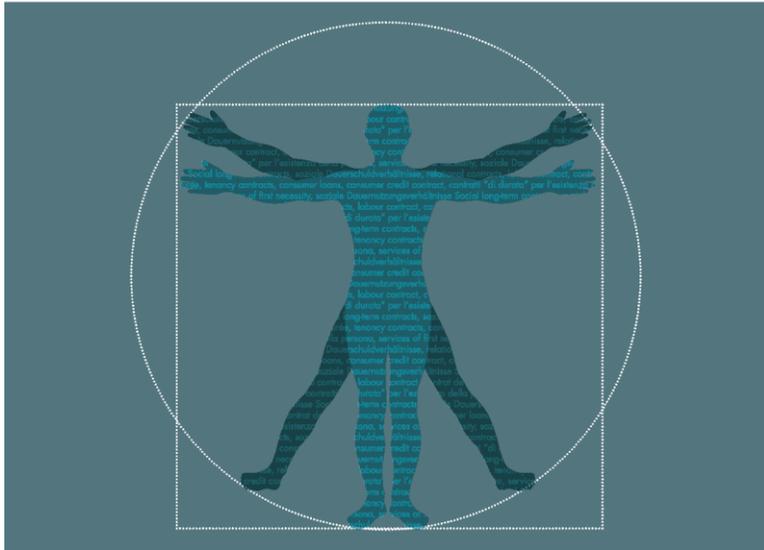




OLLSCOIL NA GAILLIMHE  
UNIVERSITY OF GALWAY





# Principles of Life Time Contracts twenty years later

Luca Nogler  
*University of Trento, Italy*

## LIFE TIME CONTRACTS

Social Longterm Contracts in Labour,  
Tenancy and Consumer Credit Law

Luca Nogler  
Udo Reifner  
(Eds)

**eleven**  
international publishing



# Principles of Life Time Contracts twenty years later

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## **Outline:**

- When the idea of the principle was born
- How the Principles were drafted
- How the principles were accepted
- Do the principles still make sense in 2023?

# When and why the idea of the principles was born?

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## **2003: DFCR**

- Top-down approach: from EU-Law to General Contract Law

## **2004: Social Justice in European Contract Law**

- Critique from a political point of view

## **2005: EuSoCo Study Group**

- Bottom-up approach: from National Laws to General Contract Law
- Civil law interventionist approach and not common law abstentionist approach
  - Contract of Employment
  - Residential Tenancy Contract
  - Contract of supply of essential goods and service
  - Consumer credit contract (mortgage, credit card, and so on)

# Inspiring Ideas

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- **EuSoCo Declaration:**

**We (...) are deeply concerned that the path to a harmonized European system of contract law (...) will be built on a reductive model of commercial and consumer sales, where information is the only substantive concession to social interests. Economic and social rights of workers, consumers and tenants in long-term relations have got no adequate place.**

- **What does ChatGPT know about life time contracts?**

**"Life time contracts, also known as permanent contracts, are employment agreements between an employer and an employee that have no predetermined end date."**

# European Social Contract (EuSoCo) Group

1. **Basic needs (C 598/21)**: income, goods, services, work, self-realisation, participation. More than just balancing through information: mandatory rules that take into account the social risks of people

Marketing	Offer	Conclusion of contract.	Servicing/ Default/ Adaptation	Termination	Insolvency
Consumer Law			Contract Law/LTCs		Insolv.C

2. The difference with the historical category of “long-term contracts”: relevance of the **life time** (social risks: illnesses, accidents etc.) **between the beginning and end of the contract**; human dimension, social risks, adaptation, cooperative dialogue

# European Social Contract (EuSoCo) Group

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4. Defense of **use value** (action of unions; setting of Tariffs; prohibitions, usury) and not simply market value; take into account poverty (unemployment, overindebtedness, homelessness).
5. Responsible for **productive use**; not antagonist but cooperative
6. Existential relevance of the **termination**
7. LTCs are embedded in a **network of linked contracts** to which the law have regard when legal questions fall to be decided.

# Leading case: chain credit contract (Kettenkreditverträge)

	1. Credit	2. Credit	3. Credit	Total
Closing date	10.1.2002	19.3.2002	10.6.202	
Cash Payments	10.600 €	5.500 €	10.000 €	26.100 €
Summed Up	<b>10.600€</b>	<b>16.100€</b>	<b>26.100€</b>	<b>26.100€</b>
Insurance premium	1.212 €	2.477,80 €	6.948,10 €	7.403,22 €
Inclusive financing	<b>1.441.18€</b>	<b>3.214,27€</b>	<b>10.947,15€</b>	<b>14.428,97€</b>
Real interest (contractual interests)	12,07%	14,46%	15,05%	12-15%
Real interest (+ insurance costs)	20,50%	22,50%	23,50%	33,07%
Interest+Editing	2.2333,56€	5.627,49€	19.447,43€	
Total Costs	3.445,56€	8.105,29€	26.395,53€	31.794,99€
Financial amount	11.812	18.933,19	33.788,68	
<b>Total debt</b>	<b>14.044,97€</b>	<b>24.559,81€</b>	<b>53.235,41€</b>	<b>59.590,26€</b>
<b>Cost to revenue</b>	<b>33%</b>	<b>50%</b>	<b>101%</b>	<b>122%</b>

# Criticism

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1. **HUGH COLLINS:** mandatory principles?
2. **DAVID HIEZ:** Not only people's lives but also that of the planet
3. **ANTONIO ALBANESE:** "early termination must have only future effect, having no bearing on the contract prior to that point" (P. 3)
4. **KLAUS TONNER:** sale linked to credit
5. **SELF-CRITICISM I:** not principles (Charter of fundamental rights of the European Union) but general rules
6. **SELF-CRITICISM II:** gaps in the principles:
  - Collective action and access to justice;
  - Prescription

# Do the LTCs general rules still make sense in 2023?

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- **What have we learnt from the pandemic?**

New article 240 BGB: Consumers are entitled to refuse performance (...) of a claim in connection with a consumer contract which is a continuous obligation (...) where, as a consequence of circumstances which can be attributed to the multiplication of infections caused by the SARS-CoV-2 virus (...), they would not be able to render performance without endangering their own decent livelihood or that of their dependents. The right to refuse performance applies to all essential long term relationships.

*LTRs (Dauerschuldverhältnisse) are 'essential' if they are necessary so that consumers are adequately supplied with services of general interest*

# Do the LTCs general rules still make sense in 2023?

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- **What have we learnt from digitalization?**
- Gig work. Division of tasks into results that allow the conclusion of many spot contracts (leading case of riders: Several contracts for services or a single contract of employment?)

CONSUMER PROTECTION ♦ DEVELOPMENTS IN THE LAW

136 HARV. L. REV. 1628

## Consumer Protection for Gig Work?

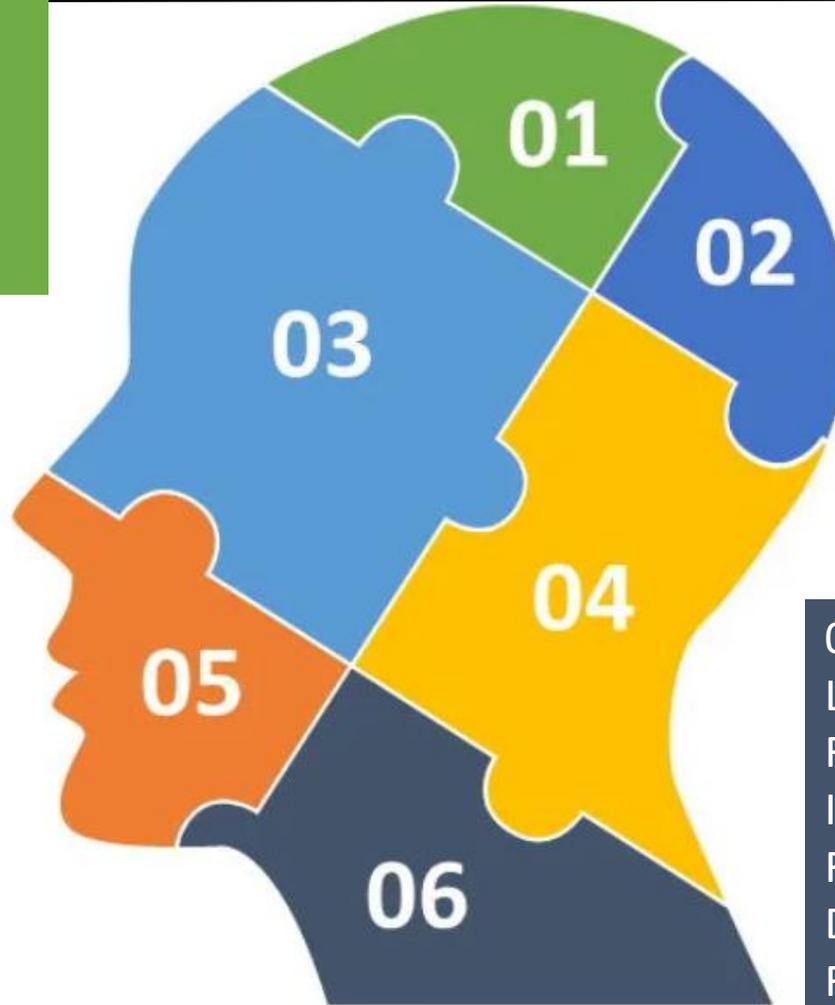
- Many everyday goods have embedded software that creates a long-term bond: they are LTCs?
- Use of social media versus data collection (profiling): are they LTCs?
- Misinformation avoidance: more prohibitions in data protection law even to protect people's own life time? (Principle 16)

# Do the general rules on LTCs still make sense in 2023?

**01 SALE CONTRACT LAW:**  
Conclusion of contract, Information and transparency  
Antitrust law  
Access to justice

**03 EMPLOYMENT LAW:**  
Life time (also contract for service with preparation of the performance)  
Adaptation  
Collective action  
Termination

**05 CONTRACT FOR SERVICES OF FIRST NECESSITY**  
Fixing price



**02 RESIDENTIAL TENANCY LAW**

**04 PUBLIC LAW**  
Education  
Unemployment, homelessness  
Overindebtedness  
Collective action

**06 CREDIT CONTRACT LAW/INSOVCENCY LAW**  
Responsible credit  
Insolvency plan  
Rehabilitation period  
Discharge  
Rebirth

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**Thank you for your attention**  
(and patience with my English)

# Principles 1-4

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- 1. Life time contracts:** Life time contracts are long-term social relationships providing goods, services and opportunities for work and income-creation. They are essential for the self-realisation of individuals and their participation in society at various stages in their life.
- 2. Human Dimension:** The subject matter of life time contracts is real- life circumstances. The role of the law governing them is to frame the power relationships of those contracts in terms of human development, so that on-going co-operation rather than the formation of the contract lies at the heart of the contractual relationship. Personal relations (like for example the family) have to be taken into account.
- 3. Long-term relationship:** Mutual trust between the parties as to the durability of the long-term relationship must be protected and early termination must have only future effect, having no bearing on the contract prior to that point. Early termination must be restricted to circumstances in which the freedom and the autonomy of the individual is at issue and makes early termination necessary.
- 4. Linked contracts:** Life time contracts are embedded in a network of linked contracts to which the law must have regard when legal questions fall to be decided.

# Principles 5-7

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5. **Basic needs:** The provision of essential goods and services for basic needs related to consumption and employment requires that physical, social and psychological considerations be taken into account in order to ensure the protection the weaker party to the contract. Stringent regulation or other collective rules will secure the degree of social protection needed in line with the subject matter of the contract, its duration and its importance in the life of the individuals concerned.

6. **Productive use:** The provider of essential goods and services or income-generating opportunities under a life time contract must avoid taking any action which will jeopardise the social purpose of the contract and the productive use of the rendered services.

7. **Collective and ethical dimensions:** Employees and consumers are entitled to expect that the collective aspect of their individual interests is safeguarded by the state through collective representation mechanisms, together with the application of general values of good morals and good faith which influence access, formation, contents, adaptation and dissolution of such relationships.

# Principles 8-10

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8. **Access:** Providers of life time contracts must refrain from discrimination in terms of the personal and social characteristics of consumers at all stages of the contract, from access to termination, including discrimination in terms of the group of intended users of the contract, or individual members of that group. The importance of life time contracts in meeting the basic human needs of subsistence, employment and participation in economic life gives access to these goods, services and income opportunities the status of fundamental human right (distributive justice).

9. **Remuneration:** The mutual obligations of life time contracts shall not be grossly disproportionate. Prices must be transparent and non-discriminatory and the charges must be affordable and in line with the costs.

10. **Adaptation:** If the social and economic circumstances upon which a life time contract is based have changed significantly since the contract was entered into, or if material circumstances from which the parties derived have arisen that are found to be at variance with its original situation to such an extent that the social nature of the contract is jeopardized, and if the parties would not have entered into the contract or would have entered into it on different terms had they foreseen this change, adaptation of the contract may be required if, taking into account all the circumstances of the specific case, and in particular the contractual or statutory allocation of risk and the fundamental obligation of a human being, one of the parties cannot reasonably be expected to continue to comply with the contract without variation of its terms. Collective regulation shall take precedence over individual adaptation.

