Housing Rights Must Be Respected and Promoted by EU Institutions for the Benefit of EU Citizens

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BRIEFING PAPER 2

EU Economic Governance and Financial Supervision

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Contents

1.	Introduction	5
2.	Executive Summary	
3.	Monetary and other policies – the ECB	
	- Single Supervisory Mechanism	
4.	Macro- and Micro-prudential Regulation and Supervision	
	- The European System of Financial Supervision	
	- The European Systemic Risk Board	
	- The European Banking Authority	
	- ECB Opinions on draft national legislation	
5.	EU Macroeconomic Co-ordination	21
6.	The European Commission - European Semester	26
7.	Conclusion	30
Appendix 1. ESRB - characteristics of residential real estate market cycles		
Figure 1. Composition of the European System of Financial Supervision		

For more information

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Terms and Abbreviations

"The Charter"	EU Charter of Fundamental Rights
"The Commission"	European Commission
"The Council"	European Council
CJEU	Court of Justice of the European Union
EBA	European Banking Authority
ESC	European Social Charter
ECB	European Central Bank
ECON	European Parliament's Committee on Economic and Monetary
	Affairs
EP	European Parliament
ESM	European Stability Mechanism
EFSF	European Financial Stability Facility
EFSM	European Financial Stability Mechanism
EMU	European Monetary Union
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
FRA	EU Agency for Fundamental Rights
MEP	Member of the European Parliament
MIP	Macroeconomic Imbalance Procedure
NPL	Non-Performing Loans
TEU	Treaty on European Union -The Maastricht Treaty
TFEU	Treaty on the Functioning of the European Union - The Lisbon
	Treaty
SGP	Stability and Growth Pact
SSM	Single Supervisory Mechanism

1. Introduction

Housing related EU institutional measures are becoming central to the economic, social and environmental sustainability of the Union. After a decade in Treaty law, it is now time for the EU Charter of Fundamental Rights to be integrated into the EU economic governance and financial supervision arrangements. This would recognise that the EU cares about its citizens. Such actions will enhance the legitimacy of Union actions, and generate wider support for the European Project.

The Conclusions of the Council of the European Union (2019) emphasised "the importance of providing accessible information about the rights enshrined in the Charter to the general public in order to foster citizens' ownership of the Charter".¹

Today, Charter housing rights are directly relevant for EU citizens, and these must be respected and promoted by EU Institutions for the benefit of EU citizens.

This is the second in a set of three Briefing Papers² outlining how this can be achieved.

Three Briefing Papers

The three Briefing Papers, prepared after detailed research and consultation, explore the following diverse topical areas.

- (1) Housing and Housing Rights in the EU Charter of Fundamental Rights;
- (2) EU Economic Governance and Financial Supervision;
- (3) Integrating EU Charter Housing Rights into EU Economic Governance and Financial Supervision.

"It is high time that we reconcile the social and the market in today's modern economy."

- Ursula Von Der Leyen, President, European Commission³

¹ Council of the European Union, *Conclusions on the Charter of Fundamental Rights after 10 Years: State of Play and Future Work* Brussels, 20 September 2019, (12357/19) para 14. https://data.consilium.europa.eu/doc/document/ST-12357-2019-INIT/en/pdf.

² The research and consultation for the Briefing Papers was funded by Open Society Foundations. I am grateful for the comments and suggestions received in the four expert seminars, personal exchanges, phone conversations, and emails on the drafts of these Briefings. In particular, I would like to thank Donal Mac Fhearraigh at OSF, Marguerite Angelari at OSJI, María José Aldanas at FEANTSA, Dee Halloran and all those who contributed to these publications.

³ See Ursula von der Leyen (2019) 'A Union that strives for more – My agenda for Europe', p. 9, <u>https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.</u>

2. Executive Summary

The global financial crisis of 2008, sparked by trading in home loan securities, prompted an overhaul of the European economic governance and financial supervision architecture. State supervision of financial institutions had failed in countries. After the crash, banking debts were transferred to some Member States budgets through bank bailouts. The social consequences of that financial crisis showed how poor governance and supervision could undermine human rights. This time it could be better.

