit purchasers and servicers are required to maintain a relationship with the NPL borrowers in which they act fairly, distribute accurate information, protect borrowers' personal information, and communicate in a way which does not harass or coerce the borrower [45].

Member States must ensure that credit servicers establish and maintain effective procedures for handling borrower complaints [46]. These procedures must be free of charge for borrowers and must record the complaints and measures taken to alleviate the issues – although the need to ensure the complaints system is in the language is not specifically addressed.

The duties implemented by the Directive are a step in the right direction to protect consumer from abusive informal debt collection practices. However, it has been suggested that the EU should have regulated these abusive practices through a dedicated instrument to cover all consumer-related debt collection without limiting itself to specific NPL activities related to or arising from consumer credit (Stănescu, 2021). Indeed, the EU Commission has already acknowledged that the potential impact on highly indebted households is hard to foresee as it will depend on the behaviour of loan servicers [47].

Recital 22 of the Directive provides that Article 47 EUCFR ensures the right to a fair and public hearing by an independent and impartial tribunal and the possibility of being advised, defended and represented by a lawyer. It also states that borrowers who lack sufficient resources should be able to resort to legal aid where that is necessary to ensure effective access to justice and under the conditions laid down by the applicable national law. This is significant in the context that Article 47 EUCFR requires that the operation of EU consumer law be in line with the Charter obligations on fair procedures. Indeed, the *Sanchez Morillo* [48] case placed the principle of effective judicial protection in Article 47 EUCFR into the principle of effectiveness of EU law, particularly concerning the legal protection of over-indebted consumers [49]. CJEU Decisions in 2022 have held that national procedural principles cannot impede the rights that individuals derive from EU law, so that the principle of *res judicata* cannot be used to render meaningless a national court's obligation to examine of its own motion the potential unfairness of contractual terms in a mortgage contract [50].

Significantly, the Directive has strengthened the forbearance measures set out in Article 28 of the MCD. It extends the protection for mortgage borrowers in distress, by inserting the previous "soft law" EBA Guidance set out in Article 28(1) of the MCD into new legally binding provisions [51]. The Directive creates a new Article 28a retrospectively into the MCD which reads:

> 1. Member States shall require creditors to have adequate policies and procedures so that they make efforts to exercise, where appropriate, reasonable forbearance before foreclosure proceedings are initiated. Such forbearance measures shall take into account, among other elements, the consumer's circumstances and may consist of, among other possibilities:

- a total or partial refinancing of a credit agreement;
- a modification of the existing terms and conditions of a credit agreement, which may include among others:
  - extending the term of the credit agreement;
  - changing the type of credit agreement;
  - deferring payment of all or part of the instalment repayment for a period;
  - changing the interest rate;
  - offering a payment holiday;
  - partial repayments;
  - currency conversions; and
  - partial forgiveness and debt consolidation.

There are also protections for consumers when lenders retrospectively modify the terms of loan agreements set out in Article 28. The Directive inserts a new Article 27a into the MCD on the information to be provided regarding the modification of the terms and conditions of a credit agreement [52]. However lenders they are not obliged to negotiate with the borrower before NPLs are assigned. Indeed, one effective way to protect consumer's rights could be to impose on the credit purchaser or credit servicer an active duty to renegotiate the debt, the compliance of which could constitute a procedural requirement for the judicial claim of the debt. However, the broad approach taken by the Directive makes it possible not only to include existing Codes of Conduct or existing debt rescheduling agreements within its scope (Rubio Gimeno, 2022), but in fact to give these legal force.

One significant obligation on the credit servicer is the requirement to issue a statement to the effect that all relevant Union and national law concerning in particular the enforcement of contracts, consumer protection, borrower's rights and criminal law continues to apply. Of course, the value of this information provision is weak if borrowers are unaware of the fact that the assignment of the credit has taken place, and it remains to be seen whether credit purchasers and credit servicers will inform about the borrower about the assignment just before initiating the debt collection. Indeed, this statement will have limited effect without a reference to the actual laws which apply, covering constitutional, human rights and EUCFR rights. For instance, In Ireland, it has been shown that some nine legislative and regulatory measures directly apply to enforcing the security in non-performing loans (Kenna, 2023). This is particularly relevant where credit purchasers/servicers are located outside the EU and are enforcing the security for the NPL within the EU [53].