# Principles 11-12

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11. **Termination:** Termination of life time contracts imposed on workers and consumers must be transparent, accountable and socially responsible. Early termination against the will of the consumer, tenant or worker must be a measure of last resort. Disclosure of true and fair grounds for termination must be non-discriminatory and be provided a reasonable period before termination comes into effect. The only grounds for termination are personal behavior of such significance as to merit termination, or financial circumstances or interests on the part of the provider which materially affect the viability of the subject matter of the contract. Where the reasons for termination are financial in nature, users are entitled to have recourse to mechanisms of collective redress, including the right of the individual to be heard or represented. This procedure must allow sufficient time for users to put forward measures preventing termination and/or its consequences. As far as the termination is in the interest of that party which has developed the contract and organized the service it has to consider the interest of the other party with due diligence.

12. **Communication:** Throughout the contractual relationship, from the beginning of the process of negotiation of the contract to its termination, a continuing and co-operative dialogue must be established on an equal basis and at a personal level between the parties with regard to fulfilling the purpose of the contract. Such a discussion must take place before each stage in the contract (formation, adaptation, termination) and communications must at all times be based on the principle of trust and confidence.

# Principles 13-16

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13. **Information and Transparency:** During the negotiation of the contract and for the life time of the contract accurate, complete, timely and understandable information must be provided which is adequate to overcome any information asymmetry that arises.

14. **Securing livelihood:** Where life time contracts provide for regular income, making it available according to time and place, or for payments to be drawn from that income, a minimum level of income must be guaranteed in the form of continuing payments sufficient to meet the consumer's subsistence needs and, if applicable, protection must be provided from attachment of income, seizure and individual voluntary arrangements with creditors.

15. **Exclusion:** The social risks of unemployment, homelessness and overindebtedness must be taken into account in both the individual and the collective forms of the contract with due regard to its social origin and in line with public law.

16. **Confidentiality:** Personal data obtained during a life time contractual relationship and assessments based on such data must be treated confidentially and only be used for the purpose of the contract.



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# Living LifeTime acts Day Conference

Conference will be addressed by the creators of the  
The Contract Principles -  
by Luca Nögler and Professor Udo Reifner.

April, 2023

10pm

Event -

V.E. Cairnes Building  
University of Galway



Scan the QR Code to Register

Collective protection of  
people who benefit  
from goods essential  
for their existence  
through LTCs.

Chiara Cristofolini,  
University of Trento

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## **Outline:**

- The relevance of collective protection for LTCs
- Constructing countervailing power: pressure groups
- Collective actions: extrajudicial and judicial
- Conclusions: a common ground of protection for LTCs

# The relevance of collective protection for LTCs

Consumer credit contract

Rent/leases contract

## LTCs as imbalanced contracts



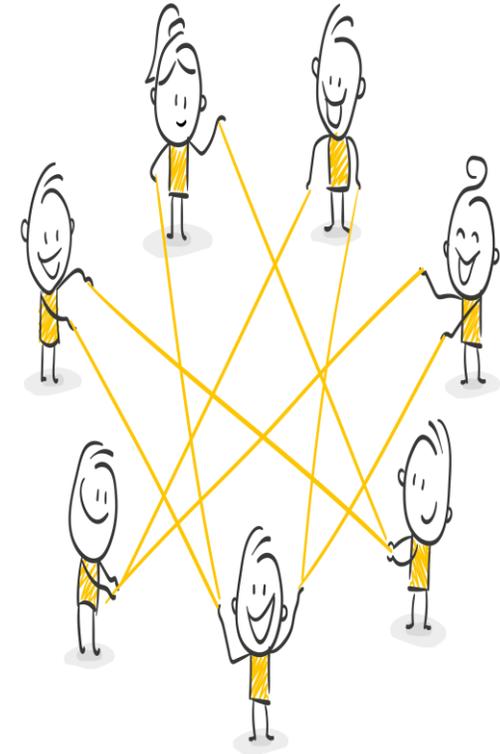
Contract of supply

Employment contract

# Constructing countervailing power: pressure groups

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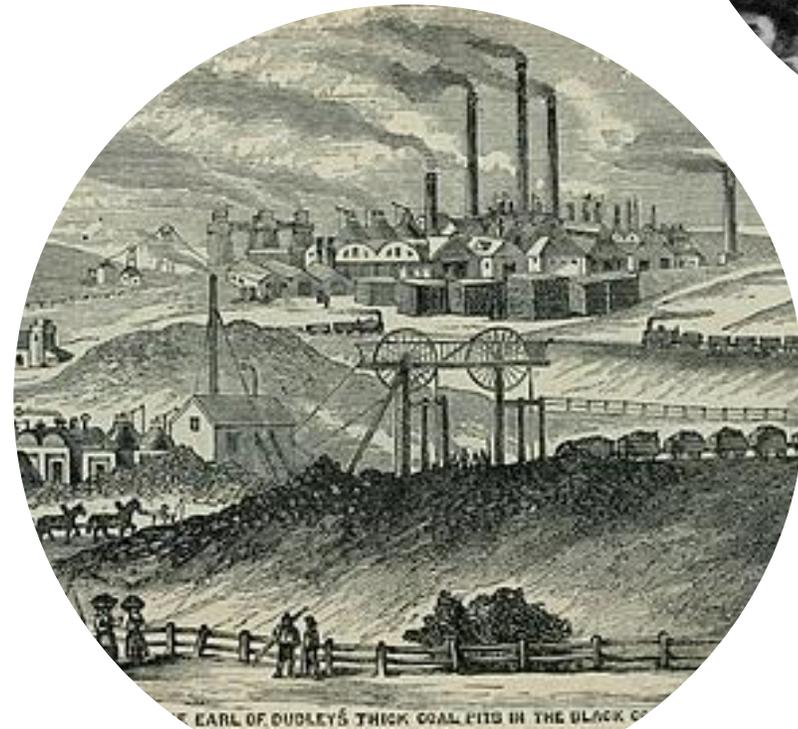
- Employees, tenants, and debtors have organised pressure groups, federations and movements
- Establishment of mass-membership organisations: **trade unions, tenants unions, consumer groups**



# Trade unions – tenants unions – consumer groups

In the early stages, collective groups were not clearly separated:

- Same membership base: poor and disadvantaged people who found their strength in solidarity and unity
- Industrial Revolution (trade union movement & tenant activism)
- 1950s-1960s (modern consumer movement establishment & increased involvement of trade unions in consumer policy)



# Trade unions – tenants unions – consumer groups

Overtime:

- The membership base of pressure groups became more diverse
- Consumer groups and tenant unions adapted methods and organisation models from trade unions



# Collective actions: extrajudicial and judicial

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**Similar forms of collective protection** in 2 fields:

A. Extrajudicial filed

B. Judicial field

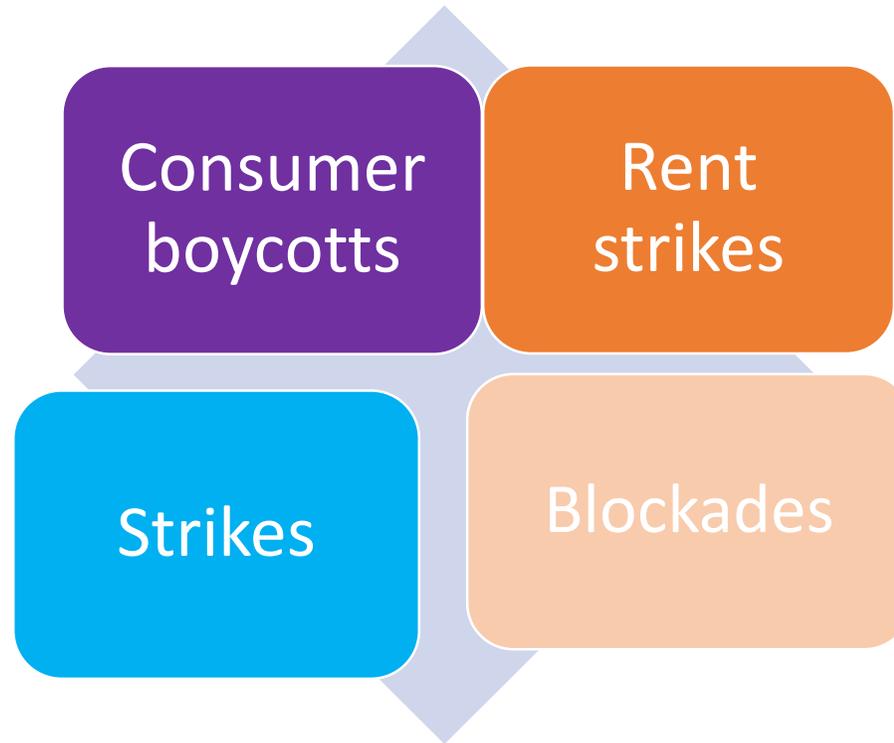
**No “one-size-fits-all model”**

**Different** degrees of **effectiveness** and **relevance** based on:

- Organising members
- Statutory intervention

## A) The extrajudicial field

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## A) The extrajudicial field

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### Differences:

- The purpose of **union** organising and strike is the bargaining of the **collective agreement**
- **Consumer groups lack** the same scale of representation - consumer protection is statutory protection
- **Tenant unions** sometimes resemble practices of collective bargaining:
  - US: academic debate on the need for statutory protection modelled after that of trade unions (e.g. obligation to bargain in good faith)
  - EU countries: **standard-form contracts** (e.g. Italy, France, Finland) - Sweden: interplay between collective bargaining and statutory legislation

## A) The extrajudicial field

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### Involvement in policy-making



Collective groups:  
Voice of consumers,  
workers and tenants



Several EU Member  
States enhance the  
political influence of  
through forums of  
consultations

## B) The judicial field

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- **Consumer organisations & tenant unions:**
  - From small beginnings to a **form of activism** (use of legal tactics and strategic litigation)
  
- **Trade unions:**
  - For a long time, judicial protection has been individual protection
  - Changing scenario: increased use of union avoidance strategies
  - Judicial protection is becoming part of the trade unions' toolbox

## B) The judicial field

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### The Landscape of Collective Litigation: A Changing Legal Framework:

- Collective redress mechanisms are **proliferating** across the EU
- In a significant majority of MS, there is one way for **claimants to combine their claims** and sue the **same defendant** before National Courts.

**However, it is a highly fragmented panorama**

## B) The judicial field

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### Horizontal approach:

Redress actions are used for any type of civil law claims

e.g. Netherlands, Slovenia, France, Spain, Italy, UK

**Vs.**

### Sectorial approach:

A) **Consumer protection only**  
(e.g. Austria, Germany, Belgium)

B) **Extended** to workers' protection  
(e.g. France, Spain, Slovenia)

## B) The judicial field

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### 1. Injunctive collective redress:

- Forward-looking only
- Claimants seek to bring an end to unlawful behaviours

### 2. Declaratory action:

- Assessment of the presence or non-presence of factual and legal requirements.
- E.g. Musterfeststellungsklage (GE)

### 3. Compensatory collective redress:

- The collective group may file for damage

## B) The judicial field

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### **New Trends and Development**

Directive (UE) 2020/1828 on representative actions for the protection of the collective interests of consumers (from 25 June 2023):

- Potential to improve access to justice for consumers in the EU
- But the uniform level of enforcement is unlikely:
  - Draft Bills differences: opt-in or opt-out; criteria of admissibility of qualified entities; third-party funding etc.

## B) The judicial field

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- **Sectorial approach:**
  - Consumer protection only,
  - The Directive does not cover employment litigation
  - Tenant protection partly falls within the scope of application (so-called “consumerization” of tenant law)
- The limited scope of application is a **gap in the creation of a common basis for LTCs**. However:  
Lesson learnt from the US:
  - product-side class actions are much more common than labour-side class action
  - products are simpler and more comparable than workers
  - workers face more trouble with class certification than consumers

## Conclusions: Creating a common ground of protection

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- Common ground must maintain sight of the peculiarities of each sector
- Principles of LTCs are of enduring significance – Principle n. 7 “Collective and ethical dimensions” should be further strengthened
- Strong and well-established legal basis for collective protection: art. 12, art. 28, art. 38, art. 34 par. 3 of the EUCFR; art. 8 ECHR and art. 31 of ESC (revised).
- Interpretative appreciation of these fundamental provisions as a united and dynamic corpus iuris.

Thank you for your attention!



