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**DOI**

[10.1111/1468-2230.12557](https://doi.org/10.1111/1468-2230.12557)

**Publication date**

2020

**Document Version**

Final published version

**Published in**

The Modern Law Review

**License**

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**Citation for published version (APA):**

Domurath, I., & Mak, C. (2020). Private Law and Housing Justice in Europe. *The Modern Law Review*, 83(6), 1188-1220. <https://doi.org/10.1111/1468-2230.12557>

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# Private Law and Housing Justice in Europe

Irina Domurath and Chantal Mak\*

This article explores the different meanings of the right to housing in Europe in public and private relations with housing providers. In light of the fundamental right to housing's meaning in the case law of the European Court of Human Rights and the Court of Justice of the European Union, we offer a new reading of the CJEU judgments that have hitherto been heralded as extending the social dimension of EU (private) law. We submit that the emphasis on economic and procedural rights risks further 'economisation' of housing relations in Europe. While the possibilities to grant direct horizontal effect to the right to housing in EU law currently offer limited potential to counter this trend, private law provides part of the framework for a further balancing of social and economic elements in housing cases. Accordingly, we call for a debate on the specific aspects of horizontal relationships in the complex system of housing justice.

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## THE RIGHT TO HOUSING AND THE EUROPEAN COURTS

As the provision of housing in many European countries has gradually shifted from public authorities to the private sector, the question has arisen of how to achieve housing justice in private law. Considerations on safeguarding the access, quality, and security of housing increasingly appear in cases governed by private law regarding the legal relationships between private actors, rather than public law concerning the relationship between citizens and the state. The importance of this shift became visible in the wake of the European economic crisis of 2008, when many homeowners were evicted from their houses due to default on their mortgage payments. The famous Spanish case of *Aziz*, brought before the Court of Justice of the European Union (CJEU) was one of many disputes in Europe<sup>1</sup> raising the question of how private law could contribute

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<sup>†</sup>The research for this article was made possible by generous grants of the National Council of Science and Technology Chile, Fondecyt Project No. 3190236 (Domurath), and the Dutch Research Council, NWO Vidi 2014 'Judges in Utopia' (Mak).

- 1 For overviews, see B. Kas, 'European Union Litigation' (2015) 11 ERCL 51, 55–57; P. Hacker and B. Kas, 'European Union Litigation' (2019) 15 ERCL 340, 354–357; B. Kas and H.-W. Micklitz, 'Rechtsprechungübersicht zum Europäischen Vertrags- und Deliktsrecht (2014–2018) – Teil I' (2018) *Europäisches Wirtschafts- und Steuerrecht* 181.

to the protection of housing rights. It was the first in a line of cases in which the CJEU mentioned the special status of the ‘home’.<sup>2</sup>

The emerging role of the CJEU in the field of housing adds a new dimension to protection of housing rights in Europe.<sup>3</sup> The CJEU is relatively new to addressing rights to housing, while the European Court of Human Rights (ECtHR) has dealt with a European right to housing for a long time.<sup>4</sup> The ECtHR’s broader competence regarding the protection of human rights may in part account for this. The Court can assess the compliance of the entire legal systems of State Parties to the European Convention of Human Rights (ECHR). The CJEU’s competence is, in contrast, confined to the scope of EU law, addressing targeted areas and including housing law only to a limited extent.<sup>5</sup> As housing lies outside of the scope of EU law, housing interests are dealt with indirectly, for example through the regulation of consumer credit and unfair contract terms. In this way, they also have an impact on European private law. The new role of the CJEU and European private law make a ‘European right to housing’ a challenging and topical research theme worth exploring.

Despite the shift from public to private housing provision, the private dimension of housing rights remains under-researched, especially concerning the meaning of the right to housing, conceived as a human right under the ECHR and the EU Charter of Fundamental Rights (ChFR). The reliance on a fundamental right to housing is less self-evident on private markets than in cases in which the state directly provides housing, insofar as fundamental human rights are in the first place meant to protect citizens against the state.<sup>6</sup> To be sure, researchers such as Lilleholt<sup>7</sup> and Rutgers<sup>8</sup> have started debates on the effects of the right to housing in private legal relationships. However, it remains unclear whether and how the content of the right to housing *changes* when it is transferred from the public to the private sphere.<sup>9</sup> This contribution aims at filling this gap by examining the following questions. What is the content of housing rights in private law relationships? How does this differ from the impact

2 Case C-415/11 *Aziz v CatalunyaCaixa* ECLI:EU:C:2013:164 (*Aziz*) at [61].

3 A further reason for examining the ECtHR and CJEU case law on housing together is that the courts can find mutual inspiration in each other’s judgments, see T. Lock, *The European Court of Justice and International Courts* (Oxford: OUP, 2015) ch 4, ‘The Court of Justice and the European Court of Human Rights’.

4 See further the cases discussed below, in the sections headed ‘Quality of housing: adequacy’, ‘Security of tenure and evictions’ and ‘The right to housing’s meaning in European private law’.

5 Initiatives of the EU are, however, not oblivious to the importance of the right to housing. The EU Commission has, for example, as part of its Urban Agenda, an interest in policies and frameworks that foster access to adequate housing and, in this way, contribute to social cohesion within the EU; see [https://ec.europa.eu/regional\\_policy/en/policy/themes/urban-development/agenda/](https://ec.europa.eu/regional_policy/en/policy/themes/urban-development/agenda/).

6 H. Collins, ‘The Impact of Human Rights Law on Contract Law in Europe’ (2011) 22 *European Business Law Review* 425.

7 K. Lilleholt, ‘The Right to Housing and its Impact on Contract Law’ in K. Ketscher et al (eds), *Velferd og rettferd. Festschrift til Asbjørn Kjønsdal 70 år* (Oslo: University of Oslo, 2013) 363–374.

8 J.W. Rutgers, ‘The right to housing (Article 7 of the Charter) and unfair terms in general conditions’ in H. Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Antwerp: Intersentia 2017) 125–137.

9 cf H. Collins, ‘On the (In)compatibility of Human Rights Discourse and Private Law’ in H.-W. Micklitz (ed), *Constitutionalization of European Private Law* (Oxford: OUP, 2014) 26, 35–36.

of housing rights on public law relationships? To what extent does this balance out the social and economic components of the right to housing?

By answering these questions, this contribution seeks to fill two gaps. First, it identifies the right to housing's meaning in private legal relationships, thus furthering the emerging debates on housing justice in European private law. Second, examining economic and social elements of the right to housing, it puts the legal debates into the context of political economy. In this way, we are able to understand the legal implications of continuous privatisation of housing sectors and analyse the impact privatisation can have on housing justice through the right to housing.

Against this backdrop, the article is divided in six parts. First, we sketch the privatisation of housing and identify the salience of private law. Second, we introduce an understanding of the right to housing for the purposes of this contribution and the theoretical framework within which we will assess the cases. Here, we also elaborate on the economic and social dimensions of housing rights in Europe. Then, we analyse the content of the right to housing in the case law on public and private legal housing relationships in the three dimensions of access, quality and affordability, and security of tenure. We subsequently elaborate on the implications of the case law analysis. In light of the right to housing's meaning in the case law of the ECtHR and the CJEU, we offer a new reading of the CJEU judgments that have hitherto often been heralded as further extending the social dimension of EU (private) law and hold that the emphasis on economic and procedural rights poses the risk of a further economisation of the right to housing. Giving direct horizontal effect to this right in EU law may not be able to fully counter this trend. Still, we do see a role for private law in safeguarding homeowners' and tenants' interests in relation to those of private housing providers. Accordingly, we call for a debate on the specific aspects of horizontal relationships in the complex system of housing justice.

## PRIVATE LAW AND HOUSING JUSTICE

### The expansion of private housing markets and the salience of private law

The importance of the home as a 'necessity of life'<sup>10</sup> and as protecting 'some of the most fundamental human needs'<sup>11</sup> has long been recognised. The home provides shelter, a place to live, and a safe base from which to engage with the life of a community and the state.<sup>12</sup> As such, secure housing provides a space for psychological and personal development and is fundamental for the protection of the community and a sense of belonging<sup>13</sup> – the home provides 'a tangible,

10 P. Kenna, 'International Instruments on Housing' (2010) 2 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 11, 11.

11 J. Hohmann, *The Rights to Housing. Law, Concepts, Possibilities* (Oxford: Hart Publishing, 2013) 4.

12 *ibid*, 4; P. Kenna, 'Human Rights and Housing' in *International Encyclopedia of Housing and Home* (Amsterdam: Elsevier, 2012) 703.

13 Hohmann, *ibid*, 4-5; Kenna (2012), *ibid*, 703.

worldly place of one's own', or 'a hiding place from the common public world', in Hannah Arendt's words.<sup>14</sup> Accordingly, human rights law has addressed states' obligations to protect people's right to housing.<sup>15</sup>

The protection of the right to housing, however, is not only dependent upon public authorities, but is increasingly becoming part of the private sector as well. Accordingly, the regulation of housing has an inherent double nature, deriving from its connection to the economic system as well as public welfare.<sup>16</sup> In fact, in the last decades, housing sectors in Europe have undergone substantial structural changes. Private housing markets in many European countries have expanded. With the retreat of welfare states, shrinking public budgets, and the implementation of austerity measures, countries have increasingly withdrawn from the provision of public or social housing.<sup>17</sup> Less social housing is constructed and existing social housing stock is sold to and increasingly managed by private parties. In parallel, private rental markets have expanded.<sup>18</sup> States have also encouraged private home ownership through easier access to mortgage credit. As a result of these developments, the share of owners with a mortgage has increased at the expense of owners outright, and the share of tenants who rent at market prices has increased at the expense of tenants paying reduced ('social') rents.<sup>19</sup> This shift towards increased reliance on private markets also entails a shift in the types of legal transactions concerning housing. Public legal relationships are increasingly replaced by private legal relationships.

For the purposes of this contribution, we understand as public legal relationships vertical ones between an individual and an entity that has been entrusted with the provision of housing by some kind of state authority, including the direct provision of housing through the state or an entity under substantial public control. This also includes private landlords who allocate housing according to some kind of conception of 'need' and who are under substantial government control.<sup>20</sup> These relations usually unfold with regard to social housing, where the owner is an entity (public or private) governed by public law, more specifically obligations derived from the state and social entitlements and fundamental human rights of citizens.

In contrast, in private legal relationships, housing is provided by private landlords. There are, for example businesses or private housing corporations that deal with private owners and tenants. Understanding the right to housing broadly, in our analysis we also include relations between creditors and debtors, particularly

14 H. Arendt, *The Human Condition* (Chicago, IL: The University of Chicago Press, 2nd ed, 1958, 1998) 70–71.

15 Hohmann, n 11 above, Part I; Kenna, n 10 above, and Kenna, n 12 above.

16 W. Smith, *Housing – The Social and Economic Elements* (Berkeley, Los Angeles, CA, London: University of California Press, 1971) 10–14.

17 Housing Europe, *The State of Housing in the EU 2017* (Brussels: Housing Europe, European Federation of Public, Cooperative and Social Housing, 2017).

18 C.U. Schmid, *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe Analysis of EUs role Towards a European Role in Tenancy Law and Housing Policy?* (Bremen: University of Bremen, 2015).