This emerging architecture of the Economic and Monetary Union is unique, with a single monetary policy, and decentralised fiscal and economic policies under the responsibility of Member States.⁴ However, the financial crisis of 2008 changed everything, and an overarching EU institutional objective emerged after the iconic *Pringle* case – that of protecting the financial stability of the euro area as a whole.⁵ This elaborate EU-wide framework includes the European System of Financial Supervision, with the ECB taking on a major new role in the Single Supervisory Mechanism, as responsibility for banking supervision was transferred to the EU level. The ECB must also be consulted on proposals for regulation, or on draft national legislation, in areas falling within its responsibility – 'to preserve the confidence and stability of financial markets'.

One of the most significant EU institutions to emerge in relation to housing rights is, arguably, the European Systemic Risk Board (ESRB). This institution coordinates EU Member States macro-prudential policies – recently adding housing markets and personal debt to its surveillance system. The risks addressed by the ESRB, however, are risks to EU financial stability and financial institutions, and not to European citizens.

Within the regulation of mortgage markets in Europe, the European Banking Authority also plays a key role, in developing the Single Rulebook and in its policies on non-performing loans and consumer protection.

EU macroeconomic coordination has advanced greatly since the crash of 2008. Member States have adopted significant EU-driven constitutional, legislative and regulatory changes to coordinate and strengthen economic governance. These include the Treaty on Stability, Coordination and Governance, and EU legislative measures known as the 'six-pack' and 'twopack'. Closer Commission monitoring and identification of Member State economic and fiscal risk, taking account of wider policy areas, as well as enhanced 'surveillance' systems, is organised through the European Semester process.

Significantly, the European Commission has addressed housing issues within this process, recognising the need for investment in social housing and the importance of the European Pillar of Social Rights. This approach goes some way to counter dissonance between economics and human rights, and between financial regulation/stability and the availability of social and affordable housing, which is prevalent in some other institutional approaches.

⁴ See European Commission (2020) – *Economic governance review*, COM(2020)55 final, p. 2

⁵ See Tuominen, T., 'Mechanisms of financial stabilisation' in Fabbrini, F. and Ventoruzzo, M. (2019) *Research Handbook on EU Economic Law* (Cheltenham: Edward Elgar) p. 100.

Indeed, the conflation of the public interest with protecting the stability of European financial institutions debilitates meaningful discussion on the human rights implications of EU institutional action in this area. The framing of EU economic governance and financial supervision as purely technical issues has revealed a deficit in the democratic and human rights oversight. These arrangements do not refer at all to the EU Charter of Fundamental Rights, or the EU Treaty social objectives. The concept of 'cognitive capture' comes to mind.

There are growing questions of legitimacy for EU institutions, amid perceived prioritisation of corporate interests over EU citizens' rights. However, the core obligation to respect and promote the Charter cannot be ignored and it is welcoming to note that the new President of the European Commission believes "it is high time that we reconcile the social and the market in today's modern economy." ⁶ Of course, the ultimate question is what interests EU economic governance and financial supervision serves – financial corporations or citizens?

What is evident, however, is the central position of housing in the risk to stability of the EU financial system, and the absence of Charter housing rights consideration, at EU institutional level.

"There are growing questions of legitimacy for EU institutions, amid perceived prioritisation of corporate interests over EU citizens' rights."

⁶ See Ursula von der Leyen (2019) 'A Union that strives for more – My agenda for Europe', p. 9, <u>https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.</u>

3. Monetary and other policies - the ECB

Ever since the adoption of the decision to form an Economic and Monetary Union, taken by the European Council in 1991, and later enshrined in the Maastricht Treaty, the monetary union has remained an 'asymmetric group of policies'.⁷ The EU enjoys exclusive competence to conduct monetary policy for the Member States whose currency is the euro, but the Member States retain control of economic policy, including budgetary and fiscal policy.