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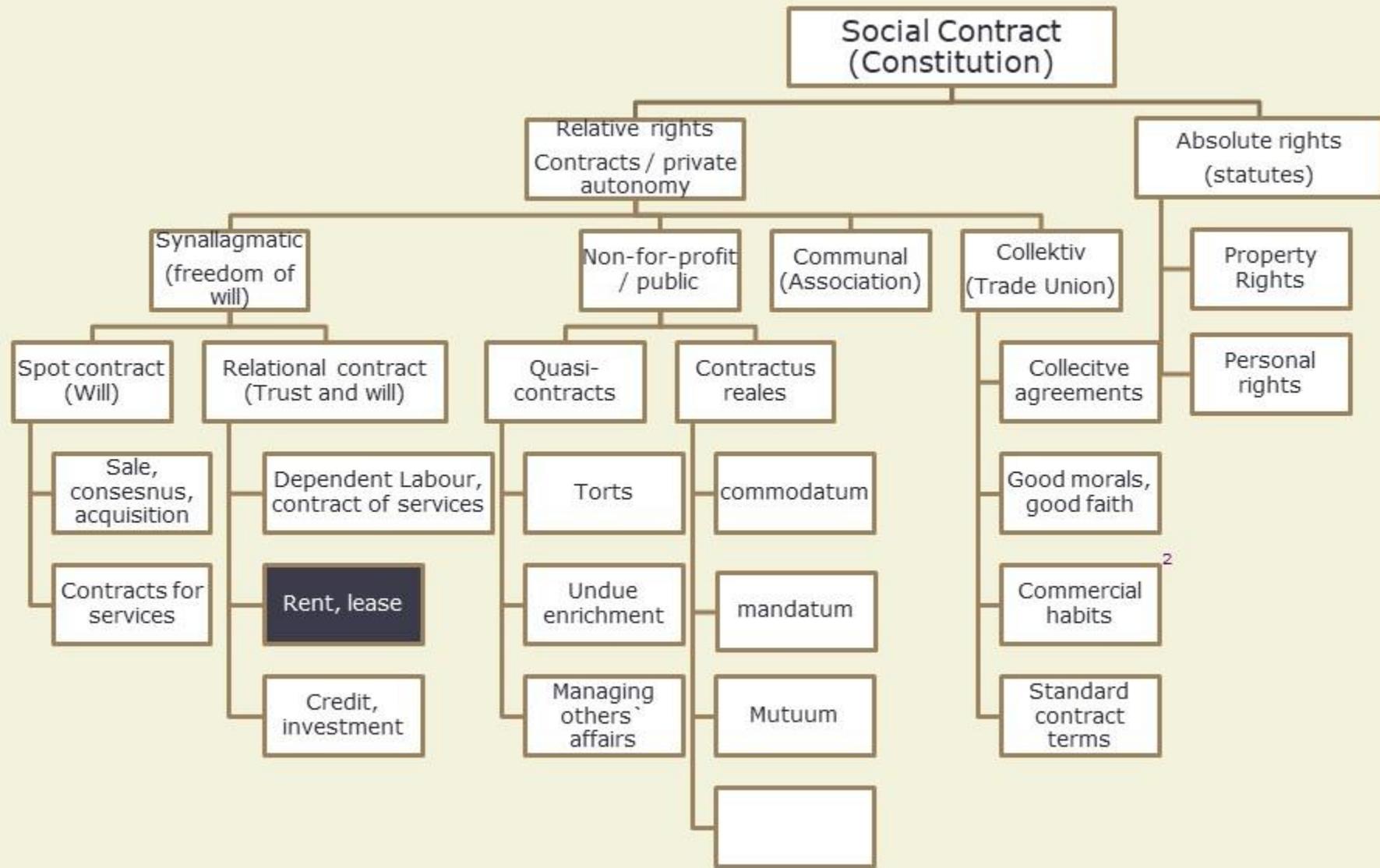
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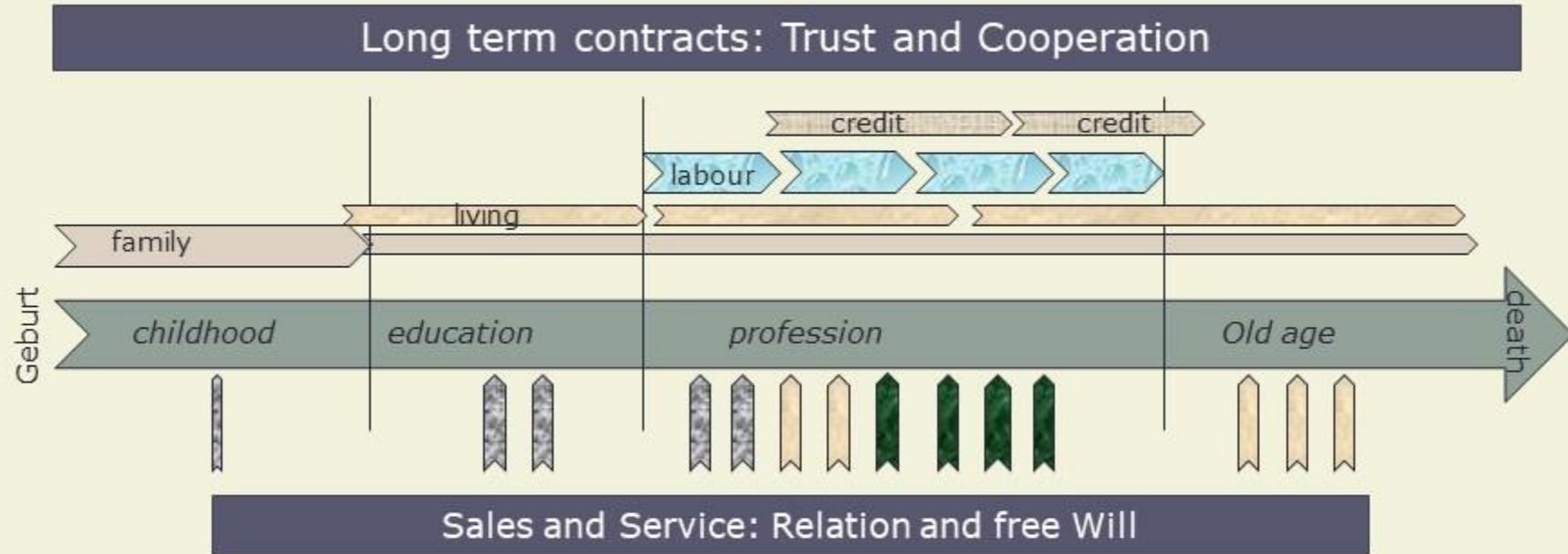


# „The other Contract“

University of Galway Ireland  
April 20, 2023

Prof. Udo Reifner, Hamburg





# Contract and Peace

## 1 Make Peace

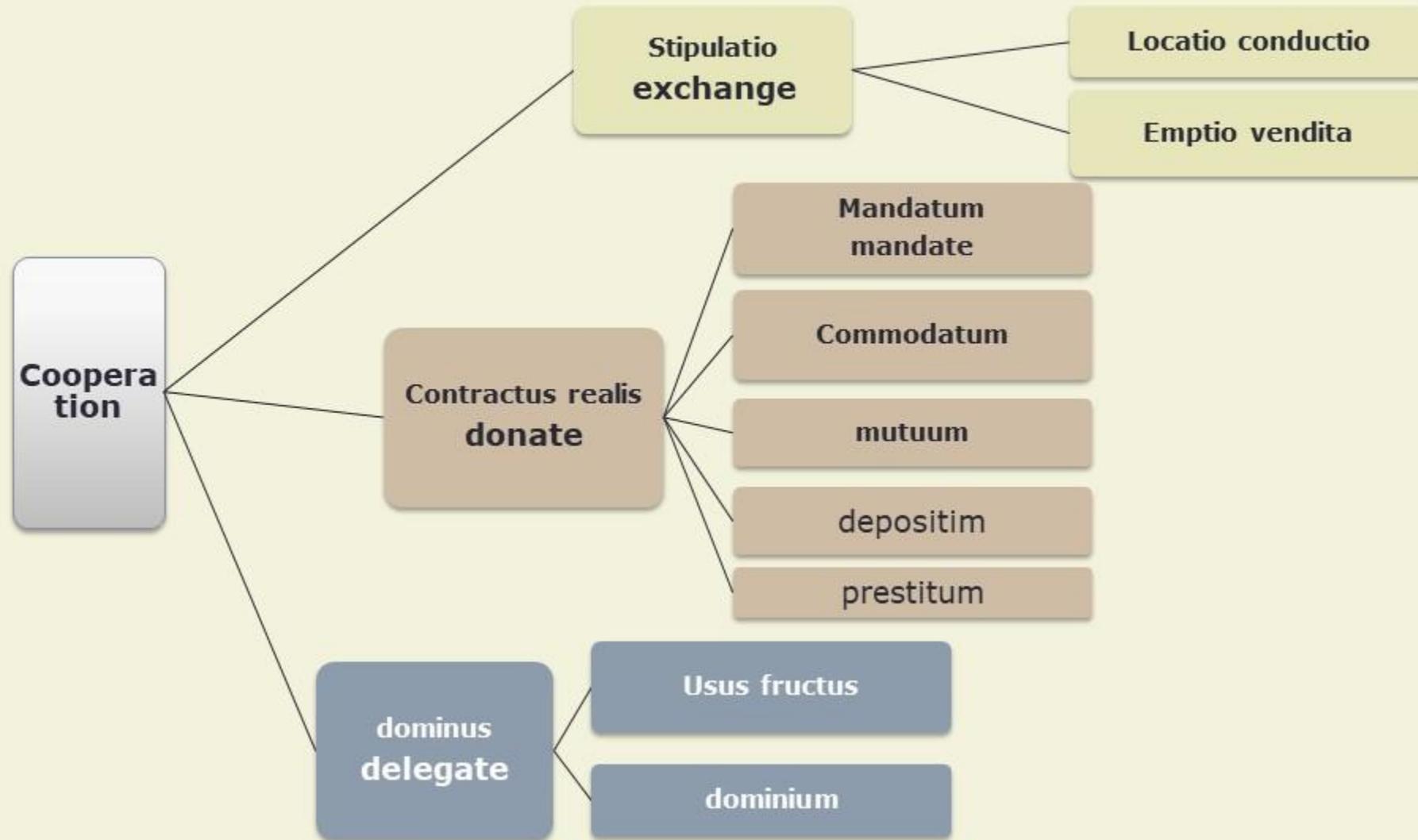
A “contract” is the central legal heuristic for organizing social relations. According to the German Constitutional Court it is through contract that the law realizes individual freedom and democracy: Roman law offered different views on contract like *pactum*, *contractus*, *conventum*, *consensus* which are still in use in German as *Pakt*, *Kontrakt*, *Konvention*, *Konsens* or *Einigung*.

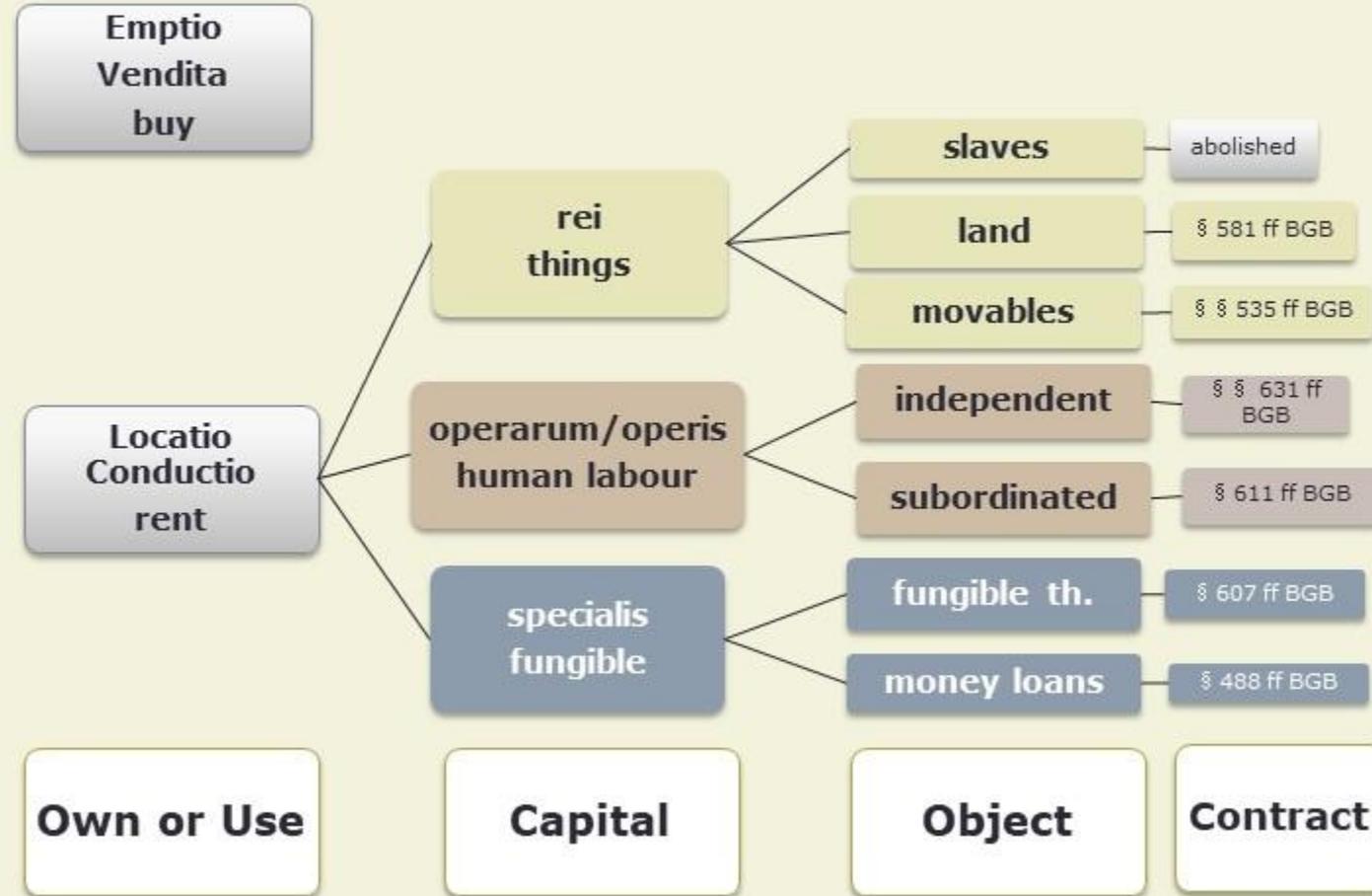
## 2 Contract or contracts?