## Conclusion

The Credit Servicers Directive has the potential to transform the treatment of homeloan NPLs in Europe, but the coherence and effectiveness of the regulatory framework for this novel cross-EU approach has yet to be seen. The sale of loans which security is people's homes through crowd-funding online platforms, and where the buyers may use credit servicers who may be authorized in any EU Member State to deal with the borrower, including taking legal proceedings for eviction seems, far-fetched. But it is the new regime introduced in the EU for NPLs.

Clearly, it will impact on consumer rights, mortgage law and property rights – indeed it impacts on all three simultaneously. BEUC the European Consumer Organisation has warned that market actors will maximise their profits on the back of vulnerable consumers and businesses, and should face restrictions (BEUC, 2018). Pistor describes how property rights are increasingly being coded at a global (especially financial or intangible capital ownership rights). This requires national and local courts and laws to recognize and uphold these codings, policing the boundaries of "private" law, and insulating these codings from local or national political contestation (Pistor, 2019) [54].

Clearly, the Directive has a complex set of information requirements and credit purchasers and credit servicers must comply with all existing consumer and human rights protection available to the borrower. It has given legal force across the EU to a range of forbearance measures which in many cases alter the mortgage contract in favour of the consumer – in some ways recognizing it as a relational contract (Rutgers, 2017). When combined with EU economic governance and banking supervision measures, CJEU consumer law precedents and the application of the EU Charter of Fundamental to the interpretation of the EU law, it does indeed advance the rights of homeloan borrowers (Kenna, 2020). All these development are in line with the Report by the European Parliament on access to decent and affordable housing for all in Europe (European Parliament, 2020; UN 2021).

But while such existing and new consumer and human rights are preserved, the whole process of EU-law backed sales of NPLs creates another layer of complexity for local courts to navigate in seeking to uphold these rights. This requires a knowledge of how EU provisions impact on property, consumer and housing rights in national courts and the points when EUCFR and other rights can be applied [55]. It is questionable whether the level of information and training is available across the EU for local courts to effectively protect these rights.

Indeed, while ECB supervision of mortgage lending and lenders, retrospective modification of mortgage terms and contracts, overruling of the doctrine of *pacta sunt servanda* and a powerful role for consumer rights are taking place, further constitutionalisation of European private law is often resisted (Perriello, 2018). While Article 345 TFEU provides that the Treaties "shall in no way prejudice the rules in Member States governing the system of property ownership" nothing prevents the EU from acting in the area of housing, contract, mortgage and property law on the basis of art. 114 TFEU [56] (the Directive takes this article as a starting point according to its Preamble) when advancing the fundamental freedoms of the Treaties, the Single Market and the supervisory powers of the ECB. Significant changes in national property, mortgage, contract and housing law are taking place through the multi-level economic governance framework of the EU. Because EU law takes primacy national laws under the Treaties, national courts and legislatures were obliged to reform their property, mortgage and banking systems [57].

It is important to recognise the life time nature of homeloan mortgages, even when described as NPLs by the EU institutions, because this type of loan engages many rights in relation to home, but also is essentially often the only means of securing one of life's essential requirements. The protections outlined in the Directive fail to convey this long term or Life time Contract relationship between the lender and the borrower.

Yet, it is important to remember that this Directive is but one measure for dealing with mortgage arrears. Ms Irene Tinagli, MEP, ECON Committee Chair and Co-Rapporteur who presided over the Committee Stage of the Directive pointed out that the sale of NPLs was only one method of dealing with these:

> […] managing NPLs doesn't necessarily mean selling them. First of all, it means that creditors must apply all necessary measures and concessions so that the debtor can return to pay. Even if their sale becomes necessary, it is essential that the secondary market for NPL is more solid and regulated than the current one. A truly efficient secondary market for NPLs can only exist if it goes hand in hand with the preservation of financial stability and with the highest possible level of borrowers' protection, both households and businesses. This is what we aim to do […] [58].

**Notes**

1. OJ L 438, 8.12.2021, p. 1–37.
2. Life Time Contracts are promoted by the European Social Contract Group (EUSoCo): www.eusoco.eu/?p=1012. On the concept of Life Time Contracts see Nogler and Reifner (2018).
3. Fineman, 2008-2009 argued that vulnerability is universal, constant and inherent in the human condition. As a result of this, the "vulnerable subject" should be the focus of State policy rather than the liberal legalist autonomous independent subject.
4. See Ondersma, 2016. See also Benohr, 2013. They suggested that the inclusion of consumer protection will be pursued as an autonomous social objective of the EU and recent Directive on

consumer rights expressly refer to the fundamental rights and principles recognised by the EUCFR.