19 Housing Europe, n 17 above, 16.

20 Here, we follow a distinction also made by: D. Cowan and M. McDermont, 'Obscuring the Public Function: A Social Housing Case Study' (2009) 61 *Current Legal Problems* 160; M. Harloe, 'The social construction of social housing' (1993) *Urban Research Working Paper* 34.

mortgage contracts, when the creditor enforces their right to the repayment of credit through the residence that was pledged as a security. In those cases, the housing interest of debtors lies in the continuation of their living situation in their own property (security of tenure). This clashes with the contractual enforcement rights of landlords or financial institutions and their interest in upholding contractual obligations. Legally, these relations are horizontal ones between non-public actors considered to be in a position of (formal) equality.<sup>21</sup> We also include here the broader regulation<sup>22</sup> of private housing markets, including privatisation measures (the right to buy), the regulation of private housing markets (rent control), or the procedural rules governing the enforcement of mortgage contracts. Even though this is technically speaking (market) regulation, we include it in our analysis of private housing relationships because it still allows parties the freedom to decide whether or not to conclude a contract, on which terms (within some limits), and how to enforce it (in accordance with national procedural law). So, privatised housing sectors are organised through a regulatory framework within which contracts determine the rights and obligations of owners vis-à-vis other owners (in a cooperative), owners and tenants, or creditors and debtors.

### **Economic and social functions of the right to housing**

Many of the problems inherent in the right to housing and privatisation processes on housing sectors are connected to the nature of housing as both a social and economic good. Housing espouses many functions and necessities, ranging from physical shelter, a space for privacy and identity, interest in spatial and social quality, a social and cultural unit, and investment.<sup>23</sup> On the one hand, through commodification, where home ownership is considered a financial asset, housing is a repository of capital appreciation for occupiers.<sup>24</sup> Legally, housing is then considered a consumer and property right.<sup>25</sup> Therefore, the right to property plays a role as well as contract law. Moreover, in this political economy, access to housing often depends on access to loans, which transforms housing relations into creditor-debtor-relations that only indirectly affect the right to housing, for example when the home is offered as a security for repayment.<sup>26</sup> On the other hand, the right to housing cannot not merely be regarded a proprietary right,

21 The same distinction is adopted by D. Leczykiewicz and S. Weatherill, 'Private Law Relationships and EU Law' in D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford: Hart Publishing, 2013) 1, 2.

22 As civil legal scholars, we refer to 'regulation' broadly, encompassing the whole realm of 'legislation, governance and social control'. See G. Majone, 'The Rise of the Regulatory State in Europe' in R. Baldwin et al (eds), *A Reader on Regulation* (Oxford: OUP, 1998).

23 See Smith, n 16 above, 3-10; also L. Fox, *Conceptualising Home – Theories, Laws and Policies* (Oxford: Hart Publishing, 2007) 146 et seq.

24 Fox, *ibid*, 147.

25 Kenna, n 12 above.

26 The topic of financial inclusion and expansion of credit is outside of the scope of this contribution. For further reference, see. I. Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Oxford: Hart Publishing, 2017), G. Comparato, *The Financialisation of the Citizen – Social and Financial Inclusion through European Private Law* (Oxford: Hart Publishing, 2018).

because the protection it affords is inherently connected to personal welfare.<sup>27</sup> Housing is central to community life, participation in employment opportunities, healthcare and school services.<sup>28</sup> This includes *culturally* adequate housing, enabling the expression of cultural identity and diversity.<sup>29</sup> Here, the right to non-discrimination can be pivotal. Understood in this way, housing carries an inherent social function that is connected to welfare.

The economic and social functions of housing should not be understood as a dichotomic view of the right to housing, but rather as constitutive elements that can be more or less pronounced in certain cases. Thus, when talking about housing as a social or economic right, we refer to its ideal form, without denying the existence of other elements. What we are interested in is how the different elements of the right to housing play out in public and private housing relationships in order to identify the possible change of emphasis of the right to housing when moving from the public to the private realm.

### LEGAL FRAMEWORK AND CASE SELECTION

The legal framework for our exploration is formed by the expression of the right to housing under the ECHR and under relevant provisions of EU law. Even though a specific right to housing is not included in these legal instruments, there are clear points of reference, which are regarded as forming a ‘right to housing’. For example, the respect for private life, family life, and the ‘home’ in Article 8 ECHR is considered to include housing rights.<sup>30</sup> The ‘home’ is defined by ‘sufficient and continuing links’ of an individual with a place.<sup>31</sup> The classification of a ‘home’ is ‘independent of the question of the lawfulness of the occupation under domestic law’,<sup>32</sup> so that protection through Article 8 ECHR does not depend on property rights or present occupation but on a more functional understanding of a place serving as a ‘home’.<sup>33</sup> Moreover, the ECtHR has ruled that – in the light of Article 1 ECHR – the obligation of states to ‘respect’ the right to a private and family home requires states to ‘secure’ Convention rights.

In EU law, Article 7 ChFR states that everyone has the right to respect for his or her private and family life, home, and communications. Article 34 (3) ChFR states that the ‘Union recognises and respects the right to social and housing assistance’ in order to combat social exclusion and poverty. Secondary legislation gives further effect to these provisions.

27 S. Nield, ‘Article 8 respect for the home: A human property right?’ (2013) 24 *King’s Law Journal* 147, 170.

28 Kenna, n 12 above, 704.

29 See UN Doc.E/1991/23. (1991) UNCESCR. *General Comment No 4. The Human Right to Adequate Housing*, also: Fox, n 23 above, 173 et seq.

30 Kenna, n 12 above.

31 See *Gillow v UK* (1986) 11 EHRR 335; *Blecic v Croatia* (2005) 41 EHRR 13; *Zehentner v Austria* (2011) 52 EHRR 22.

32 *Yordanova & others v Bulgaria* [2012] ECHR 758 (*Yordanova*) at [103]; *Chapman v UK* (2001) 33 EHRR.

33 Nield, n 27 above, 149.

Given the plurality of the terms used to frame housing interests, our analysis is based on a broad preliminary understanding of the ‘right to housing’. In our database search for cases we have thus included terms such as ‘right to a home’,<sup>34</sup> ‘right to accommodation’ or ‘right to housing’. Casting the net wide, we also include cases in which a party relies on the ECHR, EU law, or a combination of the two, or another right in order to pursue a housing interest. These housing interests can also be based on the right to non-discrimination and the right to property. In order to form a holistic picture of the right to housing, we also include cases in which housing interests are not legally articulated by reference to a specific housing right, but form the basis of the case, such as in mortgage enforcement and eviction proceedings. Here, the right to housing requires protection of rights through adequate procedural safeguards, affordable and impartial legal and non-legal remedies.

By focussing on cases before the ECtHR and the CJEU, we emphasise the European dimension of the right to housing irrespective of the concrete legal and judicial path taken by an individual. Thus, we take the perspective of the individual tenant or debtor, who can rely on both European human rights law and EU law in order give effect to a specific housing interest.

In our analysis of the case law, the right to housing will be conceptualised along the lines of three dimensions: access to a home; adequacy of that home, including affordability; and security of tenure, including protection from evictions. Taken together, these three dimensions offer a comprehensive view of housing relations from their inception to their termination and an analytical lens through which to examine the content of the right to housing.<sup>35</sup>

## ACCESS TO HOUSING

We first look into access to housing. This dimension is concerned with the possibility to access a residence in the social or private housing sector. Access to finance in order to buy or rent a home is equally important in this regard.<sup>36</sup> Also the right to property and right to non-discrimination can play a role. For example, in EU law, Article 34 (3) ChFR is given effect through secondary legislation concerning material reception conditions for asylum seekers, including

34 For a conceptualisation of the ‘home’ in the human rights framework, see Fox, n 23 above, 453 et seq.

35 The European Parliament sees the right to housing in terms of accessibility, affordability for low-income households, and quality, thus neglecting the third dimension of security of tenure, see Directorate General for Research, ‘Housing Policy in the EU Member States’ Working Document Social Affairs Series - W 14 - 1996.

36 Therefore, the Consumer Credit and Mortgage Credit Directives deal with the facilitation of available consumer and mortgage credit, see Preamble 4 CCD, Preamble 2 MCD; see Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133 22.5.2008, 66; and Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ L 060 28.2.2014, 34. There is, however, no right to credit per se.

financial housing assistance for long-term residents, Directive 2003/9<sup>37</sup> and Directive 2003/109 concerning third-country nationals.<sup>38</sup>

The question here is to what extent the two courts interpret the right to housing as the right to obtain housing from public or private providers. With regard to public providers the right to housing might be used to oblige them to provide housing. In contrast, we will see that such obligations do not exist for private providers. There, the right to housing is merely effectuated indirectly through the right to buy and the right to financial assistance.

### Public legal housing relationships: limited state obligations

The ECtHR has stated on several occasions that Article 8 ECHR does not give a right to an accommodation per se.<sup>39</sup> This is settled case law. Positive state obligations concerning access to housing only arise in very specific, limited cases.<sup>40</sup> For example, in *Fadeyeva v Russia*,<sup>41</sup> a case concerning pollution, the state had to provide an alternative residence. This can be seen as a positive, albeit minimal, obligation for states to provide housing, depending on prior causation of a situation that deprives an individual of the enjoyment of their home.

Furthermore, in a line of cases concerning gypsy families in the UK,<sup>42</sup> the Strasbourg Court has ruled that the states have to facilitate the gypsy way of life, which includes not only the right to have a certain kind of home but also the right to maintain their cultural identity and life in accordance with their tradition as a minority and vulnerable community that needs special protection. Even though those cases concerned evictions, they tie in with the access dimension of housing as well. Together with the right of non-discrimination of marginal groups in society, the ECtHR reiterates that Article 8 rights are crucial 'to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community'. As a consequence 'the disadvantaged position of the social group to which the applicants belong' must be taken into consideration, for example, in assisting them to obtain officially the status of persons in need of housing which would make them eligible for the available social dwellings on the same footing as others'.<sup>43</sup> Even though state parties do not have to provide housing per se, they have positive duties to provide vulnerable groups with assistance to

37 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003, L 31/18.

38 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004, L 16/44.

39 *Marzari v Italy* ECtHR 4 May 1999.

40 *O'Rourke v United Kingdom* ECtHR 26 June 2001.

41 *Fadeyeva v Russia* (2007) 45 EHR 10. Also state courts have held that local authorities are in breach of Article 8 ECHR because of a failure to provide adequate accommodation in unique cases of special vulnerability of the applicants, see *R (On application of Bernard) v Enfield LBC* and *O'Donnell v South Dublin County Council* [2016] UKSC 28.

42 *Buckley v United Kingdom* (1997) 23 EHR 101 at [76], [80], [84]; *Chapman v United Kingdom* (2001) 33 EHR 399 at [96]; *Connors v United Kingdom* (2005) 40 EHR 189 at [84].