But is “contract” really a single institution or rather a collective term covering quite different phenomena? *Bund* or “covenant” *treaties* “collective agreement” *Tarifvertrag*, General terms and conditions of business (GTC clauses) EU-Directive 93/13/EEC Art. 307 (2) 2 BGB “the nature of the contract is jeopardized.” “juridical act”, that is, the parties’ declaration of intention, which should be timely, clear, and free of error.

Duration? Justice involves *equal freedom* for all members of society. It presupposes first that the model of thought used is *adequate* regarding the underlying reality of interests and conditions. Secondly it supposes an *equal* distribution of rights and duties in this reality.

# Co-operation in feudal and capitalist societies





# Labour and Use

## 5 Labour contract

- no model of an employment contract in pre-industrial society; only service obligations;
- the contract for work was the free alternative to slavery in Roman law,
- service relationship is no liberal alternative to slavery. Restrictions have not been derived from the nature of the labour contract but introduced only through general *bona fides* principles;
- “labour power” does not exist separately from the worker as a contracting party;
- the free worker is contractor and tenant of a collectively integrated workplace;
- subordination and dependence are functional parts of its collective use.
- field slave, house slave, and debt slave.
- employees cannot rent or sell either themselves as a person, or as a fictionally separate unit of **labour power**.

# Towards a New Contract

## 6 Freedom and bona fide (will and perception)

Sales contracts and contracts for use are no alternatives. The freedom of individuals is no consequence of changed economic circumstances; it is the effect of a fictively defined free will of each party which includes an agreement to subordination.

## 7 Long term principles

§§313 (*rebus sic stantibus*) and 314 (termination for good cause) BGB to be exceptions instead of typical characteristics of a contract of duration.

consumer loan is the pioneer. Its reformulation in the 2002 German law from gift to rent revealed this.

## 8 Book contents

§1 prevailing contract law,: models, functions, and shortcomings. §2 Roman law tradition before the French Revolution. §3 the alternative model

§§4-6 residential tenancy, labour, and consumer credit law in the context of a concept of contract which includes duration, use, and social purpose.

# „Der andere Vertrag“ Nomos 2023

## §1 DER VERTRAG IM GELTENDEN PRIVATRECHT

- I. Modelle
- II. Funktionen
- III. Mängel

## §2 DER VERTRAG IM RÖMISCHEN RECHT

- I. Sklaventum
- II. Eigentum
- III. Locatio Conductio (Miete)
- IV. Mutuum (Geldleihe)
- V. Locatio conductio operarum (Arbeitsmiete)
- VI. Locatio conductio operis (Werkmiete)

## §3 DER DAUERNUTZUNGSVERTRAG

- I. Soziale Dauerschuldverhältnisse (Life Time Contracts)
- II. Gebrauchswert und Tauschwert
- III. Elemente sozialer Nutzungsverträge (LTC)
- IV. Prinzipien des sozialen Dauervertrages
- V. Definition des sozialen Dauervertrages

## §4 DER WOHNRAUMMIETVERTRAG (LOCATIO CONDUCTIO REI)

- I. Mieten und Wohnen
- II. Direktionsrecht
- III. Preis, Dauer und Regulierung
- IV. Definition des Wohnraummietvertrages

## §5 DER ARBEITSVERTRAG (LOCATIO CONDUCTIO OPERIS/OPERRUM)

- I. Arbeitsvertrag
- II. Arbeitnehmervertrag
- III. Arbeitskräftevertrag
- IV. Der andere Arbeitsvertrag
- V. Arbeitsprobleme im Lichte des industriellen  
Werkmietvertrages
- VI. Definition des Arbeitsvertrages

## §6 DER VERBRAUCHERDARLEHENS- VERTRAG (LOCATIO CONDUCTIO SPECIALIS)

- I. Vermietung oder Bereicherung
- II. Geld oder Forderung
- III. Geldnutzung und Schulden
- IV. Definition des Verbraucherdarlehensvertrags

## §7 Literaturverzeichnis



OLLSCOIL NA GAILLIMHE

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Modernising LifeTime  
Contracts  
*One Day Conference*

## Life Time Contracts and Regulation of Housing Systems

Professor Padraic Kenna,  
School of Law, University of Galway.  
[Padraic.kenna@nuigalway.ie](mailto:Padraic.kenna@nuigalway.ie)  
20 April 2023



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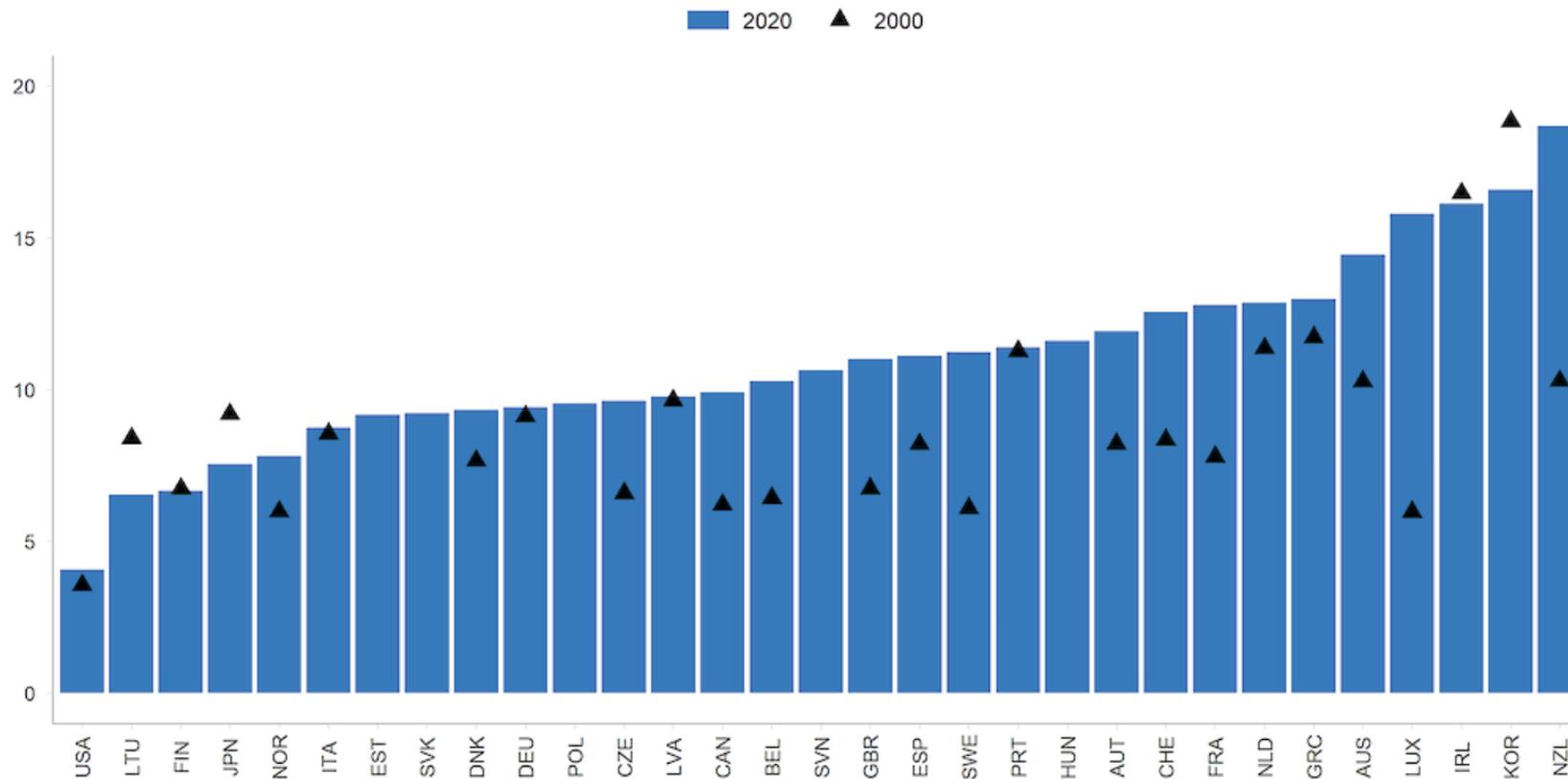
# Housing Systems

- Many models of housing – public/private; route to property ownership; privatization of State housing in the 1990s globally - even in China; political impact of tenure
- Main challenges in Europe – trinity of financialisation, touristification and residualisation
- Access, affordability and security are common concerns.
- Housing finance integrated into global financial circuits – effect ECB interest rates and QE
- Move from State spending on development to personal subsidies



# Housing is the largest lifetime expense

Number of years over which cumulated average household disposable income equals the average price of a 100m<sup>2</sup> dwelling



Note: The choice of fixed-size (100m<sup>2</sup>) dwelling is made to ease cross-country comparisons.



# HOW TO CONCEPTUALISE HOUSING SYSTEMS

The  
“enabling”  
approach to  
housing  
(Angel, 2000)

**1. Property Rights Regime**  
*Registration and mapping systems,  
guaranteed ownership and exchange  
of land and housing etc*

**2. Housing Finance Regime**  
*Development of housing finance  
institutions, mortgage insurance  
,savings, access to credit, equity,  
personal wealth, re-mortgage  
spending etc*

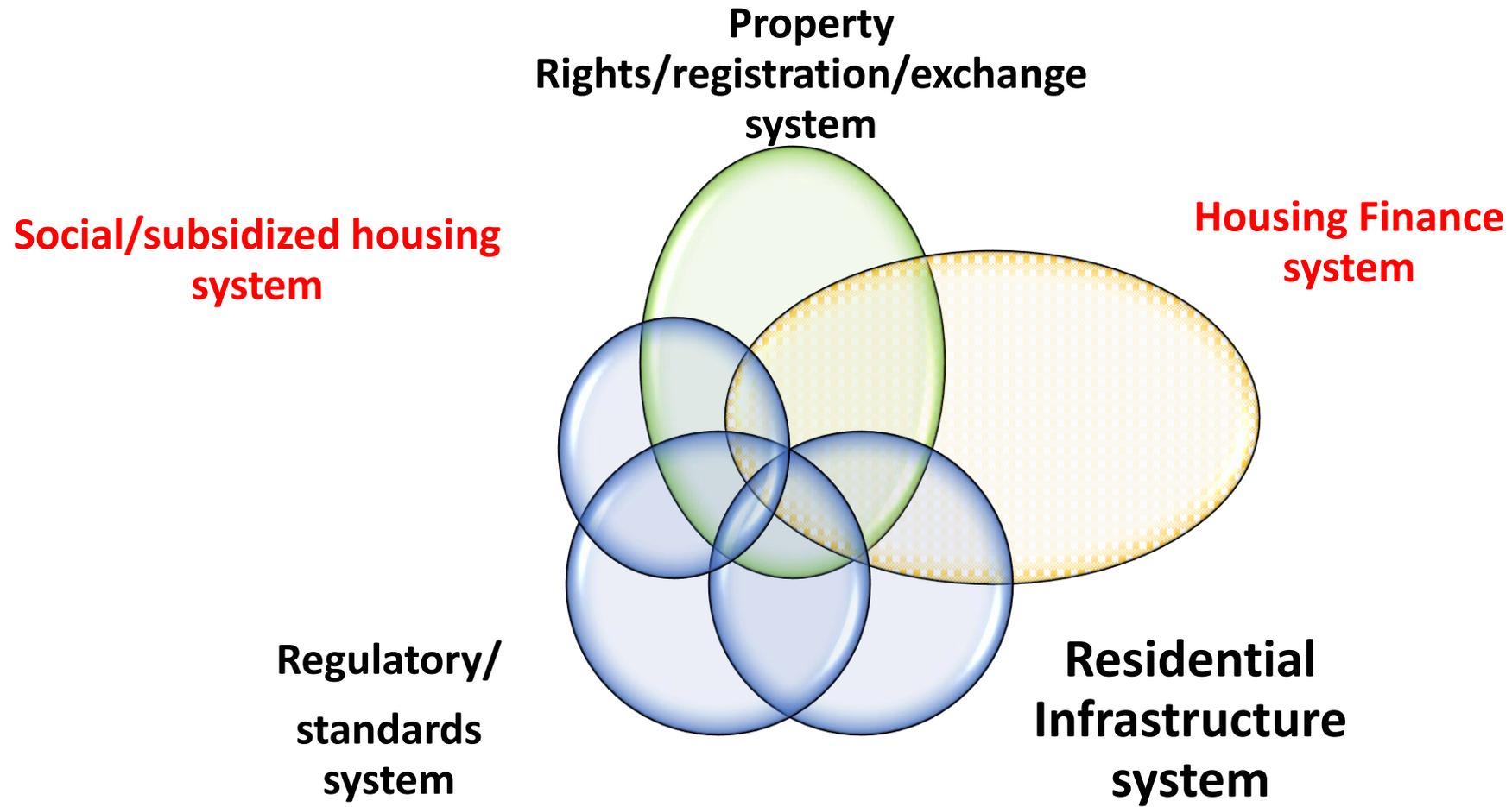
**3. Residential Infrastructure**  
*Government expenditure on water,  
sewage, roads, power, land supply,  
telecommunications. Also parks,  
playgrounds, schools, services,  
transport etc*