The global financial crisis of 2008, sparked by trading in home loans securities, prompted an overhaul of global and European macroeconomic and microeconomic governance and coordination, the financial supervision and regulatory architecture, fiscal and budgetary surveillance.⁸ There has been valuable analysis to date of the role and function of EU economic governance in relation to austerity measures, and their effects on human rights,⁹ but the impact of other EU regulatory and supervisory measures and institutions has been exposed to much less scrutiny.

The current policy, as set out in Article 3 TEU, that the EU 'shall establish an economic and monetary union', masks significant differences in EU institutional approaches, based on different competences relating to monetary policy (with EU exclusive competence) and economic policies (with shared EU/Member State competences), and other EU institutional supports.¹⁰

In relation to monetary policy, Article 3(1)(c) TFEU states that the Union shall have exclusive competence in monetary policy for the Member States whose currency is the euro.¹¹ This task is entrusted to the ECB under Article 127(1)TFEU, which provides that:

https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957 .en.pdf?258d648ffcf1be39f9d927e5c13f393f. Lenaerts points out: "Unlike other monetary unions, there was no centralised fiscal policy function and no centralised exercise of fiscal power. Member States of the euro area were thus bound to each other through a common currency, but were free to conduct their own national economic and fiscal policies. The euro was not accompanied by a 'community of risk-sharing'".

⁷ See Lenaerts, K. 'The Court of Justice and the Economic and Monetary Union: a constitutional perspective', in building bridges: Central banking law in an interconnected world,' ECB Legal Conference 2019, p. 420. Available at:

⁸ Fabbrini, F. (2016) *Economic Governance in Europe – Comparative Paradoxes and Constitutional Challenges* (Oxford University Press).

⁹ See for instance, O' Gorman, R., 'Adjustment programmes, the European Central Bank and conditionality' in Fabbrini, F. and Ventoruzzo, M. (2019) *Research Handbook on EU Economic Law* (Cheltenham: Edward Elgar); Kilpatrick, C. and De Witte, B. *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, EUI Working Paper LAW 2014/05 (2014); Poulou, A., 'Austerity and European social rights: How can courts protect Europe's lost generation?', *GLJ* (2014) 15; Salomon, M. 'Of austerity, human rights and international institutions', *ELJ* (2015) 21. ¹⁰ Article 114 TFEU confers on the European Parliament and the Council the competence to adopt measures for the approximation in Member States of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. See Craig, P. & De Búrca, G. (2015) *EU Law: Text, Cases, and Materials*, (Oxford University Press).

¹¹ In Case C-62/14, *Gauweiler and Others*, EU:C:2015:400, it was accepted that measures of monetary policy can – and often do – have incidental effects on economic policy. However, the fact that such measures might be capable of indirectly contributing to the stability of the euro area, which is a matter for economic policy, does not remove such measures from the ambit of the Union's monetary

The primary objective of the European System of Central Banks (hereinafter referred to as 'the ESCB') [ECB] shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.¹²

Article 119 TFEU guiding principles are stable prices, sound public finances and monetary conditions and a sustainable balance of payments. Remarkably, the measures of price inflation used by the ECB do not include house prices.¹³

The (secondary) objectives to be supported by the ECB within Article 3(3) TEU are:

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

The ECB, with its extensive Treaty powers and prescribed 'independence', retains significant influence in matters which may impact on national housing policies (and Charter-related issues).¹⁴ But Article 130 TFEU establishes that the ECB should not take instructions from the EU institutions and bodies in the exercise of its tasks and powers, or from any government of the Member States. Experts in this area have acknowledged that while independence is necessary when a supervisor is contributing to achieving financial stability, given the quasilegislative and executive tasks entrusted to a supervisory authority, appropriate mechanisms

policy. The Court of Justice thus found that the ECB bond-buying programme in question was, in that respect, compatible with EU law since its principal purpose was to achieve genuine monetary policy objectives. The EU also has exclusive competence in establishing the competition rules necessary for the functioning of the internal market.