43 *Yordanova* n 32 above at [132], [144].

ensure that they effectively enjoy the same rights as the majority of the population.<sup>44</sup> However, state obligations to provide alternative housing are confined to 'exceptional cases'.<sup>45</sup> The ECtHR recalls the states' broad margin of discretion and observes that Gypsies and Travellers do not have the right to park their trailers on specific sites.<sup>46</sup> Also the availability of procedural safeguards matters here. For example, in *Chapman v UK*, the ECtHR concluded that the applicant's predicament was given proper regard in the regulatory framework and that adequate procedural safeguards had already protected her interests under Article 8.<sup>47</sup>

The right to non-discrimination also plays a role in EU law. While obligations to provide housing do not exist in EU law, Article 34 (3) ChFR acknowledges that some individuals need financial assistance in order to afford housing. The non-discrimination principle ensures that third-country nationals who can be considered sufficiently integrated – as reflected in their long-term residential status – must be treated in the same way as nationals. This was the issue in *Kamberaj*,<sup>48</sup> where an Albanian national with an indefinite residence permit in Italy was denied housing benefits because the funds for those benefits were exhausted. Mr Kamberaj complained that this resulted in an unjustified discrimination between third-country nationals and Union citizens. The CJEU agreed and ruled that Article 11(1) lit (d) Directive 2003/109/EC concerning third-country, long-term residents precludes the different allocation of housing benefits between third-country nationals with long-term resident status and nationals. So, the exhaustible quota for third-country long-term residents violated EU law.<sup>49</sup>

### Private legal housing relationships: access to private housing markets

With regard to access to housing on private markets, we only found two cases that could fall into this category, one concerning the right to financial allowances to access private rental markets and one concerning the right to buy. In *Saciri*,<sup>50</sup> a family that had sought asylum could not be provided with public accommodation and was unable to find private housing. The CJEU clarified that the goal of financial allowances to ensure a dignified standard of living also permeates private markets. With regard to Directive 2003/09/EC laying down minimum standards for the reception of asylum seekers,<sup>51</sup> it decided that

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44 *ibid* at [129].

45 *ibid* at [130].

46 *Buckleley v UK* n 42 above; *Chapman v UK* n 42 above.

47 *Chapman v UK ibid* at [114]. However, seven dissenting judges had argued that Article 8 ECHR does impose positive obligations on states to ensure that Gypsies have the practical and effective opportunity to enjoy their right to a home in line with their traditional lifestyle.

48 Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* ECLI:EU:C:2012:233 (*Kamberaj*).

49 *ibid* at [93].

50 Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others* ECLI:EU:C:2014:103 (*Saciri*).

51 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6 February 2003.

where a Member State has decided to provide material reception conditions in the form of financial allowances, those allowances must enable the recipient to obtain housing, if necessary also on private rental markets.<sup>52</sup> At the same time, the CJEU confirmed that it was not up to the recipients to make their own choice of housing.<sup>53</sup>

The interest of access to housing was also at stake in *James v UK*.<sup>54</sup> The UK Housing Act 1980 had introduced the right to buy in order to extend private home ownership. This led to a growth of private housing markets at the expense of the social housing sector. The trustees of 2,000 houses in London complained that, under the new policy, long-term tenants had the right to buy at less than market value. They claimed that this ‘moral entitlement’ of the tenant to ownership interfered with their right property of Article 1 Protocol 1 to the ECHR (Art 1-P1), including the right to derive a profit. The ECtHR recognised that this compulsory transfer of property between individuals can constitute a legitimate aim in the public interest to enhance social justice and that the state has a margin of appreciation in interpreting the public interest.<sup>55</sup> In the end, the right to buy was considered a proportionate interference with the right to property, because, despite its advantages for tenants, those tenants – throughout the years – also had to pay for the lease and bear the costs of repairs.

So, in the access dimension of the right to housing, we can see that the right to housing does not lead to the provision of housing per se. In the public realm, a few limited obligations of the state to provide housing, exist, either with regard to environmental problems caused by the state or supported by the right to non-discrimination. In horizontal housing relationships, such obligations do not exist. The right to housing is effectuated here through the possibility of access to private markets that is the right to buy and the right to financial assistance for asylum seekers. Financial assistance to obtain private housing substitutes direct public housing. Concerning the right to buy, the right to housing only plays an indirect role: it is effectuated through a privatisation policy that aimed at enabling individuals to buy their own housing.

### QUALITY OF HOUSING: ADEQUACY

The quality of housing deals with the question whether the right to housing requires a certain habitability or affordability, which the private owner or state might have to ensure. Adequacy implies that a mere ‘roof over one’s head’ is not enough and that elementary housing needs to adhere to certain housing standards in order to enable a dignified living.<sup>56</sup> The UN High Commissioner for Human Rights considers that Article 25 of the UN Declaration on Human Rights, which states that ‘everyone has the right to a standard of living

52 *Saciri* n 50 above at [42].

53 *ibid* at [43].

54 *James and others v UK* [1986] ECHR 2.

55 *ibid* at [41], [48].

56 M. Sarigiannidis and I. Pervou, ‘Adequate housing: seeking justiciability through the right to property’ (2013) 1 *International Journal of Human Rights and Constitutional Studies* 27, 29.

adequate for the health and well-being of himself and of his family, including food, clothing, housing ...' contains freedoms as well as entitlements.<sup>57</sup> The right to housing is interpreted as a right to live somewhere in security, peace, and dignity.<sup>58</sup> Since housing involves shelter as essential for survival and human dignity, adequacy and appropriateness of housing form the core of housing rights.<sup>59</sup> The possibility for personal development and a life in dignity becomes especially salient in cases of people with special needs.

In the dimension of quality of housing, we seek to examine whether and to what extent quality requirements play a role in public and private housing relationships. We will see that the requirements for quality are more pronounced in vertical housing relationships, whereas in horizontal relations the right to housing plays almost no role. Instead, the right to property and freedom of contract are the yardsticks for adjudication.

### Public legal housing relationships: substantive obligations

Even though 'adequacy' is not included in the wording of Article 8 ECHR or Article 7 ChFR, the ECtHR has imposed substantive obligations on states through a functional interpretation of Article 8 ECHR, especially in cases of special needs of the applicant or of pollution. For example, in cases concerning people with physical disabilities, the ECtHR assessed whether states have complied with their obligation to provide *adequate* housing in accordance with the occupiers' needs.<sup>60</sup> This means that local authorities must be willing to make housing adequate for people with medical conditions in terms of heating and insulation as well as accessibility.<sup>61</sup> However, in *Marzari v Italy*, the Court found that Article 8 did not allow the applicant to cease paying rent for an allocated apartment, because he considered it inadequate to his needs as a sufferer from a metabolic muscle dysfunction, demanding the carrying out of certain works. The ECtHR stated that the authorities had undertaken substantial effort to find a solution to the applicant's problem by setting up a specific Commission for the study of metabolic diseases, had allocated an apartment, and were willing to carry out further works indicated by the Commission.

The Strasbourg Court has also stated that severe environmental pollution from a waste management facility can affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.<sup>62</sup> The ECtHR has also ruled in *Moreno Gómez v Spain*

57 High Commissioner for Human Rights, 'The right to adequate housing' (Geneva, New York: OHCHR, 2009) 3.

58 High Commissioner for Human Rights, *ibid.*; UN Special Rapporteur on Adequate Housing 2017, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' (Geneva: OHCHR, 2017) 5.

59 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993, L 95/29. P. Kenna, 'Housing Rights – The New Benchmarks for Housing Policy in Europe?' (2005) 37 *Urb Law* 87, 108.

60 For example *Botta v Italy* ECtHR 24 February 1998.

61 *Marzari v Italy* n 39 above.

62 *López Ostra v Spain* (1995) 20 EHRR 277 at [51].

that the failure of local authorities to take effective measures against noise nuisance can amount to a violation of Article 8 ECHR as it affects the applicant's enjoyment of the home.<sup>63</sup> Similarly, Article 8 ECHR can be violated if local authorities do not take the necessary steps, for example the reduction of airplane noise, assessing the interference with the applicant's disturbed sleeping patterns, and undertaking complete and specific studies with the aim of finding the least onerous solution.<sup>64</sup>

### Private legal housing relationships: property rights and freedom of contract

In horizontal relationships between landlords and tenants, adequacy requirements are usually affected through the countries' civil codes, for example through an obligation on the owner to undertake necessary repairs and on the tenants to repair damage caused by them.<sup>65</sup> Case law of the ECtHR or the CJEU on this matter does not exist, to the best of our knowledge.

However, the level of rent has been subject of cases before the two courts, as states often adopt rent control legislation in order to address affordability problems. Similarly to the right to buy, rent control is public regulation of property. On the one hand, it affects ownership rights, because it reduces the value of the property and can, thus, infringe Article 1 P-1.<sup>66</sup> On the other hand, it alleviates the burden for the tenant to negotiate the rent, given that in tenancy agreements there is often no freedom of contract for tenants.<sup>67</sup> It is, therefore, not surprising, that it is usually the owner who challenges rent control legislation. *Langborger v Sweden* was the only case that mentioned a right to housing as well as the tenant's freedom to negotiate rent. Here however, the ECtHR decided that the collective negotiation of rent levels by the Tenants Union does not fall within the material scope of a tenant's right to housing.<sup>68</sup>

All other cases concern the infringement of the owners' right to property through rent control. Here, the ECtHR acknowledges the legitimate state interests in social justice,<sup>69</sup> the protection of less affluent tenants from soaring rental prices on private rental markets,<sup>70</sup> and the combat of housing shortage.<sup>71</sup> In its proportionality assessment, the Strasbourg Court takes into account the specific

63 *Moreno Gómez v Spain* (2005) 41 EHRR 4 at [53].

64 *Hatton and others v the United Kingdom*, (2003) 37 EHRR 611 at [106]. There are further cases, in which the Strasbourg Court discussed adequacy, albeit within the scope of the right to non-discrimination, for example in *Zehnalova v Czech Republic* ECtHR 14 May 2002.

65 The German Civil Code, para 536 for example, gives the tenant the right to reduce the amount of rent to the owner in case of 'defects' that affect the possibility of normal usage. The Dutch Civil Code, Art 7:207 also stipulates that a tenant may claim reduction of the rental price in case of a diminution of the enjoyment of the rented object because of a 'defect'. Similarly, the Italian Civil Code, Art 1576 contains the obligation of the landlord to undertake necessary repairs during the rental period.

66 Lilleholt, n 7 above, 370.

67 The significance of rent control for freedom of contract was discussed in *Hutten-Czapska v Poland* (2007) 45 EHRR 4.

68 *Langborger v Sweden* ECtHR 23 May 1989 at [39].

69 *Mellacher v Austria* ECtHR 19 December 1989 at [56].

70 *Lindheim & others v Norway* ECtHR 12 June 2012 at [56]; also *Mellacher ibid* at [47].