**4. The Regulatory/Standards  
Regime**  
*Building codes, planning and zoning,  
sustainable development, minimum floor  
areas etc*

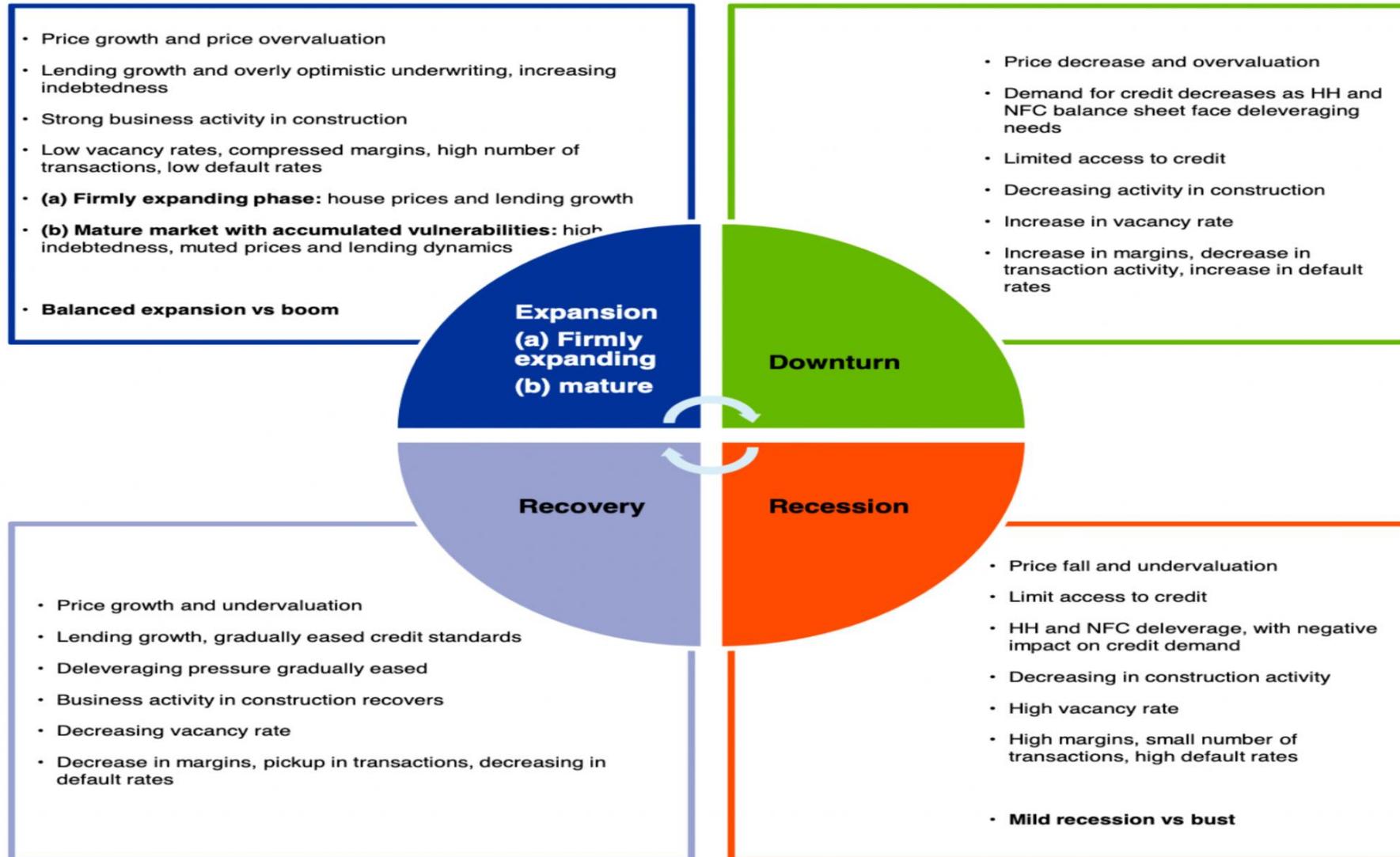
**5. Housing Subsidies/Social Housing**  
*Demand and supply - side subsidies, management of  
housing finance institutions, price and rent control,  
mortgage tax relief, public provision and management  
of housing and land etc*



# The “Enabling” Housing System (Angel 2000)

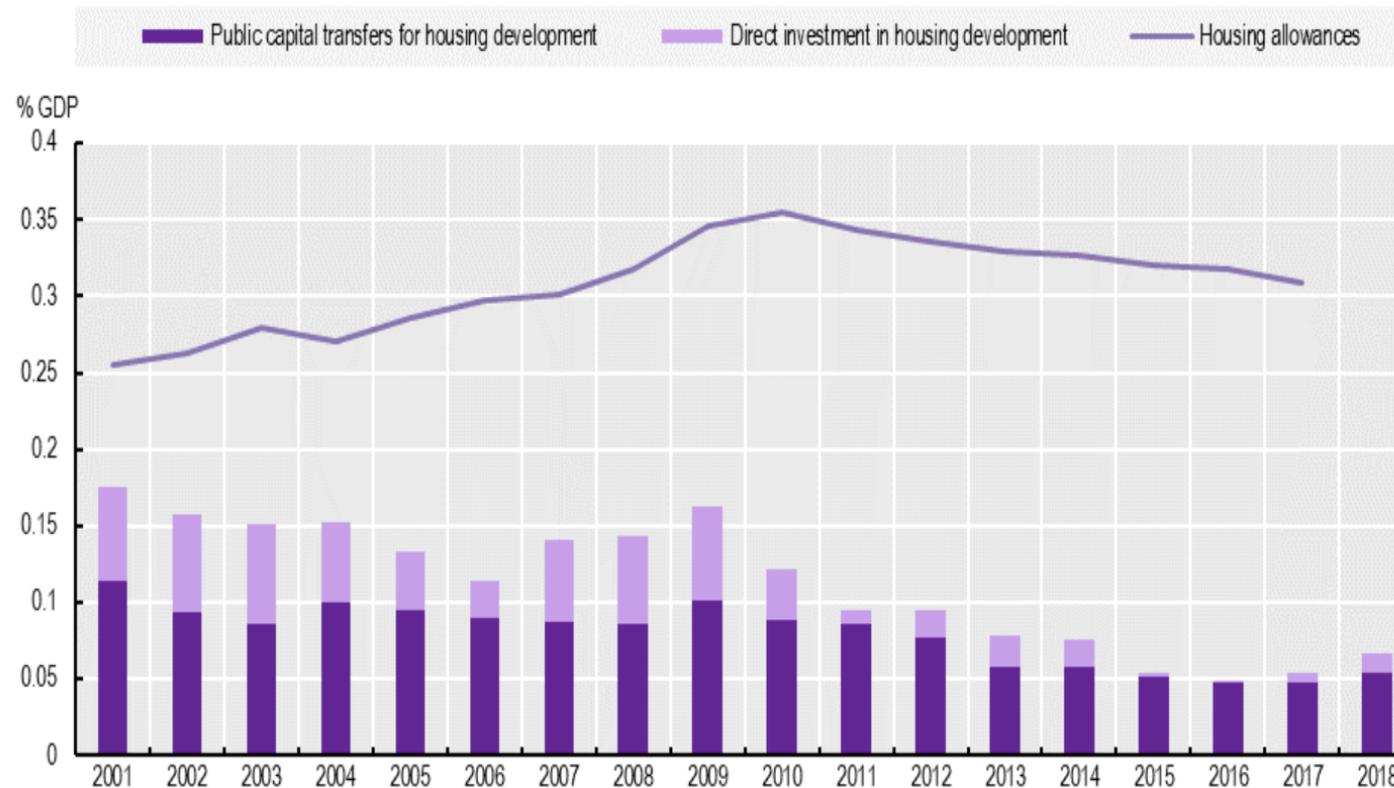


# BUT: The boom-bust housing market model (ESRB 2019)



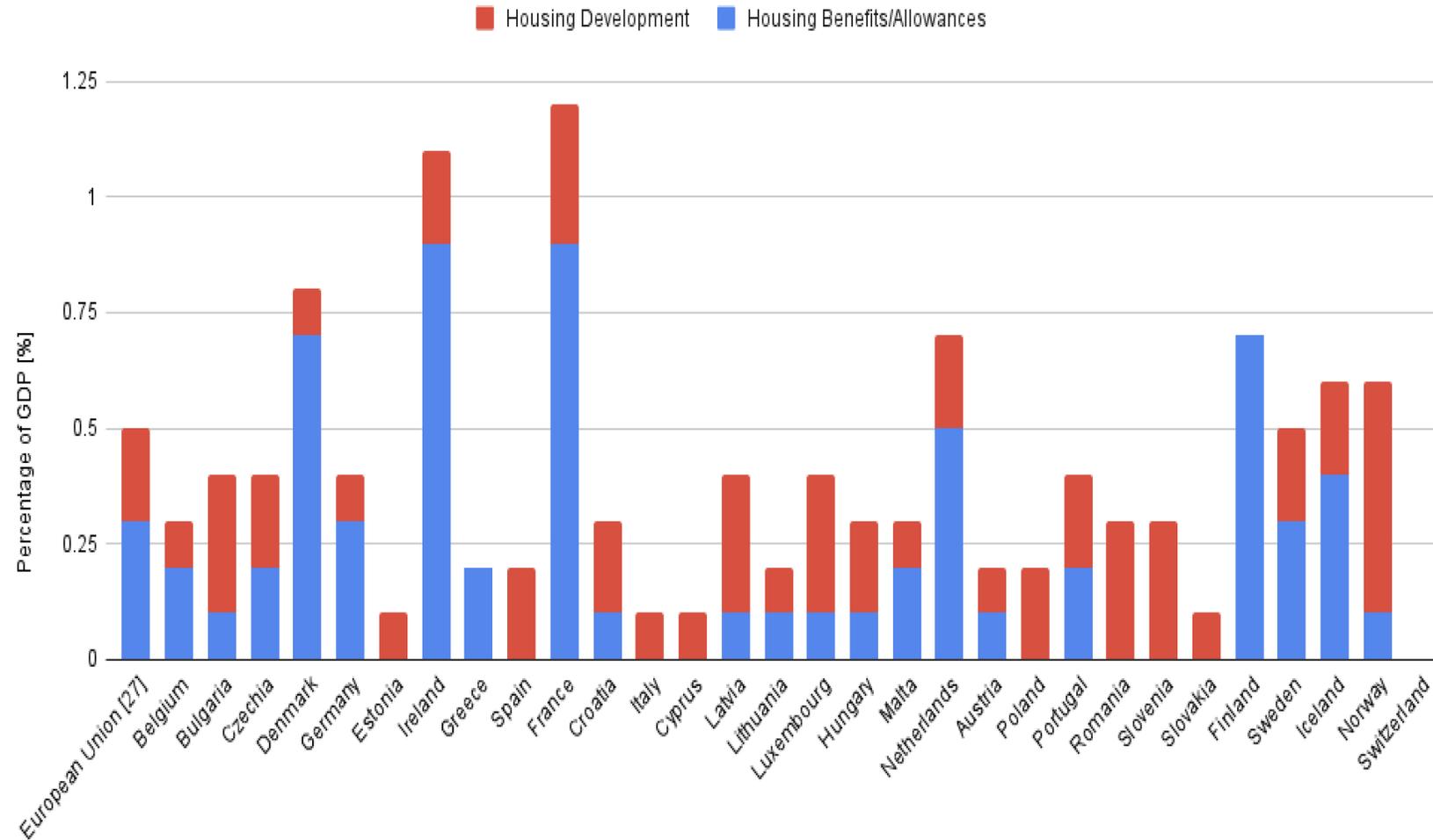
# The Housing subsidies/social housing element