5. The Shift (2022) *Directives – From Financialised to Human Rights-Based Housing*. Available at: https://make-the-shift.org/ (accessed 19 July 2024).

6. See *Explanations to the Charter of Fundamental Rights* (OJ 2007/C 303/02), 7. Article 52(7) EUCFR states: "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."

7. ECtHR, *McCann v. the United Kingdom*, Appl. No. 19009/04, judgement of 13 May 2008, para. 50.

8. Non-performing loans or exposures are those that satisfy either of the following criteria: (a) material exposures that are more than 90 days past due; and (b) the debtor is assessed as unlikely to pay its credit obligations in full without realisation of collateral, regardless of the existence of any past due amount or of the number of days past due. Regulation (EU) 575/2013. See EBA, 2014.

9. Council Regulation 1024/2013 (SSM Regulation). O.J. L287, 29 October 2013, 63–89. Available at: www.bankingsupervision.europa.eu/about/thessm/html/index.en.html (accessed 19 July 2024). Since 2014, EU measures provide Member States with a set of macroprudential instruments to mitigate systemic risk in the banking sector by creating "buffers" or reserves to be held by banks. See Directive 2013/36/EU and Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms. Subsequent macroprudential measures taken by most Member States since 2015 involve restrictions of bank mortgage lending based on loan-to-value and loan-to-income, a situation which limits first time home ownership to the more affluent. See Whitehead and Williams, 2017.

10. Directive 2014/17/EU Preamble 5. The Directive led to the adoption of a standardized European Standardised Information Sheet (ESIS) which must provide specific information to borrowers, to allow them to compare offers from different credit providers, a 7 day "cooling off" period, and information on early repayment. Article 28 set out a range of forbearance measures which lenders were obliged to undertake before taking legal action to repossess homes with mortgage arrears. See also European Commission, 2021.

11. For an up to date review of national measures see Visser, Breedeweld and Hasnaoui, 2022.

12. "NPL write-off: In certain cases, as part of a forbearance solution, banks may proceed with a forbearance option that involves NPL write-off, either on a partial or full basis" (Para 3.5.3).

13. Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J. L 095, 21 April 1993. See Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya*, ECLI:EU:C:2013:164. For a non-judicially supervised mortgage enforcement proceeding, see Case C-598/21 *P, CI, v Všeobecná úverová banka a.s.*, ECLI:EU:C:2023:845. About the different models of enforcement proceedings, see Visser, Breedeveld and Hasnaoui, 2022.

14. This was aptly described the Opinion of AG Medina in Case C-598/21 *SP, CI v Všeobecná úverová bank*a, (12 January 2023). "Since the financial crisis, EU law has provided a more robust framework for consumer protection in the field of credit secured by immovable property. Meanwhile, the Court has developed an important line of case-law on the procedural protection of consumers which is also reflected in the field of housing repossession proceedings. That case-law reflects the constitutionalisation of consumer contract law. The secondary legislation serving as the 'nexus' between procedural law, consumer law and the Charter of Fundamental Rights of the European Union ('the Charter') is Directive 93/13/EEC".

15. www.nama.ie

16. www.sareb.es

17. www.reuters.com/article/markets/slovenia-s-bad-bank-sees-first-bad-debt-transfer-june-28-idUSL5N0EU1I9/ (accessed 19 July 2024).