71 *Nobel v The Netherlands* ECtHR 2 July 2013.

circumstances at hand. In *Mellacher v Austria*,<sup>72</sup> the ECtHR acknowledged that the rent reductions, albeit striking in their amount, were proportionate because the owners could pass on various expenses to tenants and because a transitional provision was in place. Similarly, in *Nobel v The Netherlands*,<sup>73</sup> the restriction to freely negotiate the level of rent did not affect the owners' right to freely dispose of their property and receive rent. Moreover, it matters if the owners know about the rent restriction when they buy the property. In contrast, in *Lindheim v Norway*,<sup>74</sup> the ECtHR found the measure disproportionate because the level of the rent was particularly low (annual rent was fixed at less than 0.25 per cent of market value).<sup>75</sup>

In EU law, the CJEU has brought the assessment of tenancy agreements under the legal framework of consumer law, specifically the Unfair Contract Terms Directive (UCTD).<sup>76</sup> Thus, courts must examine *ex officio* whether rental agreements contain unfair clauses.<sup>77</sup> There are hitherto no cases where the CJEU had to deal with bad conditions or dilapidation of a residence under the UCTD. Such control would only be possible if the bad quality of housing was reflected in an 'unfair' term in the tenancy agreement. There are also no cases on rent control and the UCTD. This is because the unfairness assessment under the UCTD 'does not relate to' the price as a main subject matter of the contract, Article 4 (2) UCTD, as long as the respective contract term is drafted in plain, intelligible language.<sup>78</sup> So, the possible unfairness of the amount of rent is premised upon the non-transparency of the rental fee clause. This transparency and emphasis on freedom of contract is a fundamental pillar of EU consumer law.<sup>79</sup>

So, we can again identify a clear difference between vertical and horizontal relationships. In vertical housing relationships with public authorities, Article 8 ECHR gives individuals certain adequacy rights either in line with their needs or when the enjoyment of their home is impaired by pollution. In horizontal relationships, the freedom to negotiate rental agreements serves as a conceptual hitch for the affordability of housing on private markets. For property owners, as long as freedom of contract is not totally limited, there remains some freedom to derive a profit from property. In none of the cases concerning private law relations did the right to housing play any legally significant role. If anything,

72 n 69 above.

73 n 71 above.

74 n 70 above.

75 Moreover, Norway had not submitted any evidence about the achievement of a 'fair balance' between the interests of the lessors and lessees; *Lindheim v Norway* *ibid* at [128]-[129].

76 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29, 21.4.1993.

77 Case C-488/11 *Asbeek Brusse & Katarina de Man Garabito v Jahani* ECLI:EU:C:2013:341.

78 Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* ECLI:EU:C:2010:309 at [32].

79 For example, in *Gutiérrez Naranjo*, the CJEU stated that the 'substantive transparency' of Spanish so-called 'floor clauses' must be reviewed under Article 4 (2) UCTD because the consumer needs to have all the necessary information on the contractual conditions and the consequences of entering into a contract in order to decide whether she wants to be bound by the terms of the contract. See joined cases C-154/15, C-307/15 and C-308/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU* ECLI:EU:C:2016:980 at [73]; further discussion in: C. Mak, 'Gutiérrez Naranjo: On Limits in Law and Limits of Law' (2018) 43 *EL Rev* 447.

it could form an indirect part of broader social justice considerations of the legislator when putting in place rent control legislation. Under EU law, rental agreements fall under the scope of the UCTD, which however states that the unfairness assessment does not cover clauses that set out in a transparent way the main subject matter of the contract, which would include the calculation of rent. Any interest in the quality of the housing can only be indirectly considered inasmuch as it is reflected in some kind of ‘unfair’ clause. A right to housing plays no role.

## SECURITY OF TENURE AND EVICTIONS

In its third dimension, the right to housing impacts security of tenure, including the termination of rental agreements and evictions from own property. Here, the many eviction cases before the ECtHR and CJEU shed light on the question to what extent the right to housing implies the existence of protective mechanisms against eviction. Especially salient legal questions arise in creditor–occupier relationships, where in the case of default of the debtor, different interests in the housing property clash: on the one hand, there is the creditor, who seeks repayment of the loan, on the other there is the occupier who seeks to stay in her home despite failure to comply with repayment obligations. Eventually, the court must decide on a factual hierarchy of those interests in the particular case.

Both the ECtHR and the CJEU have confirmed that the loss of the family home is the most extreme form of interference with the right to a home.<sup>80</sup> Thus we seek to understand to what extent the right to housing offers protection from eviction in those relationships. We will see that, although eviction proceedings have been closely scrutinised, the right to housing plays out in different ways in vertical and horizontal housing relationships.

### Public legal housing relationships: proportionality of evictions

In many cases, where public authorities had evicted occupiers, Article 8 ECHR and Article 1–P1 were combined. Like the right to housing, the right to

80 For example, *Rousk v Sweden* ECtHR 25 July 2013 at [137]; Case C-34/13 *Monika Kušionová v SMART Capital* ECLI:EU:C:2014:2189 (*Kušionová*) at [63]–[64]. The CJEU referred to the ECtHR here, noting that ‘the loss of a home is one of the most serious breaches of the right to respect for the home’ and that the affected person must have the right to have the proportionality of the underlying enforcement measure reviewed. Even though the CJEU does not specifically mention a right to housing in most of the cases, it gave special consideration to the fact that the mortgaged property was also the primary home of the debtor. In the seminal case *Aziz v CatalunyaCaixa* n 2 above, the CJEU referred to the importance of the family home when considering legal protection in eviction proceedings, see *Aziz* at [60]–[61]. See also Opinion of AG Kokott at [52]. In *Sánchez Morcillo* the CJEU acknowledged that the ‘final vesting of mortgaged property in a third party is always irreversible’ and that the ‘special features of the mortgage enforcement proceedings’ have to be taken into account, see Case C-169/14 *Sánchez Morcillo* ECLI:EU:C:2014:2099 at [38].

property under the ECHR has an autonomous meaning.<sup>81</sup> Accordingly, the lack of recognition of property as a ‘right’ by domestic laws does not hinder its qualification and protection as ‘possession’ under the ECHR. For example, in *Öneryıldız v Turkey* the ECtHR argued that the state’s consistent policy on slums had encouraged the integration of illegal settlements into the urban environment and, therefore, amounted to an amnesty for breaches of town planning regulations.<sup>82</sup>

Proportionality questions arise with regard to the discretion of states, the achievement of social goals, and procedural safeguards. The ECtHR has summarised its approach to proportionality in *Yordanova*, in particular the need to justify evictions as ‘necessary in a democratic society’: the legitimate aim of the interference with the right to housing must answer a ‘pressing social need’; at the same time, the margin of discretion for example in the urban or rural planning context is wide, while it narrows with regard to ‘key rights’ such as Article 8 ECtHR; and there must be procedural safeguards available to the individual.<sup>83</sup>

In *Vaskersic v Slovenia*, the ECtHR confirmed the wide margin of discretion of states in the area of debt enforcement. Nevertheless, authorities must take careful and explicit account of other suitable but less intrusive means.<sup>84</sup> Here, enforcement into the applicant’s property was based on an outstanding debt of 124 EUR and interest on an unpaid utility bill owed to the state-owned water company. In the light of the ‘irreparable consequences of the judicial sale’ of the applicant’s home and the ‘manifest disproportion’ between the enforcement measure and the amount of debt, the ECtHR found the enforcement disproportionate.<sup>85</sup>

In almost all eviction cases, the ECtHR emphasises the importance of procedural safeguards and reiterates that enforcement measures must ensure proper consideration of the individual’s right to a home.<sup>86</sup> Procedural safeguards are ‘material in determining whether the respondent state has remained within its margin of appreciation’, even more so when the loss of the applicant’s home is at stake.<sup>87</sup> For example, the eviction in *Connors v UK* was considered disproportionate because public authorities had had the power to evict without giving reasons that could have been examined by an independent tribunal.<sup>88</sup> And in *Yordanova*, public authorities had not given any explanation or argument as to the necessity of the eviction, which narrowed Bulgaria’s margin of discretion.<sup>89</sup> Also in *McCann v UK*,<sup>90</sup> where the applicant’s wife had signed a notice to vacate council housing, ECtHR deemed that the council had sidestepped the procedures in place under the Housing Act 1985, which aim at giving effect

81 *Gasus Dosier- und Fördertechnik GmbH v The Netherlands* (1995) 20 EHRR 403 at [53]; henceforth routinely referred to, for example *Iatridis v Greece* (2000) 30 EHRR 97 at [54].

82 *Öneryıldız v Turkey* (2005) 41 EHRR 20 at [139].

83 *Yordanova* n 32 above at [117]–[118].

84 *Vaskersic v Slovenia* ECtHR 25 April 2017 at [83].

85 *ibid* at [83], [85].

86 *Rousk v Sweden* n 80 above at [138].

87 *Yordanova* n 32 above at [118].

88 *Connors v UK* n 42 above at [94].

89 *Yordanova* n 32 above at [118].

90 *McCann v UK* (1996) 21 EHRR 97.

to security of tenure and would have a court assess the facts of the individual case.<sup>91</sup> Instead, the council had given no consideration to Article 8 and the assessment of availability of procedural safeguards and proportionality assessment.<sup>92</sup> The ECtHR concluded that the interference with Article 8 was unjustified, because McCann did not have the possibility, as any person at risk of losing one's home, to have the proportionality of the measure determined by an independent tribunal.<sup>93</sup>

### **Private legal housing relationships: proportionality v effectiveness**

Many cases have dealt with eviction proceedings that were started by private owners of residential property against tenants for outstanding rental payments or by financial institutions against mortgagors for outstanding debt. Even though, technically, the legal problems concern the procedural law applicable to those proceedings, we treat these cases as part of private legal housing relationships, because those procedural rules govern the enforcement of contracts between private parties and because the interest of debtors to stay in their homes is affected. In fact, the cases in which private creditors have sought eviction are probably the most illustrative of the differences between public and private legal housing relationships and the role of the right to housing.

#### *Landlords v Tenants: Proportionality of Moratoria*

In a few cases against Italy, the ECtHR assessed the difficulties of landlords evicting tenants from their property due to outstanding rental payments. In order to combat housing shortages, Italy had adopted a statutory extension of existing leases and several decrees suspending and staggering evictions. As a result, landlords encountered problems enforcing the terms of their rental agreements and evicting tenants. In *Scollo v Italy*<sup>94</sup>, a private landlord could not evict a tenant despite an execution order and 36 unsuccessful attempts at eviction and, in the end, needed to incur debt to buy another flat for himself and his family. In *Immobiliare Saffi v Italy*<sup>95</sup>, the enforcement proceedings had lasted 13 years and Saffi could only recover the property upon the tenant's death. In both cases, Italian law violated Article 1 P-1 and Article 6 ECHR.

The ECtHR emphasised the states' wide margin of discretion to organise housing sectors and to counteract chronic housing shortages as integral to welfare and economic policies.<sup>96</sup> Nevertheless, in *Scollo*, the ECtHR ruled that the failure of the authorities to consider the exceptions to the rules amounted to a disproportionate control of property. It also found that the inertia of the administrative bodies had led to a breach of Article 6 ECHR. While the Italian

91 *ibid* at [51].

92 *ibid* at [52].

93 *ibid* at [50].

94 *Scollo v Italy* ECtHR 28 August 1995.

95 *Immobiliare Saffi v Italy* (2000) 30 EHR 756.

96 *ibid* at [49].

Constitutional Court had drawn particular attention to the restriction on freedom of contract through the statutory extension of leases, the ECtHR treated the issue as one of the enjoyment of possession under Article 1 P-1, because the tenant had continued to occupy the property. Similarly, the ECtHR reiterated in *Saffi* that a fair balance must be struck between the interests of the community and landlords' rights. In the end, it stated that exceptional state intervention in the enforcement of eviction orders should not lead to the evictions being prevented, invalidated or unduly delayed.