Public capital transfers and public direct investment in housing development, and public spending on housing allowances and rent subsidies, OECD 25 average, as percentage GDP, 2001 to 2018



# State spending on housing – mostly benefits/allowances

Spending on Housing Programs Across EU Countries, 2020



Source: Eurostat COFOG (gov\_10a\_exp) - "Housing" (10.60); "Housing Development" (06.10)



# ***Housing finance regimes – “Understanding” homeloan mortgages***



Classical legal liberal mortgage contract

- Individual contract – free contracting parties
- Negotiated terms
- Contract law applies
- Right of lender to enforce security in default
- May involve repossession for breach of contract – ie. missed payments



# Mortgage Credit Directive 2014/17/EU (MCD)

## Preamble 4

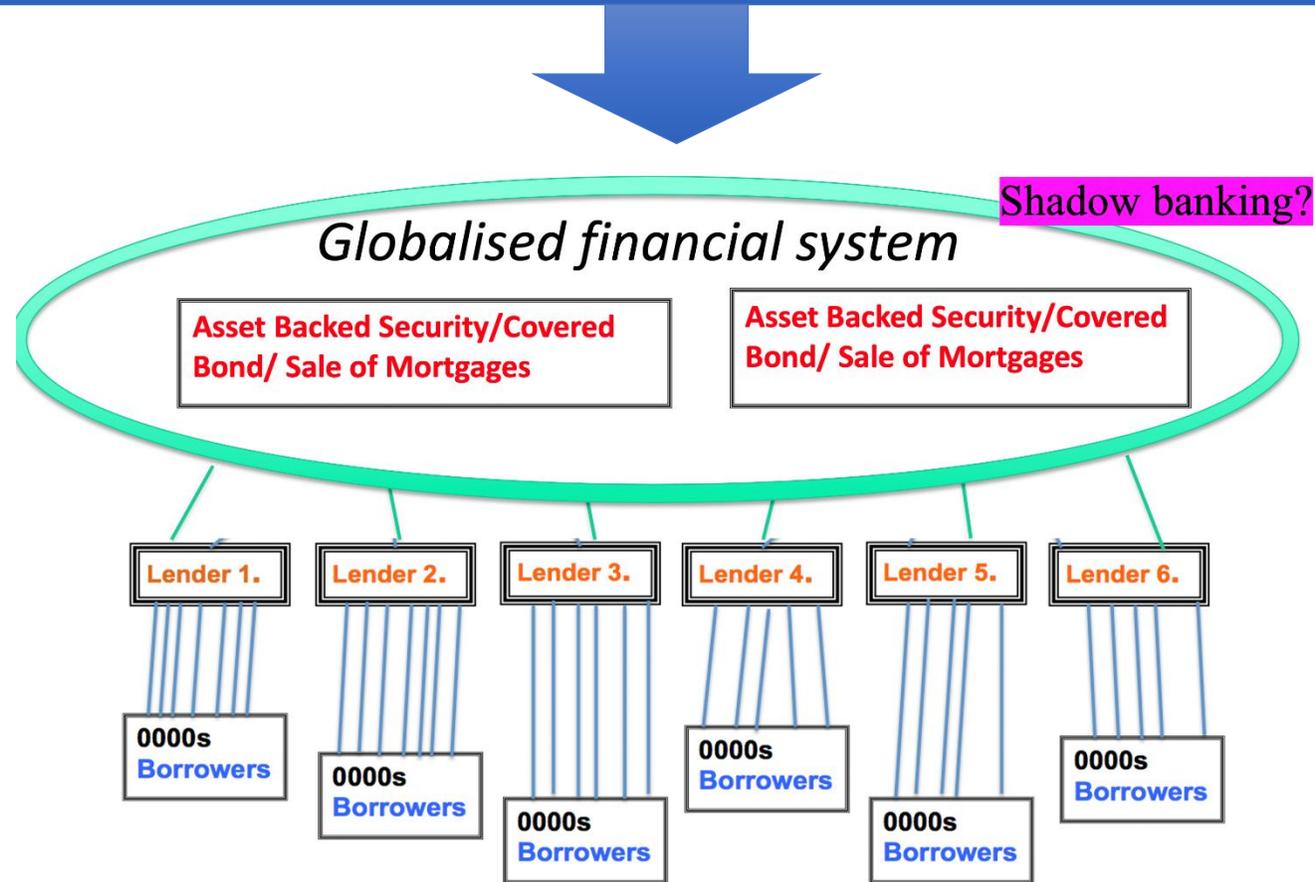
“A series of problems have been identified in mortgage markets within the Union relating to irresponsible lending and borrowing and the potential scope for irresponsible behaviour by market participants including credit intermediaries and non-credit institutions. . . .”





EUROPEAN CENTRAL BANK

The ECB now directly supervises all 111 main lenders in Eurozone under SSM (2014)



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Simon-Moreno & Kenna - ELJ (2019)





# EU law views mortgages as consumer contracts

- EU Directive 93/13/EEC on unfair terms in consumer contracts applies to mortgages
- Art 3. ‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties rights and obligations arising under the contract, to the detriment of the consumer’





# EU law recognition that the mortgage contract relates to “home”

- Case 415/11 *Aziz v Catalunyaacaixa* [2013]
- Para 61. “This [Directive] applies all the strongly where the mortgaged property is the family home of the consumer whose rights have been infringed ‘since the means of consumer protection is limited to payment of damages and interest, and does not make it possible to prevent the definitive and irreversible loss of that dwelling”



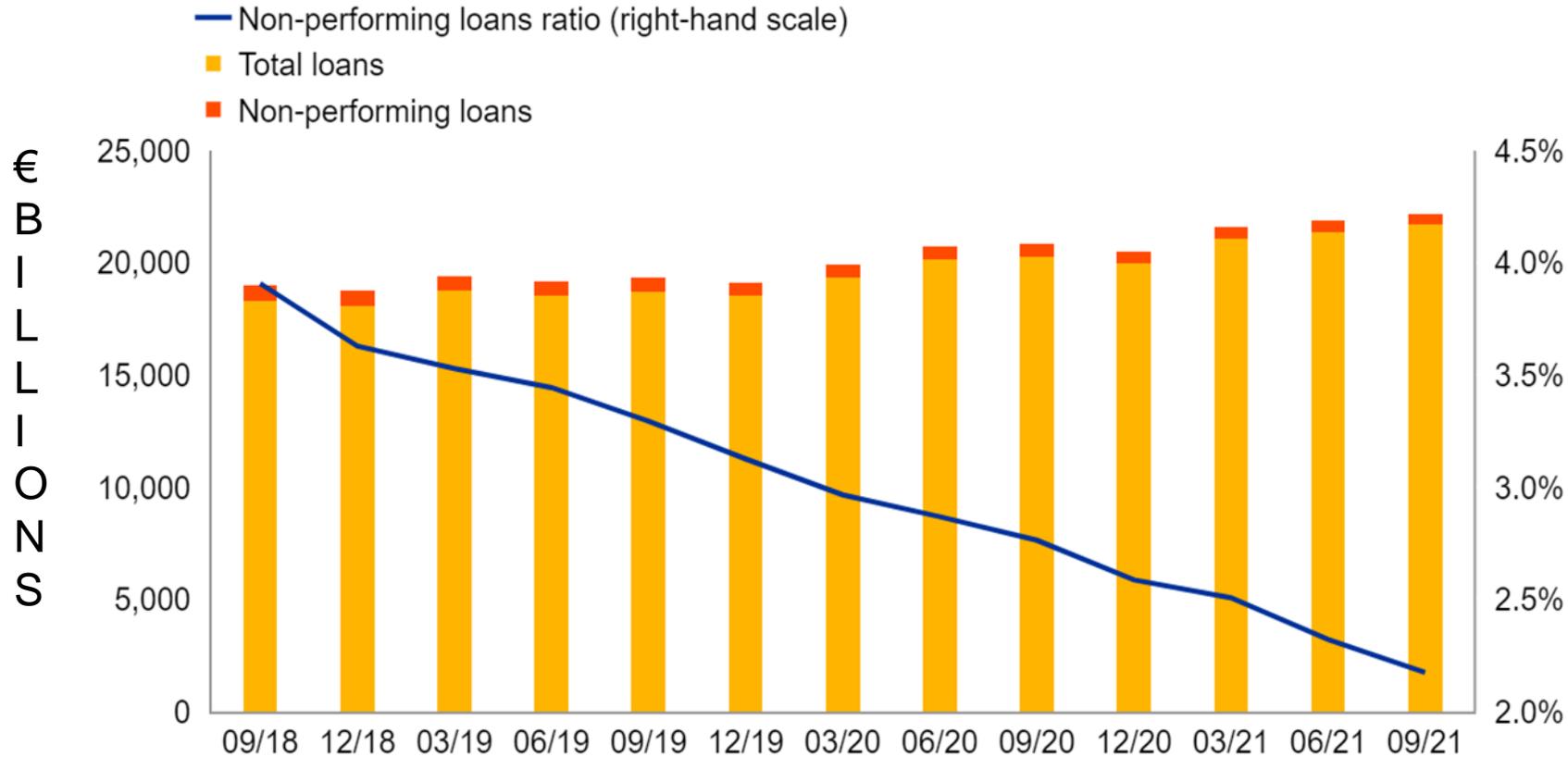


# Case C-34/13 *Kusionova v SMART Capital* [2014] consumer law joins human rights

- Para 63. The loss of a family home is not only such as to seriously undermine consumer rights (*Aziz*, para 61) but it also places the family of the consumer concerned in a particularly vulnerable position
- Para 65. Under EU law, **the right to accommodation is a fundamental right** guaranteed under Article 7 of the EUCFR that the referring court must take into consideration when implementing Directive 93/13 (and indeed all Directives)
- AG Medina in Case C-598/21 *SP, CI v Všeobecná úverová banka, a.s* [2023] - Article 7 EUCFR falls within the Title II EUCFR - “Freedoms”, and not under the “Solidarity” provisions (principles), which can only be applied in the context of EU social inclusion policies.



# Number of NPLs in EU 2018-2021 – 40% are mortgages on homes



[https://sdw.ecb.europa.eu/quickview.do?SERIES\\_KEY=420.SUP.Q.B01.W0.Z.I7000.Z.Z.Z.Z.PCT.C](https://sdw.ecb.europa.eu/quickview.do?SERIES_KEY=420.SUP.Q.B01.W0.Z.I7000.Z.Z.Z.Z.PCT.C)



# Enter the magic wand.....

- We can help banks make these NPLs disappear.....
- Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU
- Must be transposed by 29<sup>th</sup> December 2023
- Facilitate sales of NPLs across the EU
- “passporting system” for “credit servicers” (debt collectors)

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32021L2167&qid=1651603312225>



# Sales of NPLs (including homeloans)

- NPLs can be sold in **electronic auctions** and **transaction platforms**. (EBA)
- Credit institutions required to give a credit purchaser necessary information on creditor's rights under a non-performing credit agreement before sale.
- Art 20. Credit institutions selling NPLs to credit purchasers required to inform their **home member** state competent authority **and host member state** competent authority details of sales of NPLs including aggregate balances etc.



# “Credit Purchaser”

- Any natural or legal person, other than a credit institution (bank) that purchases a creditor’s rights under a non-performing credit agreement.
- Credit purchaser domiciled or established in the EU, must appoint a credit servicer.
- Credit purchasers **not established/domiciled in the EU**, must designate an EU-domiciled/established representative.
- Representative responsible for the performance of the obligations of a **third country credit purchaser**.
- Representative will be required to appoint a credit servicer (unless the representative is a credit servicer itself).



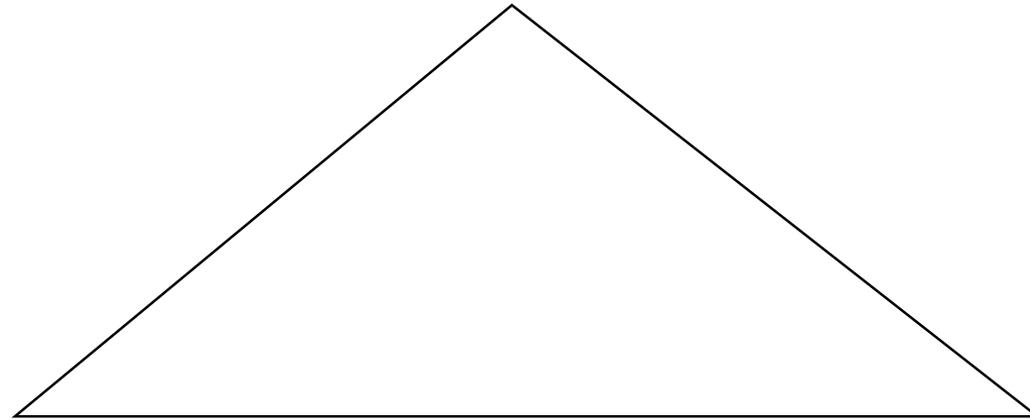
# “Credit Servicer” Role

- A legal person that, in the course of its business, manages and enforces the rights and obligations related to a creditor’s rights under a non-performing credit agreement and carries out one or more of:
  - collecting or **recovering [security]** from the borrower;
  - renegotiating with the borrower any terms and conditions related to a creditor’s rights under a credit agreement;
  - administering any complaints;
  - informing the borrower of any changes in interest rates or charges or of any payments due related to a creditor’s rights under a credit agreement



# Tripartite Regulatory Scenario

Credit Purchaser



Credit  
Servicer

Borrower/  
consumer



# Supervision and Complaints

- Cross-border complaints between MS to be resolved between the regulatory authorities.!!! (27 languages - different legal systems including notary sales)
- Directive sets out means of cooperation and EBA adequacy requirements.
- Regulatory structure yet to be set up.
- Borrowers retain consumer rights of their 'home' MS.
- Credit Purchasers are regulated by their 'home' MS.
- Credit Servicers are regulated by 'home' and 'host' MS.