18. "Proposal for a directive on credit servicers, credit purchasers and the recovery of collateral", European Commission, COM(2018)135Final. Available at: https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-135_en (accessed 19 July 2024).
19. Regulation (EU) 2019/630 of 17 April 2019 amending Regulation (EU) No 575/2013 as regards minimum loss coverage for non-performing exposures (OJ L111, 25.4.2019).
20. European Parliament News, *Non-performing loans: vote on EU rules for selling NPLs to third parties*. Available at: www.europarl.europa.eu/news/en/press-room/20210111IPR95312/non-performing-loans-vote-on-eu-rules-for-selling-npls-to-third-parties (accessed 19 July 2024).
21. Article 3(4).
22. Article 1 (a) and (b).
23. A Credit Agreement means an agreement as originally issued, modified or replaced, whereby a credit institution grants a credit in the form of a deferred payment, a loan or other similar financial accommodation (Article 3(4).
24. See TITLE II and Article 3(6).
25. Article 15 (1).
26. Article 15 (1).
27. European Banking Authority (2022) *Final Report – Draft Implementing Technical Standards* EBA/ITS/2022/05.
28. Ibid.
29. Ibid., p. 5.
30. Ibid., p. 11.
31. Article 3 (8).
32. Article 4 (2).
33. Article 4 (1).
34. Article 11 (1).
35. Article 11 (2).
36. Article 24.
37. Article 5 (1)(b)(iv).
38. Article 8 (1).
39. Article 13 (1).
40. Article 14 (1).
41. Article 2(2).
42. Statutory accessoriness is present in Spain, Portugal or France, whereas contractual accessory mortgages are regulated for instance in Germany or Switzerland. Accordingly, the new holder of the NPL takes the legal position of the transferor either by operation of law (statutory accessoriness) or by entering into an agreement with the debtor that links the debt with the security right (contractual accessory mortgages). Non-accessory mortgages facilitate the credit purchaser and the borrower to secure more claims under the existing security right after the assignment has taken place, but problems may arise if the secured claim is assigned to one holder and the security right to another. The protection here does not come from property law rules, but

from contract law rules, *i.e.* mortgage borrowers should be able to make the contract binding to the holder of the security right. The German Civil Code (www.gesetze-im-internet.de/bgb/index.html, accessed 26 February 2025) has addressed this problem in § 1192.2 ("(1a) If the land charge has been established as security for a claim (security land charge), defences to which the owner is entitled with regard to the land charge on the basis of the security contract with the previous creditor, or which emerge from the security contract, also may be imposed on any acquirer of the land charge; section 1157 sentence 2 does not apply in this respect. Section 1157 remains unaffected in other respects"). Be that as it may, in all EU Member States the security right over immovable property can only be enforced if the secured claim can also be enforced (https://app.vdpgrundpfandrechte.de/dashboard/, accessed 26 February 2025).

43. O.J. 2023, L 2023/2225. Preamble 86 and Article 39.

44. <https://app.vdpgrundpfandrechte.de/dashboard/> (accessed 26 February 2025).

45. Article 10.

46. Article 24 (1). Competent authorities must also establish and publish procedures for handling complaints from borrowers, credit purchasers and credit servicers. Article 24(3).

47. Impact Assessment, *The development of secondary markets for non-performing loans* (14.3.18), p. 77.

48. Case C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2014:2099.

49. See van Duin, 2017. The author argues that the Kušionová and Sánchez Morcillos cases show 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."

50. Case C-600/19 *Ibercaja Banco;* Joined Cases C-693/19 *SPV Project 1503*, C-831/19 *Banco di Desio e della Brianza and Others:* Joined Cases C-725/19 *Impuls Leasing România* and C-869/19 *Unicaja Banco* [2022].

51. Section 28(1) MCD states: "Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated."

52. "Without prejudice to other obligations provided for in this Directive, Member States shall ensure that, prior to modifying the terms and conditions of the credit agreement, the creditor communicates the following information to the consumer: (a) a clear description of the proposed changes and, where applicable, of the need for consumer consent or of the changes introduced by operation of law; (b) the timescale for the implementation of the changes referred to in point (a); (c) the means for complaint available to the consumer regarding the changes referred to in point (a); (d) the time period available for lodging any such complaint: (e) the name and address of the competent authority to which the consumer can submit that complaint".

53. Kenna, 2020; Kenna *et al.*, 2016.

54. Pistor suggests that creating or understanding these codings requires a knowledge of the common law of England and Wales, or law of New York State.

55. For instance, Irish courts have interpreted the constitutional protection of property rights of the "citizen" to include both natural and legal persons, including a company registered outside the jurisdiction, even in an offshore tax haven. See also Domurath, 2017.

56. According to Akkermans, 2011, this article "can be used to remedy deficiencies with the internal market where there is a substantial hindrance to its functioning".

57. Case C-415/11 led to a major revision of Spanish mortgage law. See Kenna and Simón-Moreno, 2019.

58. European Parliament News: Non-performing loans: vote on EU rules for selling NPLs to third parties. www.europarl.europa.eu/news/en/press-room/20210111IPR95312/non-performing-loans-vote-on-eu-rules-for-selling-npls-to-third-parties. Significantly, the references to the

Accelerated Extrajudicial Collateral Enforcement (AECE) whereby lenders could enforce the security on a loan (including on a home) without any judicial oversight, were dropped from earlier drafts of the Directive.

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