*Creditors v Debtors: No Right to Proportionality Assessment and the Effectiveness of EU Consumer Law*

In a line of seminal cases concerning enforcement of mortgage contracts, the ECtHR has made clear the difference between public authority landlords and private landlords. For example, in *Vrzić v Croatia*<sup>97</sup>, the applicants had used their house as collateral for a loan agreement with a private company. The ECtHR examined whether the enforcement of the contract violated Article 8 ECHR. It expressly noted the differences between this case and others, such as *McCann*, where the applicants had lived in state- or socially-owned flats. In contrast, in *Vrzić*, there was an opposing private interest at stake in the repayment of a substantial loan.<sup>98</sup> Thus, the Strasbourg Court concluded that the sale of the applicants' home in the enforcement proceedings was a consequence of the applicants' failure to meet their contractual obligations which they had freely and expressly agreed to.<sup>99</sup> The proportionality of the measure was not assessed, as enforcement was prescribed by national law with the purpose of protecting other private interests. This national provision was considered by the ECtHR to be necessary in a democratic society and in light of the public interest in reinvigorating the private residential rental sector.<sup>100</sup> This approach was confirmed in *FJM v UK*, where the applicant was not entitled to a proportionality assessment because the eviction concerned the enforcement of a contract between two private entities.<sup>101</sup>

In contrast to the ECtHR, the CJEU does not even mention the problem of proportionality. Instead, it examines whether the eviction procedure is 'unlawful' because it makes EU law 'ineffective'. Here, it especially matters whether the debtors (consumers, occupants) – under national law – have the same procedural remedies at their disposal as the enforcing party,

97 *Vrzić v Croatia* ECtHR 13 July 2016.

98 *ibid* at [66].

99 *ibid* at [71]-[72].

100 *ibid* at [15], [67]. This seems to be a departure from a previous judgment in *Brežec v Croatia*, where the ECtHR ruled that adequate safeguards had not been available because the national courts had confined themselves to finding that the applicant's occupation had no legal basis, without examining the proportionality of the evictions; see *Brežec v Croatia* ECtHR 18 July 2013 at [48]-[50].

101 *FJM v UK* ECtHR 6 November 2018 at [43]-[46]. The same issue had arisen in *McDonald v McDonald and others* [2016] UKSC 28, where the Supreme Court held that Article 8 can only be invoked against public authorities, where the proportionality must be assessed, whereas in that case the landlord and mortgage provider as private entities were not subject to such obligation.

including the claim of unfairness of the underlying loan contract. In case of an imbalance in procedural remedies, the court deems the national law to render EU law ineffective and, thus, to violate EU law. The CJEU built up this reasoning in a series of cases, especially from Spain, where the number of foreclosure proceedings had increased almost fivefold in three years since the financial crisis.<sup>102</sup> Spanish judges had called upon the CJEU to clarify the scope of the UCTD.

Considering the special status of the ‘home’ in eviction procedures, the CJEU interprets the effectiveness of the UCTD in the context of national procedural rules for guaranteeing protection of mortgage debtors. For example, in *Aziz*, where Mr Aziz was to be evicted without being able to contest the unfairness of the underlying mortgage agreement in the eviction proceedings, the CJEU – unlike the referring national court – did not use the concept of proportionality to assess the eviction procedure, but relied on the contract law notions of ‘good faith’ and a ‘significant imbalance’ of the rights and obligations of the contract parties. It emphasised that the control of unfair terms would remain without real effect in mortgage enforcement proceedings if separated from the enforcement procedure. Even if the terms of the mortgage contract were found to be unfair, this would not stop the enforcement of the mortgage contract and the eviction. Monetary compensation would not prevent the loss of the family home.<sup>103</sup> This would render consumer protection afforded under the UCTD ineffective.

So, effectiveness of EU law needs to be reflected through national procedural remedies. In *Sánchez Morcillo*, the Luxembourg Court found that Spanish rules, which had been amended after *Aziz*, giving the creditor the right stay enforcement proceedings without giving the same right to the debtor, were contrary to the principle of procedural equality of arms as enshrined in Article 47 ChFR<sup>104</sup> and thus jeopardised the effectiveness of the UCTD.<sup>105</sup> In *Kušionová* where the applicant could object to the impact of the enforcement on her home, there was no judge who could review *ex officio* the unfairness of contract terms. The CJEU ruled that interim measures must be in place by which unlawful mortgage enforcement proceedings into the family home can be suspended or terminated if those measures are necessary to ensure effective legal protection under EU law.<sup>106</sup> However, because the term was based on a statutory provision according to Article 1 (2) UCTD, whereby creditors could enforce in an extra-judicial procedure determining the amount owed and selling the property, the CJEU did not see a principled contradiction with EU law.<sup>107</sup> Again, the idea behind this approach is the consideration that statutory provisions already strike a balance between contractual rights and obligations to be respected by the CJEU.

In sum, we can see that in vertical relationships, the ECtHR assesses the proportionality of the eviction, whereas in horizontal relations this proportionality

102 F. Gómez Pomar and K.M. Lyczkowska, ‘Spanish Courts, the Court of Justice of the European Union, and Consumer Law. A Theoretical Model of their Interaction’ (2014/4) *InDret* 5.

103 *Aziz* n 2 above at [60].

104 *Sánchez Morcillo* n 80 above at [48].

105 *ibid* at [50].

106 *Kušionová* n 80 above at [66].

107 *ibid* at [80].

assessment is suspended due to the existence of contrary private interests. Also the existence of mandatory national provisions makes the court refrain from a proportionality assessment. There is no right to a proportionality assessment when private interests are at stake: the ECtHR states this expressly in *Vrzić* and *FJM*, and the CJEU does not even engage in this discussion. The pivot of the CJEU judgments is the effectiveness of EU law, violated by an unfairness of the contract due to an imbalance in contractual rights and obligations (unless the imbalance derives from a mandatory statutory national provision). Only in cases of unfair contracts could mortgage enforcement proceedings be considered unlawful. Since, under EU law, housing becomes a contractual consumer law issue,<sup>108</sup> EU law does not treat housing issues differently from any other consumer issue and housing interests are merged into the assessment of contractual rights and obligations. It is unclear how Article 7 ChFR plays into this assessment precisely, as the CJEU has not given any indication in this regard. It is illustrative that there is only one case, *Kušionová*, in which Article 7 ChFR is expressly mentioned.<sup>109</sup> In the other cases, the CJEU limits itself to merely mentioning the importance of the family home.<sup>110</sup> In the end, the concrete legal impact of a right to housing in the CJEU cases remains unclear. Arguably, this leads to an obfuscation of home interests.<sup>111</sup> What remains clear is that in both vertical and horizontal relations, the existence of effective procedural rights is crucial.

## THE RIGHT TO HOUSING'S MEANING IN EUROPEAN PRIVATE LAW

Against the backdrop of our case law analysis, we now turn to answering our research questions: What is the content of housing rights in private law relationships? How does it differ from the impact of housing rights on public law relationships? To what extent does this right balance out the social and economic components of the right to housing?

### **The content of the right to housing in private and public law relationships**

In our analysis, we found pronounced differences between the right to housing's meaning in cases governed by public law and cases under private law. These differences concern all three dimensions: access, quality, and security of tenure.

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108 In *Sánchez Morcillo*, for example, the CJEU mentioned that the provision of a dwelling is an 'essential need of the consumer', see *Sánchez Morcillo* n 80 above at [38].

109 *Kušionová* n 80 above at [65].

110 For example *Aziz* n 2 above at [61]; *Sánchez Morcillo* n 80 above at [43]; Joined Cases C-537/12 and C-116/13 *Banco Popular Español SA v Maria Teodolinda Rivas Quichimbo, Wilmar Edgar Cun Pérez* ECLI:EU:C:2013:759 and *Banco de Valencia SA* ECLI:EU:C:2013:759 at [59].

111 Fox, n 23 above, 35-36; see also: S. Nield and N. Hopkins, 'Human rights and mortgage repossession: Beyond property law using Article 8' (2013) 33 *Legal Studies* 431.

In the access dimension, the right to housing does not lead to an obligation to provide housing for private housing providers. It is rather perceived as an access right that enables individuals to obtain housing on private markets, for example through the right to buy or financial assistance. With regard to the latter, the right to non-discrimination plays a distinct role: there is no right to be able to access housing on private markets as such, there is rather the right to have *equal* access to housing on private markets. This contrasts significantly with the content of the right to housing in public law relationships, where states have – albeit limited – obligations to provide housing. Even though there is no right to obtain housing from public authorities *per se*, we have seen that environmental pollution can imply the right to relocation. Moreover, the right to non-discrimination implies that the disadvantaged position of a vulnerable group, such as Gypsies and Travellers, imposes the obligation on states to assist in making members of those groups eligible for social dwellings on an equal footing with other members of the population.

In the quality and affordability dimension, the right to housing does not impose quality obligations on private housing providers. In rent control cases, the right to housing played no role. Instead, it was the owners of housing who alleged violation of Article 1 P-1. In general, quality and affordability of housing are treated as contractual issues to be dealt with in national law. Similarly, in EU law, rental agreements are part of the consumer law framework. However, there is no EU case law investigating right to housing issues. Moreover, the EU consumer law framework is limited. With regard to affordability of housing, the UCTD is not applicable, as rental prices are outside of its scope, as long as they are set out in a transparent way. Again, we detect a significant difference to the right to housing in public law relationships, where the ECtHR has spelled out concrete adequacy rights in cases of environmental pollution and individuals with special needs. In contrast to private law relationships, here the right to housing gives rise to positive state obligations *vis-à-vis* tenants in social housing in terms of catering to the needs of disabled or mobility-impaired people.

With regard to security of tenure, we found the most pronounced difference between private and public law housing relations. In private housing relationships, the mere existence of another private interest competing with the housing interest, prevents an assessment of the proportionality of evictions. Furthermore, the existence of national mandatory rules on which the contract enforcement is based, impedes the further investigation of the consequences of evictions in a particular case. Instead, it is assumed that the national provision already balances competing interests. In EU law, it is also unclear what role Article 7 ChFR plays precisely – beyond the mere reference to it having to be taken ‘into account’ when interpreting the contractual balance of rights and obligations. Housing interests, thus, do not play a concrete role in EU law; they are subsumed under the assumed consumer’s interest in a fair contractual balance of rights and obligations. In contrast, the legal assessment of evictions in public housing relationships always results in the assessment of proportionality of the eviction. This allows for concrete housing interests to be part of the adjudication.

In all three dimensions of public legal housing relations, the proportionality principle is salient. Especially in cases of evictions it becomes clear that it

leaves space for the substantive elaboration of opposing interests – a space that is missing in private housing relations. However, even though the proportionality assessment leaves space for substantive elaboration, it does not give an absolute content to the right to housing – the content of the right depends on the content of the opposing right in that particular case. It has a limited role in defining substantive rights, as rights and obligations are put into relation to each other, so that by balancing the possible violation of the right to housing with the pursuit of legitimate goals, courts have to find a hierarchy between opposing interests.

We can also see that the right to housing is not always decisive in cases concerning housing relations and that occupants' housing interests are supported by other rights, such as non-discrimination, the right to property, and procedural rights. It seems that those rights strengthen the applicants' position.