# Human/consumer rights protection?

- Consumers will retain existing rights in national and EU law.
- Identification and contact details of credit purchaser (or representative) to be given to consumer, as well as details of the account sold – consumer notified of any modifications in agreement.
- Still no separation of NPLs on “homes” and other NPLs is data produced? – potential for breaches of Art 7 EUCFR.
- EU institutions respecting or promoting the Charter??



# However, Preamble 22

*“Article 47 of the Charter of Fundamental Rights of the European Union ensures the right to a fair and public hearing by an independent and impartial tribunal and the possibility of being advised, defended and represented by a lawyer. That can be of particular relevance for the full and complete understanding of all the issues and legal arguments being addressed and to ensure comprehensive preparation of court representation for the case in dispute. Borrowers who lack sufficient resources should be able to resort to legal aid, where that is necessary to ensure effective access to justice and under the conditions laid down by the applicable national laws.”*



# Modifying the Individual Mortgage Contract - New Art 27a into MCD.

## “Information regarding the modification of the terms and conditions of a credit agreement

Without prejudice to other obligations provided for in this Directive, Member States shall ensure that, prior to modifying the terms and conditions of the credit agreement, the creditor communicates the following information to the consumer:

- (a) a clear description of the proposed changes and, where applicable, of the need for consumer consent or of the changes introduced by operation of law;
- (b) the timescale for the implementation of the changes referred to in point (a);
- (c) the means for complaint available to the consumer regarding the changes referred to in point (a);
- (d) the time period available for lodging any such complaint;
- (e) the name and address of the competent authority to which the consumer can submit that complaint.’; ”



# Forbearance - A New Article 28a into MCD.

“(a) paragraph 1 is replaced by the following:

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

(a) a total or partial refinancing of a credit agreement;

(b) a modification of the existing terms and conditions of a credit agreement, which may include among others:

(i) extending the term of the credit agreement;

(ii) changing the type of credit agreement;

(iii) deferring payment of all or part of the instalment repayment for a period;

(iv) changing the interest rate;

(v) offering a payment holiday;

(vi) partial repayments;

(vii) currency conversions;

(viii) partial forgiveness and debt consolidation.’;”



# Life Time Contracts

“At the heart of this class of contracts there is an individual human being, with his or her physiological and ethical requirement, in terms of security, belonging, success and self –fulfillment in other words the existential need to be able to enjoy essential goods (lebenswichtige Güter), services, labour opportunities and income opportunities. Satisfaction of such needs is normally an essential pre-condition for the pursuit of a happy life, or self-realization and participation.”

Nogler, L. and Reifner, U. (eds)(2014), *Life Time Contracts*, (The Hague; Eleven) p. 6.



## *Life Time mortgage contracts are now part of EU housing systems*

- LifeTime contracts are long-term social relationships providing goods, services and opportunities for work and income-creation. They are essential for the self-realisation of individuals and their participation in society at various stages in their life.
- <http://www.eusoco.eu/?p=1012>.
- Homeloan mortgages are lifetime contracts
- Security of homeloan borrowers with NPLS at risk from EU Directive





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An Roinn Airgeadais  
Department of Finance

## Credit Servicers Directive Public Consultation

### Submission

Professor Padraic Kenna, Centre for Housing Law,  
Rights and Policy and School of Law, University of  
Galway.

7th March 2023.

Available at: <https://www.universityofgalway.ie/chlrp/news/new-directive-creating-eu-wide-and-global-market-for-irish-distressed-homeloan-mortgages.html>



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# How digitalization make consumer contracts LifeTime contract

GERAINT HOWELLS

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# Digital Content and Services Directive

- ▶ Digital content and services
- ▶ Subjective conformity – be updated as stipulated art. 7(d)
- ▶ Objective conformity - duty to inform consumer of supply updates to keep in conformity including security updates art. 8 (2).
- ▶ Liability for duration of supply under continuous supply contracts, art.11(3).
- ▶ Remedies and trader's right to use data for particular purposes art. 16(3)
- ▶ Art. 17 consumer right to recover data.
- ▶ Art. 19 on power to modify contracts.



# Sale of Goods Directive

- ▶ Covers digital goods and services incorporated into goods
- ▶ Subjective conformity – updates as stipulated art.6(d)
- ▶ Objective conformity – updates art.7(d).
- ▶ Liability of seller in continuous supply art.10.



# Product Liability Proposal

- ▶ Defect art.6
  - Effect on product of any ability to continue to learn
  - Assessment when product placed on market or under control of manufacturer.
- ▶ Includes modifiers (but not refurbishers?) art. 7
- ▶ Defences art8.
  - ▶ Objective state of knowledge also assessed based on when manufacturer in control

See also artificial intelligence liability directive – presumption of causation from fault.

EU parliament Juri Recommendations on a Civil Liability

Regime for AI recommended strict liability for high risk AI.



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# Product Safety Regulation Proposal

- ▶ Safety art 7 take account of the evolving, learning and predictive functionalities of a product.
- ▶ Corrective measures to bring into conformity art. 8.
- ▶ Recalls by economic operators art 8(9), 10(8), 11(4), 34 and powers of authorities under Regulations 2019/2010.





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# Right to respect for the home and evictions in tenancy and mortgage contracts

**Elena Bargelli**  
Law Department  
University of Pisa

# Questions



I. How has protection of security of tenure in mortgages/tenancies developed after the financial crisis?

II. Do the Principles of Life Time Contracts need to be modernized in the light of the post-financial crisis EUCJ case-law and EU and national legislation?



A. Vicissitudes of CJEU's case-law in matter of residential tenancies and mortgage contracts: Constitutionalization of mortgage/tenancies?

B. EU Secondary legislation: Mortgage directive (2014/17/EU) and national implementation: new trends?

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**A) A. Vicissitudes of CJEU's case-law in matter of residential tenancies and mortgage contracts**  
**a) First period (2013-2014)**

Three cases concerning credit contracts secured by mortgages on borrowers' family home (Aziz, Sanchez Morcillo, Kusionova)

One concerning a residential tenancy contract (Asbeek)

One concerning a loan to purchase a vehicle to "meet the needs of the household" (Banco Espanol, C-618/10)

# 1. Priority of the fairness test over the speed of eviction procedure and enforcement of creditors' rights



The UCTD precludes national legislation which, “while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court...to grant **interim relief**, including, in particular, **the staying of those enforcement proceedings**, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision” (Aziz, Kusionova)

the UCTD, read in conjunction with Article 47 of the CFR precludes an enforcement system... which provides that **mortgage enforcement action cannot be stayed by the court** of first instance, which, by a final decision, **can at most compensate the damage ...**, inasmuch as the debtor ... cannot appeal against a decision rejecting his opposition to that enforcement, whereas the seller or supplier, the creditor seeking enforcement, can appeal against the decision terminating the proceedings or ordering the disapplication of an unfair term” (Sancez Morcillo)

The UCTD precludes “legislation of a Member State... which **does not allow the court before which an application for an order for payment has been brought to assess of its own motion, *in limine litis*** or at any other stage during the proceedings, even though it already has the legal and factual elements necessary for that task available to it, whether a term relating to interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, in the case where that consumer has not lodged an objection” (Banco Espanol).

## 2. Application of the right to housing to consumer law litigations to reinforce the effectiveness argument in the context of the procedural autonomy of the Member States.



“That applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling” (Aziz)

“The loss of a family home places the family of the consumer concerned in a particularly vulnerable position” (Order of the President of the Court in *Sánchez Morcillo and Abril García*).

“The ECtHR has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed (see the judgments of the European Court of Human Rights in *McCann v United Kingdom*, application No 19009/04, paragraph 50, ECHR 2008, and *Rousk v Sweden*, application No 27183/04, paragraph 137). Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing UCTD” (Kusionova)

## Clauses under scrutiny

**Acceleration clauses** (Aziz, Sanchez Morcillo, Banco Español Crédito) → provided guidelines for assessing unfairness



Whether the right of the seller or supplier to cancel the contract unilaterally is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question,

whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the contractual term and amount of the loan,

whether that right derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defence, and

whether national law provides for adequate and effective means enabling the consumer subject to such a contractual term to remedy the effects of the unilateral cancellation of the loan agreement



# Follows. Penalty, extrajudicial enforcement, default interest rate

- **Penalty clause** (Asbeek) → preventing national courts from reducing the amount of the penalty imposed on the consumer by that clause and requiring them to exclude the application of that clause in its entirety with regard to the consumer.
- **Extrajudicial enforcement** of the charge on immovable property (Kusionova) leading to mortgage enforcement proceedings or tenants' eviction → falling outside the scope of UCTD as far as reflecting the content of a mandatory national provision
- **Excessive default interest rate** (Banco Espanol) → no guidelines to national courts



## a) First period's major points: Timidly shaping mortgages/residential tenancies as Life Time Contracts

- «Constitutionalization» through a substantial fundamental right based on Articles 7 EUCFR and 8 ECHR instead of (or beside) a procedural fundamental right (Article 47 EUCFR);
- “Materialization” of the effectiveness argument/principle - Basic needs taken into account (Principle 5);
- “The loss of the family home is the most extreme form of interference with the right to a home” as ECtHR achievement mentioned;
- Risk of exclusion taken into account (Principle 15);

## A. Vicissitudes of CJEU's case-law in matter of residential tenancies and mortgage contracts - b) Second period (2014-2022)

### I. Foreign currency loans (Kasler, OTP, Dunai, E.K., S.K. v D.B.P.)

- A contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible... but also that **the contract should set out transparently the specific functioning of the mechanism of conversion** for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it” (Kasler, 2014 (mortgage loan secured by a guarantee *in rem* [mortgage])).
- “If... a contract concluded between a seller or supplier and a consumer **cannot continue in existence** after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to **cure the invalidity of that term by substituting for it a supplementary provision of national law**” (Kasler).

...Follows....OTP  
Bank, 2018  
(OTP Bank, loan  
contract at issue,  
secured by a  
non-ancillary  
pledge)

- “The fact that some terms which reflect statutory provisions fall outside the scope of that directive does not mean that the validity of other terms, which are included in the same contract and are not covered by statutory provisions, may not be assessed by the national court in the light of that directive”. **If it were not permissible for a national court to replace an unfair term**, without which the contract concerned could not continue in existence, **with a supplementary provision of national law, that court would be required to annul the contract in its entirety. This might expose the consumer to particularly unfavourable consequences, since the consequence of such an annulment is that, in general, the outstanding balance of the loan becomes due forthwith, to a degree likely to be in excess of the consumer’s financial capacities”**



...Follows...Dunai, 2019  
(loan concluded by  
notarial act--> default by  
the debtor was sufficient  
for that contract to  
become enforceable, in  
the absence of any  
litigation proceedings  
before a Hungarian  
court)

- Not precluding national legislation which prevents the court ...from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to the exchange difference provided that **a finding that terms in such an agreement were unfair would restore the legal and factual situation that the consumer would have been in had that unfair term not existed**
- Precluding national legislation which prevents... the court ...from granting an application for the cancellation of a loan contract on the basis of the unfair nature of a term relating to exchange rate risk **where it is found that that term is unfair and that the contract cannot continue to exist without that term**
- Directive 93/13, read in the light of Article 47 of the Charter, does not preclude a supreme court of a Member State from adopting, in the interest of ensuring uniform interpretation of the law, binding decisions concerning the modalities for implementing that directive, in so far as those decisions do not prevent the competent court from ensuring the full effect of the norms laid down in that directive and from offering consumers an effective remedy for the protection of the rights that they can derive therefrom, or from referring a question for a preliminary ruling to the Court in that regard, which it is however for the referring court to determine.



.. ...Follows... E.K.,  
S.K. v D.B.P. (2022)  
Joined Cases  
C-80/21 to C-82/21  
(mortgage  
agreements to  
finance the costs of  
homes).