¹² This involves organising, evaluating and crosschecking information on assessing risks to price stability, based on 'two pillars' – economic analysis and monetary analysis. See http://www.ecb.europa.eu/mopo/strategy/html/index.en.html.

¹³ Stanislaus Jourdan has pointed out that the ECB's primary mission is to maintain consumer price stability, but while doing so it omits an important item of household consumption: the cost of housing. This data gap reveals a cognitive bias in the way the ECB formulates its monetary policy, impacting on the Eurozone economic governance arrangements, which in turn affect national housing policies. See Positive Money - <u>https://www.positivemoney.eu/2020/01/housing-prices-inflation-index/</u>

¹⁴ Article 127(2) states that 'The basic tasks to be carried out through the ESCB shall be ... to define and implement the monetary policy of the Union ...'; See Zilioli, C. and Selmayer, M. (2001) *The Law of the European Central Bank* (Oxford: Hart).

for accountability are absolutely essential.¹⁵ In the supervisory context, a financial supervisor 'has the power to affect in profound ways the interests of the individual financial institutions, of financial consumers, and even of nation states ...'¹⁶ Dawson points out that even if the ECB is politically independent, legal scrutiny, including the ability of individuals and financial institutions to challenge decisions affecting their daily lives, should remain intact.¹⁷

"There has been valuable analysis to date of the role and function of EU economic governance has been on austerity measures and their effects on human rights, but the impact of other EU measures and institutions has been exposed to much less scrutiny."

Single Supervisory Mechanism (SSM)

The SSM¹⁸ extends the role of the ECB beyond monetary policy, to ensure the safety and soundness of the European banking system, increase financial integration and stability, and ensure consistent supervision of financial institutions.¹⁹ Through SSM the ECB directly supervises almost 120 significant banks in the participating countries, which hold over 80% of banking assets in the euro area. Banks that are considered as "less significant" institutions continue to be supervised by their national supervisors, in close cooperation with the ECB.²⁰ All euro area countries participate automatically in the SSM, and EU countries that do not yet have the euro as their currency can choose to participate.

Under SSM the ECB has the authority to conduct supervisory reviews, on-site inspections and investigations, grant or withdraw banking licences, assess banks' acquisition and disposal of qualifying holdings, ensure compliance with EU prudential rules and set higher capital requirements ("buffers") in order to counter any financial risks.²¹

¹⁵ Zilioli, C., 'The Independence of the European Central Bank and its New Banking Supervisory Competences', in Ritleng, D. (ed.)(2016) *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press), p. 159: For an examination of tensions between the roles of the ECB see Alexander, K., 'European Banking Union: A legal and institutional analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism', *European Law Review* (2015) 2, pp. 154–188.

¹⁶ Zilioli, C., 'The Independence of the European Central Bank and its New Banking Supervisory Competences', in Ritleng, D. (ed.)(2016) p. 159.

¹⁷ See Dawson, M., Bobić A. and Maricut-Akbik, A., 'Reconciling independence and accountability at the European Central Bank: The false promise of proceduralism', *European Law Journal* (2019) 25, 75–93 at 88.

¹⁸ See Regulation 1024/2013.

¹⁹ See ECB/2014/39, 'Decision of the European Central Bank of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank.'

²⁰ See <u>https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html</u>

²¹ However, 'conduct of business' regulation i.e., institutions interaction with customers, rests with national competent authorities, usually national Central Banks.