### The economisation of the right to housing

Whereas in legal relations with housing providers governed by public law the right to housing has a more social and substantive content, in horizontal relationships the right to housing is increasingly economised. Especially in the case law of the CJEU, social concerns are at risk of fading away by the insertion of housing conflicts into bilateral consumer contracts.

In public law housing relations, both the ECtHR and the CJEU are clearly guided by welfare considerations, as interference with the right to property must respond to a 'pressing social need'.<sup>112</sup> So, the generally wide margin of appreciation for states in the field of housing, which 'plays a central role in the welfare and economic policies of modern societies',<sup>113</sup> is narrowed. Moreover, the concern with habitability has a clear social dimension that goes beyond a mere shelter function of housing. The ECtHR takes into account the social implications of inadequate housing to impose substantive obligations to remedy inadequacy (*Botta, Marzari, Moreno Gómez*). Also *Kamberaj* has a clear social dimension, embedded in the right to non-discrimination, in terms of the social inclusion of long-term residents into the host Member State.

In contrast, the right to housing in private housing relationships may be read as having a more economic and procedural character. To be sure, we do not deny a social dimension of some of the cases. For example, in *Saciri*, the CJEU ruled that financial allowances granted to asylum seekers must be enough to ensure a *dignified* standard of living. It is clear that only when housing is habitable and enjoyable, the inhabitants have the basis for leading a self-determined and dignified life. In fact, the prevalent narrative of post-financial-crisis case law and analyses, including some of our own, treats the eviction cases of the CJEU as infused with a social dimension, grounded in the use of fundamental rights in private actor litigation.<sup>114</sup> Some authors describe the references to

112 For example, *Yordanova* n 32 above at [118].

113 *Mellacher* n 69 above at [45]; *Saffi* n 95 above at [49].

114 For example, H.-W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive' (2014) CML Rev 771, 800–802; C. Mak, 'First or Second Best?

fundamental rights in eviction proceedings as ‘hidden constitutionalisation’,<sup>115</sup> or socially-inspired activism, proclaim the CJEU as ‘new social actor’<sup>116</sup> and EU consumer law as an expression of fundamental rights and principles,<sup>117</sup> because the Court’s reasoning put eviction procedures into a larger social context.<sup>118</sup> Running counter to these interpretations, we submit that EU law’s approach to housing questions under private law, despite its social awareness, is at risk of further economising the right to housing’s meaning.

We ground our claim in four arguments. First, even though the references to fundamental rights expose private law to constitutionalising forces, this does not necessarily entail ‘materialisation’ in a broadly Weberian sense of making law more ‘social’ or achieving social goals (also) through the judiciary in welfare states. The reason for this lies in the nature of the fundamental rights invoked. Second, the right to property that often supports or replaces the right to housing has a strong economic dimension. Third, the application of the EU consumer law framework leads to a further economisation of housing relations, because the very basis of EU consumer law lies in the economic rationales of market access, freedom of contract, and transparency. Fourth, dealing with housing problems as consumer issues under EU law, is likely to lead to the erosion of citizen rights.

### *Proceduralisation Instead of Materialisation*

First, the reference of the CJEU to fundamental rights does not in itself lead to a materialisation in the sense of making the law more socially oriented. This is due to the nature of the human rights applied in the cases. They either relate to procedural rights or to access rights. Obviously, much if not all depends on the way in which the parties frame the cases. The ECtHR and the CJEU in principle refer to the right to housing if it is invoked by one of the parties to the dispute or the referring court. However, the courts would have the freedom to mention the right even if the parties do not, as the CJEU did in *Kušionová*.<sup>119</sup>

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Judicial Law-Making in European Private Law’ in J.M. Mendes and I. Venzke (eds), *Allocating Authority* (Oxford: Hart Publishing, 2018) 217.

115 G. Comparato and H.-W. Micklitz, ‘Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU’ in U. Bernitz et al (eds), *General Principles of EU Law and European Private Law* (Alphen a/d Rijn: Kluwer, 2013) 140.

116 Comparato and Micklitz, *ibid*, 121-153; G. Comparato, ‘The Rationales of Financial Inclusion in the Changing European Private Law’ (2015) ERCL 22; L. Perriello, ‘Right to Housing and Unfair Contract Terms’ (2018) 7 *Journal of European Consumer and Market Law* 96; O. Gerstenberg, ‘Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts’ (2015) 21 ELJ 599; Mak, n 114 above.

117 S. Iglesias Sánchez, ‘Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: *Aziz v. CatalunyaCaixa*’ (2014) 51 CML Rev 955, 974; V. Mak, ‘Social Considerations in EU Consumer Law. The Legislator, the Court and a Rhapsody in Blue’ in D. Ferri and F. Cortese (eds), *The EU Social Market Economy and the Law. Theoretical Perspectives and Practical Challenges for the EU* (Oxford: Routledge, 2018) 213.

118 For a discussion, see Comparato and Micklitz, n 115 above, 87.

119 Apart from that single case, the courts probably refrained from including a reference to a subjective right to housing in order to avoid a complex balancing of opposing rights and obligations of owners and tenants. Especially in European private law the question is to what extent this right can directly affect private legal relationships. We deal with this question further below.

Instead of referring to a substantive right to housing, such as Article 7 ChFR or Article 17 ChFR on the right to property, or even the ‘high level of consumer protection’ in Article 38 ChFR, procedural rights are often emphasised.

The CJEU emphasises procedural rights such as Article 47 ChFR in order to guarantee the effectiveness of consumer protection under the UCTD.<sup>120</sup> The problem here is that once the procedural rules are in place, fairness control of contract terms reaches its limits – it is simply not concerned with security of tenure or any other dimension of the right to housing. For example, the *Aziz* case led to the amendment of Spanish procedural law, but it did not support the acknowledgment of a right to housing for Mr Aziz in the enforcement procedure, which could have then been used directly in order to assess mortgage enforcement. Due to the absence of references in the case law to substantive rights and the importance given to procedural rights, the constitutionalisation process that is unfolding through the case law of the CJEU is ‘proceduralised’.<sup>121</sup>

### *The Right to Property as an Economic Right*

Second, the right to property plays a special role in the economisation of the right to housing. On the one hand, the right to buy in the ECtHR’s judgment in *James v UK*, for example, can be regarded as a manifestation of a social right to housing in terms of improving security of tenure. The right to buy was implemented in the UK in a housing system that hardly knew security of tenure;<sup>122</sup> so it has a clear social dimension as it also aimed at remedying this structural problem. On the other hand, the right to acquire property, whether it is the vehicle for security of tenure or not, has a clear economic dimension. The classical interpretation of the right to property consists in the right to exclude others and, thus, reflects an individualistic instead of a social character.<sup>123</sup> As we have seen, it also includes the right to make a profit from property. This fits into the neo-liberal ideology of private home ownership and reduced state involvement in housing affairs that are regarded as market transactions between autonomous property owners as economic actors. This narrative runs counter to any materialisation-theory that describes the involvement of welfare states in its economic and social affairs. Seen from this perspective, the invocation of the right to property in eviction cases, for example, must also be regarded critically. The justiciability sought by regarding the right to housing as emanating from

120 For a discussion, see J.M.L. van Duin, ‘Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC’ (2017) *EuCML* 190.

121 Domurath, n 26 above, 172.

122 H. Carr, ‘The right to Buy, the Leaseholder, and the Impoverishment of Ownership’ (2011) 38 *Journal of Law and Society* 519.

123 For an overview of property theory, see G.S. Alexander and E.M. Peñalver, *An Introduction to Property Theory* (Cambridge: CUP, 2012). More progressive property theories exist but have yet to be adopted by mainstream academia and courts: B.M. Weiss, ‘Progressive Property Theory and Housing Justice Campaigns’ (2019) 10 *UC Irvine Law Review* 1.

the right to property<sup>124</sup> can in this sense be seen as a further step towards the economisation of the right to housing.

This argument is supported by a closer look at the rent control cases. With undoubted awareness of the social roots and distributive implications of rent control legislation, the ECtHR examines the legitimacy of the legislation's aim of in terms of redistribution and social justice. However, rent control measures are regarded as violations of the right to property. This means that the right of property owners, including the right to derive a profit from rented property, is the conceptual sounding board for any social justice considerations. Rent control legislation needs to be justified against the right to property and the freedom to negotiate profit. The default position is that the right to property prevails, unless the state – being put in the position of the defendant – can bring forward substantiated arguments to the opposite.

### *Housing Interests as Consumer Interests and the Internal-market Bias of EU Consumer Law*

Third, the right to housing is becoming 'economised' by its insertion in the EU consumer law framework. This is probably the most contentious part of our argument. To be sure, consumer law may be considered a 'social' type of law, for example with regard to product safety standards or the prohibition of misleading commercial practices. The protection of the 'weaker party' is the pivotal point of EU consumer law. However, the protection of the weaker party in EU law is very much based on the objective to lift those weaker parties on par with the professional so that contracts can fulfil their economic function and mirror the result of an equal bargaining process.<sup>125</sup> The protective aspect of consumer law is 'expulsed' from the EU legal framework.<sup>126</sup>

Instead of having a social outlook, EU consumer law may be conceived of as an internal market policy.<sup>127</sup> The legal basis for most EU consumer law directives is Article 114 TFEU and any measure based on this article must have the genuine aim of improving the conditions of the internal market.<sup>128</sup> In this vein, the Consumer Credit and Mortgage Credit Directives specifically aim

124 Argument made by M. Sarigiannidis and I. Pervou, 'Adequate Housing: Seeking Justiciability through the Right to Property' (2013) 1 *International Journal of Human Rights and Constitutional Studies* 27.

125 S. Weatherill, 'Consumer Policy' in S. Weatherill (ed), *The Evolution of EU Law* (Oxford: OUP, 2001) 177; J.G.J. Rinkes, 'European Consumer Law: Making Sense' in C. Twigger-Flesner et al (eds), *The European Yearbook of Consumer Law 2008* (Aldershot: Ashgate, 2008) 3, 15; P. Nebbia, *Unfair Contract Terms in European Law – A Study in Comparative and EC Law* (Oxford, Portland: Hart Publishing, 2007) 23; I. Domurath, 'The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law' (2013) 3 *Journal of European Consumer and Market Law* 124, 127–128.

126 H.-W. Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' (2012) 35 *Journal of Consumer Policy* 283.

127 S. Weatherill, 'Consumer policy' in P.P. Craig and G. DeBúrca (eds), *The Evolution of EU Law* (Oxford: OUP, 2011) 838 *et seq*; G. Howells et al, *Rethinking EU Consumer Law* (Abingdon: Routledge, 2019) 3–4; also, Domurath, n 125 above.

128 Case C-376/98 *Germany/EP and Council* ("Tobacco Advertising") ECLI:EU:C:2000:544.

at creating a cross-border internal market through the facilitation of available consumer and mortgage credit.<sup>129</sup> Also the UCTD aims at the improvement of the internal market through the removal of unfair terms from standard consumer contracts, so that consumers have more choice and, in this way, stimulate competition.<sup>130</sup> So it incorporates the economic rationales of information and transparency of contracts. Against this backdrop, it is not surprising that the UCTD is limited with regard to advancing social goals, including a more socially-oriented right to housing.