- Precluding national case-law according to which the national court may declare unfair not the entire term of a contract ...but only those parts of it which are unfair...
- Precluding national case-law according to which the national court may, after finding that an unfair term ...is void and does not result in the annulment of that contract as a whole, replace that term with a supplementary provision of national law.
- Precluding national case-law according to which the national court may, after finding that an unfair term ...is void and that the contract as a whole is void, replace the annulled term either by interpreting the parties' wishes in order to avoid the annulment of the contract, or by applying to the annulled unfair term a supplementary provision of national law, even though the consumer has been informed of the consequences of the annulment of that contract and has accepted them.
- **Precluding national case-law according to which the 10-year limitation period** for a consumer's action for the restitution of sums unduly paid to a seller or supplier in performance of an unfair term contained in a credit agreement with a duration of 30 years **begins to run on the date of each performance** by the consumer, even though the consumer was not in a position, at that date, to assess the unfairness of the contractual term himself or herself or was not aware of the unfairness of the term, and regardless of the fact that the contract had a repayment period, in this case 30 years, which is much longer than the statutory limitation period of 10 years.



**II. Loan with interest rate floors - L v Unicaja Banco SA (2022) Case C-869/19 (mortgage loan in the amount of EUR 120 000 to finance the purchase of a single-family house)**

- **Precluding national case-law that temporally limits the restitutory effects connected with a finding of unfairness ... to amounts wrongly paid under such a clause after the delivery of the decision in which the finding of unfairness is made** (judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraph 75).
- In the case in the main proceedings, ...the consumer did not lodge an appeal or cross-appeal against the first-instance judgment imposing a temporal limitation on the restitutory effects as regards the amounts received under the unfair term.
- However, ... in the circumstances of the present case, the fact that a consumer did not bring proceedings within the appropriate period may be attributable to the fact that, when the Court delivered the judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, the period within which it was possible to bring an appeal or cross-appeal under national law had already expired. In such circumstances, the consumer cannot be regarded as having displayed complete inaction within the meaning of the case-law referred to in paragraph 28 above, in not challenging before an appeal court hitherto settled case-law of the Tribunal Supremo.
- It follows that, in depriving the consumer of the procedural means enabling him or her to assert his or her rights under Directive 93/13, the application of the principles of national judicial procedure at issue is liable to make the protection of those rights impossible or excessively difficult, thereby undermining the principle of effectiveness.
- In the light of the foregoing, ...Article 6(1) of Directive 93/13 must be interpreted as precluding the application of principles of national judicial procedure, under which a national court, hearing an appeal against a judgment temporally limiting the repayment of sums wrongly paid by the consumer under a term declared to be unfair, cannot raise of its own motion a ground relating to the infringement of that provision and order the repayment of those sums in full, where the failure of the consumer concerned to challenge that temporal limitation cannot be attributed to his or her complete inaction

III. Financing  
contracts - order for  
payment become  
final – SPV project  
(2022) Case  
C-693/19 and  
C-831/19

Precluding national legislation which provides that, **where an order for payment** issued by a court on application by a creditor **has not been the subject of an objection** lodged by the debtor, **the court hearing the enforcement proceedings may not**, on the ground that the force of *res judicata* of that order applies by implication to the validity of those terms, thus **excluding any examination of their validity, subsequently review the potential unfairness of the contractual terms** on which that order is based. The fact that, at the time when the order became final, the debtor was unaware that he or she could be classified as a ‘consumer’, within the meaning of that directive, is irrelevant in that regard.

## b) Second period's major points

- CJEU stopped mentioning any fundamental right's argument other than that based on Article 47 ECtFR - One swallow doesn't make a summer?

CJEU often even omitted any reference to the subject of the loan (primary home, any existential need, etc.);

HOWEVER: It reiterated and even extended the Aziz doctrine (SPV case);

- It extended the sphere of application of UCTD by “substantializing” the transparency test wherever the definition of the main subject matter of the contract or the adequacy of the price and remuneration of the services or goods supplied in exchange is concerned (Article 4 UCTD);

→ If the transparency test is passed, the clause remains valid even if substantially unfair → See, however, Court of Appeal of Milan, September 2022: Floor clause unfair even if transparent as falling under Article 6 UCTD

# I. How did the CJEU case-law develop the security of tenure?



- Constitutionalized consumer (Micklitz)?
- Consumerization of the right to respect for the home rather than constitutionalization of consumer law.
- However, no direct horizontal effect of the right to housing (Domurath & Mak)
- Materialization of consumer law/interpersonal approach? →
- Right to respect for the home to be taken into account in conducting the fairness test wherever the clause under scrutiny multiplies the debtor's risk of non-performance and places him at risk of losing his home;
  - Article 4 UCTD: "Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent".



## B. Secondary legislation: Mortgage directive (2014/17/EU – modified by dir. 2021/2167/EU)....

No reference to the right to housing in the Recitals: “a smoothly functioning internal market with a high level of consumer protection in the area of credit agreements relating to immovable property and in order to ensure that consumers looking for such agreements are able to do so confident in the knowledge that the institutions they interact with act in a professional and responsible manner, an appropriately harmonised Union legal framework needs to be established in a number of areas, taking into account differences in credit agreements arising in particular from differences in national and regional immovable property markets”

Security of tenure: “1. Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated. 2. Member States may require that, where the creditor is permitted to define and impose charges on the consumer arising from the default, those charges are no greater than is necessary to compensate the creditor for costs it has incurred as a result of the default. 3. Member States may allow creditors to impose additional charges on the consumer in the event of default. In that case Member States shall place a cap on those charges” (Article 28)

... and following national implementing legislation - Article 120-quinquiesdecies Italian Bank Law (TUB): “The lender shall adopt procedures to manage relations with consumers in payment difficulties. The Bank of Italy shall adopt provisions to implement this paragraph, with particular regard to the lender’s information and fairness obligation s, as well as cases of any state of need or particular weakness of the consumer”.

## Bank of Italy Regulation on Transparency (2019)



- **“Blameless” default and cooperation:** adequate assistance to be provided to consumers in difficulty in meeting the payment deadlines, especially if this is due to supervening hardships (e.g. loss of a job, disability or serious illness, death of a close relative, separation or divorce, natural disasters affecting them, their place of residence, their assets or ability to income of the consumer);
- **Suggested measures to be chosen by the banks to cure the creditor/debtor relationship:**
  - 1) refinancing the whole credit or a part of it;
  - 2) modifying the terms of the credit agreement, for instance by: (a) **prolonging** the contractual length; (b) changing contractual terms (for example, instead of the simultaneous repayment, with each instalment, of principal and interest, the **payment of interest only for a predefined time frame**); (c) the total or partial **postponement** of the payment of instalments; (d) the **renegotiation** of the interest rate; (e) **temporary suspension** of the payment of instalments.

# I. How did EU/national legislation develop the security of tenure? Post-crisis new vocabulary of defaulting credit relations



- **“Blameless” default as a consequence of serious hardship**
  - Decree Law No. 102 of August 31, 2013 (as requirement to claim Funds to help residential tenants in arrears)
- **Moratorium**
  - Residential immovables leasing (Law no. 208/2015 art. 1 comma 79)
  - Consumers’ over-indebtedness procedure (Law No. 3/2012)
- **Curing the contractual relationship before the judicial/enforcement stage**

# Modernizing the inefficient residential tenancies prototype – no early measures of preventing termination developed

Art. 55 L. no. 392/78 →  
Moratorium, serious hardship -  
Curing the contractual  
relationship **at the first hearing**  
**by allowing the court to grant**  
**repeated moratoriums**

Temporary moratorium **of**  
**evictions** in case of serious  
hardship by repeated  
temporary statutes

## II. Modernization of Principles of LTC needed?



- Principle 11: Termination...must be transparent, accountable and **socially responsible**. Early termination ... must be a measure **of last resort**....Where the reasons for termination are financial in nature, users are entitled to have recourse to **mechanism of collective redress**... This procedure must allow sufficient time for users to put forward measures preventing termination and/or its consequences. As far as termination is in the interest of the party which has developed the contract and organised the service, **it has to consider the interest of the other party with due diligence**.
- Post-crisis vocabulary to be introduced?
- **SERIOUS HARDSHIP IN PECUNIARY OBLIGATIONS, DUTY TO CURE THE CONTRACTUAL RELATIONSHIP, MORATORIUM**
- **Materialization of the fairness test in life-time contracts to be introduced?**
- **GAPS: utilities contracts?**
- **Legal framework? EU principles of private law?**



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# Life Time Mortgage Contracts

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## Research project

- > Part of the research project Rethinking Public Interests in Private Relationships, led by prof. Aurelia Colombi Ciacchi (<https://www.rug.nl/rechten/onderzoek/expertisecentra/repp/?lang=en>)
- > Supported by ERC Evict Project, led by prof. Michel Vols ([www.eviction.eu](http://www.eviction.eu))
- > Research project: consumer protection in mortgage enforcement proceedings
- > Current project: comparative research on systems of forbearance and mortgage enforcement after the Global Financial Crisis



“The phenomenon of mortgage repossessions in the aftermath of the 2008 subprime mortgage loan crisis was an occasion to expose **gaps in the procedural protection of mortgage debtors** and unearth **the imbalances in the respective positions of the parties** in the contractual and postsigning contractual processes, deeply rooted in the **unlimited right of the mortgagee to repossess**” (A. Beka, 2018)



## Developments after/around GFC

- > Art. 8 ECHR (right to respect for home) & A1P1 (right to peaceful possession of property)
- > Art. 11 ICESCR
- > The EU Charter of Fundamental Rights and the European Social Charter
- > EU Directives
  - Unfair Contract Terms Directive
  - Mortgage Credit Directive
  - Directive on credit servicers and credit purchasers



## Insights from these developments (1)

- › Growing attention for the protection of the ‘basic need’
  - Kenna 2019: “a nascent European standard, linking mortgage law, consumer law, and human rights law, with the UCTD providing the nexus among all three areas”
  - Kenna & Aldanas 2023: “the horizontal application of the right to respect for the home [...] is being advanced in EU law and in the UN human rights monitoring systems. This is leading to a more expansive and modern approach”
  - A-G Medina 2023: “Since the financial crisis, EU law has provided a more robust framework for consumer protection in the field of credit secured by immovable property. [...] The secondary legislation serving as the ‘nexus’ between procedural law, consumer law and the Charter of Fundamental Rights of the European Union (‘the Charter’) is Directive 93/13/EEC.”



## Insights from these developments (2)

### > But also criticism...

- Domurath 2016: “The CJEU's use of the right to effective legal protection cannot make up for an imbalance in the rights and obligations in the contract and possible unfairness of the contract term occurring after an adverse event. In the end we have to bear in mind that Mr. Aziz, like many others, lost his home after all.”
- Van Duin (2017): “Consumer protection is not absolute”
- Domurath & Mak 2020: “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.”



## Comparative research

- > The influence of the Global Financial Crisis on systems of forbearance and mortgage enforcement proceedings – (How) did the developments described changed these systems?
  - Focus: owner-occupied residential property, professional mortgage lender, mortgage debtor = homeowner
- > 12 experts from different jurisdictions: Belgium, England, Germany, Greece, Ireland, Italy, the Netherlands, Poland, South-Africa, Spain, Turkey, and the USA
- > Methodology: 2 expert meetings and 1 questionnaire



## More information



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EUROPEAN JOURNAL OF COMPARATIVE LAW AND  
 GOVERNANCE (2022) 1–36

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### Different Models of Forbearance and Mortgage Enforcement Proceedings

*Comparing Default Resolution Approaches in Europe*

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## First findings, relevant for LTC (1)

### > Parties involved

- Shift from the traditional mortgage lender/bank – mortgage borrower relationship to non-banks
  - Nogler & Reifner 2018, p. 19: “It is always the **use of someone else’s capital** that defines the synallagmatic relationship”
- Securitization → there could be more than more than two parties involved

### > Length of the contract

- Average mortgage maturity rate in the euro area: 22.01 years
- Turkey: 120 months
- Nogler & Reifner 2018, p. 7: “an **ongoing compromise** between individual freedom and the social relationships that directly concern the life and time of workers, borrowers and tenants.”



## First findings, relevant for LTC (2)

### Specific recommendations concerning the Principles for LifeTime mortgage contracts

- › Change in circumstances (addition to Principle 10)
- › Implementing forbearance measures in adaptation/termination phase (addition to Principles 10 and 11)
- › Possibility to cure default – termination process does not necessarily mean ending the contract (addition to Principle 11)
- › Pre-contract information and affordability assessment (addition to Principle 13)



## First findings, relevant for LTC (3)

- > Adverse effects of more protection
  - Turkey: “delay the inevitable payment”
  - South Africa: “postponing the inevitable”
  - Ireland: “Ironically, while the protection of borrowers’ right to home requires a judicial process before evictions, two-thirds of repossessions take place as a result of ‘voluntary surrender’ or abandonment, meaning without a court order”
  - The Netherlands: example of the irrevocable power of attorney to avoid the suboptimal auction procedure
  
- > Judicial protection should always be available (in the broadest sense)



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