As a consequence, the UCTD, however important since the financial crisis,<sup>131</sup> only serves as an indirect outlet for housing concerns. While the main objective of the applicants who are to be evicted from their homes is to remain in those homes, the CJEU is concerned with the effectiveness of EU law. As the review of unfairness leads to penalties that are imposed for the violation of EU law,<sup>132</sup> housing disputes become an arena for safeguarding EU consumer law and, thus, competition on the internal market rather than for safeguarding a right to housing. Even though in some cases the effectiveness of EU law, more precisely the fairness control of contract terms, can coincide with housing concerns,<sup>133</sup> this is not necessarily the case.<sup>134</sup> The UCTD only promotes the right to a 'home' as long as underlying contracts are 'unfair', especially if national procedural rules are deficient. The case law of the CJEU has only led to the upgrading of national remedies in procedural law,<sup>135</sup> but not an upgrading or a clear acknowledgment of a substantive and social right to housing. Socially desirable results, such as the protection of the home, are only a welcome side benefit of the effectiveness of EU law and the functioning of the internal market – they are not a main concern. For this reason, we see the use of the UCTD in housing relations critically as a risk of further 'economising' legal relationships and losing sight of the social element of fundamental rights. In the end, Mr Aziz and many others lost their homes and were left with significant debts that were not covered by the judicial sale of their property.<sup>136</sup>

129 Preamble 4 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66, 22.5.2008 (CCD); Preamble 2 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ L 60/34, 28.2.2014 (MCD).

130 Preamble 6, 7 UCTD.

131 Micklitz and Reich, n 114 above.

132 See F. Della Negra, 'The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: Sánchez Morcillo and Kusionová' (2015) 52 CML Rev 1009; for a differentiated view see van Duin, n 120 above, who submits that Art 47 ChFR supports both parties and, as such, also protects individual rights.

133 O.O. Cherednychenko, 'The impact of fundamental rights' in C. Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Cheltenham: Edward Elgar, 2016) 109, 133.

134 See also: Sánchez, n 117 above, 956.

135 N. Reich, *General Principles of EU law* (Antwerp: Intersentia, 2013) 97 et subs.

136 Even though foreclosure rates have decreased in the last years, more than half a million people have lost their homes in Spain. In 2013, the *Financial Times* reported more than 400,000 repossession between 2007 and 2013 alone, see: T. Buck 'EU Court strikes down Spain's eviction law' 14 March 2013 at <https://www.ft.com/content/16e37aca-8ca5-11e2-8ee0-00144feabdc0>; in addition, in 2014 alone, more than 100,000 people were newly facing eviction from their

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Last but not least, including housing issues into EU consumer law removes them from the sphere of public citizen rights. Instead of ensuring citizen rights that aim at participation in civil and political life of a society, EU consumer law serves to guarantee the autonomy of the consumer as a market participant through protecting her freedom of choice and legitimate expectations.<sup>137</sup> Instead of public autonomy in terms of freedom to participate in the formation of public opinion and society's collective decisions and private autonomy understood as the freedom to decide what way of life is worth pursuing and what gives meaning to that way of life,<sup>138</sup> consumer rights are grounded in an understanding of consumers as economic actors.

More specifically, EU consumer law is based on an understanding of the consumer as a rational actor who can bargain for advantageous contracts if only put on par with the professional. At the moment in which citizens with a right to housing, however framed, are removed from the public sphere, they are treated as market actors who have to enforce their rights against another private party. We can even say that the shift from housing as a citizen right to be enforced against states to a consumer right enforced against another private party leads to an impoverishment of the right to housing. Either the right to housing plays a role as part of the protection of 'weaker parties' in contractual bargaining positions or the right to property turns homeowners into economic market actors. The removal of citizens from the public realm and re-defining them as consumers on the market, can be regarded as 'defiling' the view of consumers as persons<sup>139</sup> and removing aspects of justice from contract law.<sup>140</sup> While the activist application of consumer rights might lead to socially acceptable or even desirable results, it does not change the fact that, conceptually, consumer rights in the EU are economic rights based on market rationales and freedom of contract law rules instead of social rights based on citizens' rights vis-à-vis the state.

The function of housing as a home, in which citizens can feel safe to lead a self-determined life according to their own defined wishes and life choices, becomes neglected as housing is reduced to a market asset. Homeowners especially are considered entrepreneurs who participate in the economic wellbeing of the country, by exercising their 'moral entitlement' to home ownership.<sup>141</sup> The re-signification of the home as a privately consumed commodity has transformed residents into 'investor subjects'.<sup>142</sup>

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homes, according to the National Institute of Statistics, see: [http://ine.es/en/daco/daco42/eh/eh0414\\_en.pdf](http://ine.es/en/daco/daco42/eh/eh0414_en.pdf). Furthermore, a new housing crisis may be on the rise due to rising rents, see C. Wright and A. Vicente: 'Why rising rents across Spain are causing a new crisis' 26 September 2018 at <https://www.thelocal.es/20180926/why-rising-rents-across-spain-are-causing-a-new-crisis>.

137 N. Reich et al, *European Consumer Law* (Cambridge: Intersentia, 2014) 6.

138 Stanford Encyclopedia of Philosophy, *Civil Rights* at <https://plato.stanford.edu/entries/civil-rights/>.

139 Perriello, n 116 above.

140 M.W. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?' (2007) ERPL 323.

141 For a discussion, see Carr, n 122 above.

142 R. Ronald, *The Ideology of Home Ownership – Homeowner Societies and the Role of Housing* (Basingstoke, New York, NY: Palgrave Macmillan, 2008) 48. Compare also *Vrzić v Croatia* n 97 above

In sum, the post-crisis case law can be read in a different light, especially the CJEU case law on evictions. Due to its disruptive effect on national procedural law, especially in Spain, and to the connection of the UCTD to human and fundamental rights, analysts have commented on the new social role of the court and its judgments. In contrast, we have put into the focus the right to housing and have seen that the CJEU appears to follow the same market-logic as with regard to fundamental rights more generally and their impact on private law.<sup>143</sup> Consequently, something is lost when translating the right to housing from public legal to private legal relationships. With commodification comes the rise of consumer law and its rationales of economic market actors. Social aspects of the right to housing do not necessarily have a legal space within this framework. This shows that the potential of the right to housing to lead to a ‘paradigm shift’ away from economic and libertarian rationales<sup>144</sup> has not yet been achieved.

### A WAY FORWARD: DIRECT EFFECT AND PROPORTIONALITY IN PRIVATE LAW?

The question arises whether the economisation of the right to housing in EU law could be countered by the possibility of relying directly on the right to housing in a private legal relationship, rather than through the interpretation of norms of EU consumer law. Before concluding our analysis, we therefore discuss the more theoretical question of direct horizontal effect, concerning the possibility of basing a remedy upon the infringement of the right as such instead of on the interpretation of private law norms in light of fundamental rights (indirect horizontal effect).<sup>145</sup> The possibility of direct horizontal effect could enhance the legal standing of the right to housing in private legal housing relations because the occupant could in this case rely directly on the right in order to claim a remedy. Since the ECtHR only addresses complaints against State Parties to the Convention, a direct effect of this kind has been denied, as for example in *Vrzić* or *FJM*.<sup>146</sup> The development of the CJEU’s case law on

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at [104]: ‘In addition, in order to avoid having their house sold at a public auction and the inherent risks, such as the possibility that the property might be sold for only a third of its assessed value, when the applicants realised that they could not comply with their contractual obligations, knowing that those obligations had been secured by their house, they could have sold the house themselves, outside the enforcement proceedings. They could thus have attempted to obtain the full market value for it.’

143 M.F. Starke, ‘Fundamental Rights before the Court of Justice of the European Union – a Social, Market -Functional or Pluralistic Paradigm?’ in Collins (ed), n 8 above, 93.

144 This ‘paradigm shift’ is identified in comparison with the right to property by U. Mattei et al, ‘Commons as *possessions*: The path to protection of the commons in the ECHR system’ (2019) 25 *European Law Journal* 1, 15.

145 Collins, n 9 above, 38–39.

146 Mattei et al, with reference to the exceptional *Pye* case (*J.A. Pye (Oxford) Ltd v J.A. Pye (Oxford) Land Ltd v UK* ECtHR 15 November 2005), argue that the ECtHR has engaged with the ‘horizontal axis of legal relationships among privates’ when it traced the functioning of adverse possession to the sphere of the ‘control of use’ of properties, Mattei et al, n 144 above, 10. Moreover, the absence of direct horizontal effect in the overwhelming majority of the ECtHR case

the Charter of Fundamental Rights, however, provides glimpses of what such a direct effect of the right to housing could look like.

Recent CJEU case law may offer some possibilities for elaborating a directly effective right to housing. In the case of *Bauer and Broßonn*, the Court acknowledged the possibility for all Charter rights to have direct horizontal effect, if they are mandatory and unconditional in nature.<sup>147</sup> It thus seems to have turned upside-down its earlier view in *Association de Médiation Sociale*,<sup>148</sup> in which the Court recognised a potential direct horizontal effect only in very limited circumstances. In that case, the starting point seemed to be that the Charter could not apply directly to private legal relationships, unless a Charter provision was ‘sufficient in itself to confer on individuals an individual right which they may invoke as such’.<sup>149</sup> In *Bauer and Broßonn*, the Court changed its view insofar as it held that the wording of the Charter, in particular Article 51(1), does not exclude the possibility that private actors may be bound to its provisions in relation to other private parties.<sup>150</sup> Accordingly, the door is open for a broader application of Charter rights in private legal cases.

In our view, the main advantage of granting direct horizontal effect to the right to housing would be the opportunity to review the proportionality of limitations to the right to housing and the balancing of opposing rights. Currently, the CJEU refers to proportionality only as a possible limitation of the power of the national court to stay the enforcement procedures while the unfair terms assessment is pending.<sup>151</sup> And the ECtHR does explicitly not weigh the proportionality of evictions vis-à-vis the right to housing of the evicted in private legal relationships. This type of balancing is contested by some private lawyers, as it may weaken the force of fundamental rights, insofar as rights that had ‘trumping power’ in public law are turned into ‘diamonds to be traded’ in the private legal context.<sup>152</sup> Many EU law commentators also caution against what they perceive as the ‘politicisation’ of horizontal legal disputes by the courts.<sup>153</sup> Others, however, observe that an expansion of the application of fundamental rights to private legal cases is desirable and even necessary to protect private actors’ interests.<sup>154</sup> Indeed, balancing the rights and interests of the parties involved in a case is what civil courts do and, accordingly, it should be determined

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law does not exclude that direct effects of Convention rights can and have been acknowledged in national civil cases. See A.S. Hartkamp, *European Law and National Private Law* (Antwerp: Intersentia, 2016) 188–191.

147 Joined cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer & Volker Willmeroth v Martina Broßonn* ECLI:EU:C:2018:871.

148 Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2.

149 *ibid* at [47].

150 n 147 above at [87].

151 Perriello, n 116 above.

152 Collins, n 9 above, 36.

153 For example, Cherednychenko, n 133 above, 137.

154 For an overview of the debate, see C. Mak, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Alphen a/d Rijn: Kluwer Law International, 2008) 47–50; O.O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party. A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Munich: Sellier, 2007) 51–53; H.-W. Micklitz, ‘Introduction’ in Micklitz (ed), n 9 above, 4–7.

how they should conduct this balancing process rather than preventing it.<sup>155</sup> So, if private law is to play a role in furthering housing justice in increasingly privatised housing sectors, the debate should be about *how* to shape the balance of parties' rights and interests.

Should direct effect be granted to the right to housing, it is likely that this right will have to be balanced against other fundamental rights.<sup>156</sup> In horizontal relationships not only the homeowner or tenant may invoke a fundamental right, but also the housing or mortgage credit provider may seek recourse to the right to enjoyment of one's property. In such cases, a balance will have to be struck that takes into account the proportionality of the measures in question for both parties. In this light, we submit that the proportionality test related to the protection of the right to housing could open space for a more substantive elaboration of the right's meaning in private law. In this vein, Lilleholt believes in the ability of human and fundamental rights, also in the private law realm, to create a new basis for a right to housing by setting up procedural guarantees to have the proportionality of evictions reviewed and refine the balance of opposing rights.<sup>157</sup> Although procedural guarantees in themselves do not lead to socially desirable results in the field of housing, a further elaboration of the specific features of the proportionality test in private law may provide a framework for defining the right to housing in relation to other rights, such as the right to property. This would necessitate weighing the two rights against each other. Through judicial balancing of those rights, a more substantive content of the right to housing in its relation with other rights may lead to a more concrete and social understanding of the right to housing. If we were to allow such balancing, the right to housing could even – with an utmost social concern – outweigh any evictions, inasmuch as they would lead to a more precarious living situation, if not outright homelessness. In this sense, private law could provide a framework for a balanced elaboration of the right to housing's meaning.

Be that as it may, a few obstacles would have to be overcome in order to construct direct horizontal effect of the right to housing. In fact, the case of *Bauer and Broßonn* has not yet led to an acknowledgment of a horizontal direct effect of Article 7 ChFR. The CJEU's reference to the importance of the private and family home when assessing the effectiveness of EU consumer law rules constitutes, if anything, an indirect effect of the right to housing on private legal relationships. This indirect horizontal effect is realised by its inclusion in the court's interpretation of consumer contract law. Even though this could be interpreted as an attempt to avoid the discussion on a possible direct effect,<sup>158</sup> it could also simply mean that the court does not want to accept a direct effect of the right to housing in horizontal relationships. As most of the mortgage cases date from before the *Bauer and Broßonn* judgment, it remains to be seen to

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155 Collins' 'double proportionality' test would be a means to address this point; Collins, n 9 above, 49-51.

156 Mak, n 154 above, 167.

157 Lilleholt, n 7 above.

158 Perriello, n 116 above, 102.

what extent the Court's opening up of possibilities for direct horizontal effect of Charter rights may also affect future housing cases.

The possibility of granting direct horizontal effect to the right to housing depends on overcoming the requirement to fulfil certain technical criteria. In EU law, the right to housing is most likely to be given effect through secondary legislation that triggers the application of the Charter, in particular Directives affecting contract law. In this context, the *Bauer and Broßonn* judgment could open the door for a direct application of the right to horizontal relationships. An interpretation of national law in conformity with the Directive at hand is not necessary if the fundamental right underlying the Directive may be invoked.<sup>159</sup> It then has to be determined what the obligations of housing providers are under the Charter. The first question is to what extent private actors may be seen as addressees of the right to housing. If they were, this would have far-reaching consequences in terms of access to accommodation or the prevention of evictions. It could result in an obligation for a private housing provider to accept a prospective tenant or buyer, which is problematic in light of the limitation this would set to freedom of contract (possibly resulting in *Kontrahierungszwang*<sup>160</sup>). Here, it should be debated whether such *Kontrahierungszwang* should only exist for large-scale housing providers with the social power to actually influence offer and demand on housing markets, but not for private home owners who might merely rent out one apartment for a specific period of time, for example until they reach retirement age and then want to use the property for themselves. Even then, however, the right to housing's direct horizontal application raises a second question. A main concern is whether the right to housing, as it is currently phrased, will be considered to be specific enough to directly apply to private parties. It is improbable that Articles 7 and 34(3) ChFR can currently be deemed 'mandatory and unconditional' in line with the CJEU's criteria. As a result, we would have to continue to give indirect horizontal effect to the right to housing, meaning the less concrete interpretation of EU law 'in the light of the right to housing, as the CJEU did in *Kušionová*.<sup>161</sup>

Possibly with a view to avoiding these technical problems, some commentators seek to elaborate the direct horizontal effect of a right to housing by combining it with other rights and principles. Kenna and Simón-Moreno argue that the use of Article 7 ChFR coupled with the principles of effectiveness and equivalence of EU law bypasses the lack of horizontal application of Article 8 ECHR, which is beneficial for example also for mortgage borrowers subject to enforcement proceedings.<sup>162</sup> This ties in with Kenna's more general claim that international housing rights offer a coherent set of benchmarks that can challenge the orthodoxy of commodification and consumer-rights-driven

159 cf Case C-144/04 *Werner Mangold v Rüdiger Helm* ECLI:EU:C:2005:709 and Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* ECLI:EU:C:2010:21; see Hartkamp, n 146 above, 203–205.

160 Mak, n 154 above, 25–28, 42–44, 67.

161 n 80 above.

162 P. Kenna and H. Simón-Moreno, 'Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights' (2019) 25 *European Law Journal* 608, 620.

discourses.<sup>163</sup> Others debate whether the combination with Article 47 ChFR, which protects the right to an effective judicial remedy, may help define more specific housing rights within the ambit of the Charter. Article 47 could provide a procedural ground for further elaborating substantive remedies under the Charter.<sup>164</sup> Insofar as the EU Directives that apply to housing cases require effective remedies on the domestic level of the Member States, they may trigger the application of Articles 7 and 34(3) ChFR in combination with Article 47 ChFR. On that basis, direct horizontal effect of specific elements of a general right to housing might be constructed under secondary EU law. This would provide space for a further elaboration of the protection of private legal interests in housing cases.<sup>165</sup>

Of course, this route should be carefully assessed and elaborated further. The combination of the right to housing with other fundamental rights for instance raises questions, as we have seen in the case law in which courts relied on the right to non-discrimination, the right to property or the principle of effectiveness of EU law. If a right to housing is to be taken seriously, the combination with other rights should be seen critically because those rights could change the content of the right to housing or over-emphasise one aspect of the right to housing at the expense of others. The right to property has a clear economic and neo-liberal dimension. The right to non-discrimination, albeit socially oriented, puts emphasis on equal treatment with another societal group; it aims at achieving a more individual social inclusion, which must be distinguished from a more collective-oriented social justice. Article 47 ChFR is essentially of procedural and vertical character. Therefore, while the combination with other rights may strengthen the right to housing, it might also have unforeseen effects and change the right to housing's meaning. A way forward along the lines of the Charter rights mentioned should, therefore, be undertaken with consideration of these issues.

On the basis of the case law, thus, a picture emerges that contrasts the different effects that private law may have on housing justice. On the one hand, as things currently stand, it is doubtful that private law will be able to fully address the social functions of housing, even if it incorporates values of the ECHR or the ChFR. Contract law is considered conceptually different from human rights law and individuals often lack sufficient bargaining power.<sup>166</sup> In this vein, Cowan and McDermont point out that the enforcement of human rights standards in private law can only be part of the answer to housing problems, because they lack the public dimension of housing rights.<sup>167</sup> Furthermore, the analysis shows that it is still a long way from the direct horizontal effect of a right to housing. In order to allow such effect, the European courts would have to relax their requirements or EU and its Member States would have to give such

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163 Kenna, n 59 above; P. Kenna, 'Housing rights: positive duties and enforceable rights at the European Court of Human Rights' (2008) 13 *European Human Rights Law Review* 193.

164 Van Duin, n 120 above, 192; Reich, n 135 above, 122.

165 cf Hartkamp, n 146 above, 204–205.

166 D. Cowan and M. McDermont, 'Obscuring the Public Function: A Social Housing Case Study' (2009) 61 *Current Legal Problems* 160.

167 *ibid.*

effect through their legislation. Until then, we will be stuck with the more interpretative function of the right to housing for a while. On the other hand, this interpretative function could be enough to at least make housing interests visible also in horizontal cases and open a space for further deliberation.<sup>168</sup> Private law might not give full answers but can contribute to the broader search for justice in access to adequate housing. These contrasting results stand beside a normative position in favour of direct horizontal effect. For sure, the current legal framework underlines the need for a further debate on opportunities and drawbacks of pursuing housing justice through private law.

## CONCLUSION

In this article, we have sought to outline the debate on a holistic understanding of the right to housing's meaning for private legal relationships in Europe. Given the proceeding privatisation of housing sectors in Europe, the question of whether and how the right to housing's content changes in the private legal context has become salient. We have answered our research questions through an analysis of the case law of the CJEU and the ECtHR in three dimensions: access, quality, and security. Furthermore, we have addressed the balancing of economic and social components of the right to housing in the case law of the two courts. In this light, questions arise on the future direction the debate should take.

We found that with the shift from public to private housing sectors, the right to housing is changing as well. Most importantly, privatisation processes lead to the economisation of the right to housing, meaning that the economic character of that right is emphasised over its more social content. Furthermore, the right to property, which supports the right to housing in many cases, has an inherent economic dimension. In EU law, the economisation of the right to housing is furthered by the application of consumer law with its rationales in competition and the fostering of the internal market. In this political economy, citizens with housing rights become consumers with contractual rights that need to be bargained for. This stands in contrast to the emerging characterisation of the social character of CJEU case law by many academic commentators. We see private law becoming 'proceduralised' (rather than 'materialised') through the references to procedural fundamental rights.

The division between public and private law also in housing matters is very well in line with legal-technical problems involved in the separation of public and private law, for example in relation to direct horizontal effect of human and fundamental rights. Yet, this can hinder the development of the right to housing's social dimension in private legal housing relationships. Housing rights will only play a decisive role in private legal housing relationships if the legislators and courts enable that role. Notwithstanding the very valid, mostly historical, technical, or categorical reservations against horizontal direct effect, we put forward for consideration that, unless we enable the concrete balancing of rights

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<sup>168</sup> cf Mak, n 154 above, 307-309.

and obligations in horizontal relations, there will be no socio-legal space to weigh individual rights against each other. Especially in a political economy of proceeding privatisation and commodification in which the right to housing and the right to property are *de facto* pitted against each other, the possibility of *judicial* balancing should not be off the table.

A further elaboration of the right to housing in private legal relationships is needed. Only if the economic and social dimensions of the right to housing are well-balanced, tenants' and mortgage debtors' positions versus landlords and banks may be strengthened. As long as the right to housing is not clearly articulated and vested with a social meaning in horizontal relationships, its legal force will be dependent upon the existence of other rights, such as the right to non-discrimination or the right to property. So, a new, holistic approach concerning the various dimensions of the right to housing in private law in Europe is required, encompassing its substantive and procedural sides, its social and economic elements, and its different content in the public and private realms. This paper has sketched the outlines for this debate. It is clear that private law can only play one role in a complex system of ensuring housing justice – still, this is an important role in light of the on-going privatisation and marketisation of housing. A comprehensive view that takes into account developments on public and private housing sectors is needed to do justice to the right to housing.