The ECB in its supervisory role is subject to significant accountability and reporting arrangements – to the European Parliament, to the Eurogroup, and even to national Parliaments in relation to its supervisory functions. Indeed, for the first time, an EU institution is asked not only to report, but also to enter into dialogue with, and explain its policy choices to national Parliaments.²²

The SSM Regulation provides that SSM prudential supervision should be 'unfettered by nonprudential considerations',²³ but that within SSM the ECB should carry out its tasks subject to and in compliance with relevant Union law including the whole of primary and secondary Union law.²⁴ Recital (86) of the SSM Regulation states:

This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial, and has to be implemented in accordance with those rights and principles.

The ECB role in SSM is based on a number of key supervisory principles including, in Principle 5 which states '[I]n line with the SSM Regulation, there will be democratic accountability at both the European and national levels.'²⁵ The Chair of the ECB Supervisory Board must, upon European Parliamentary request, participate in ordinary public hearings on the execution of its supervisory tasks twice a year, in additional to ad-hoc exchanges of views on invitation and in special confidential meetings where necessary for the exercise of European Parliament's powers.²⁶ There is an obligation on the ECB to inform the European Parliament's competent Committee of the procedures it has set up for adoption of ECB regulations, decisions, guidelines and recommendations which are subject to public consultation in accordance with the SSM Regulation.

In the prudential supervision of credit institutions, the ECB must respect the rights and observe the principles set out in the Charter in accordance with its powers. In view of these powers, the Charter is relevant primarily with regard to the rights: to good administration (Art 41); to access documents (Art 42); to refer a matter to the European Ombudsman (Art 43); to an effective remedy and to a fair trial (Art 47 in conjunction with Arts 49 and 50); to the protection of personal data (Art 8); for supervisory matters, to freedom to conduct a business (Art 16). The ECB has pointed out that 'while some powers of the ECB may also affect the rights granted under Article 34 EUCFR, there is no express provision in the Treaties addressing this issue with the ECB'.²⁷

²² Zilioli, C. (2016) p. 176.

²³ Recital 12 to the SSM Regulation (1024/2013).

²⁴ Para 32 SSM Regulation.

²⁵ European Central Bank, 'Guide to Banking Supervision,' September 2014,

http://www.ecb.europa.eu/pub/pdf/other/ssmguidebankingsupervision201409en.pdf p. 5. See also Lamandini, M., Ramos Muñoz, D. and Solana, J. (2015), 'Depicting the Limits to the SSM's Supervisory Powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection', *Quaderni di Ricerca Giuridica*, no. 79.

²⁶ Article 284(3)(2).

²⁷ Source: Correspondence with author 5/11/15.

There has been some legal analysis of the application of Charter rights within SSM in relation to possible violations of the principle of *ne bis in idem* (no legal action can be instituted twice for the same cause of action), and fundamental rights in general, but these apply only to supervisory decisions relating to financial corporate bodies. While the ECB accepts some Charter rights as being applicable to its activities, the full extent of EU Charter rights related to housing are not explicitly respected or promoted in the exercise of competences and mandates in the SSM process, or indeed, the wider activities of the ECB.

"In the context of high levels of household and mortgage debt across Europe it is very likely that the ECB's direct supervision of the largest European lenders will have an impact on fundamental social rights, especially those set out in the Charter."

4. Macro - and micro-prudential regulation and supervision

The European System of Financial Supervision (ESFS)

The ESFS constitutes the EU institutional response to the global financial crisis of 2008. Member State supervision of financial institutions had failed in some cases, and the systemic risks to financial stability from excessive mortgage lending and house price booms had been underestimated.²⁸ Equally, some regulatory harmonisation at EU level was necessary given the cross-border nature of the EU banking sector, the need for uniform application of international standards, and 'passporting' of service providers across EU Member States.²⁹ The *De Larosière Report* proposed a new regulatory and supervisory structure for European financial institutions and States, which was adopted in 2010 and became operational in 2011.³⁰ The system comprises various authorities with a macro-prudential mandate at national level, and the ECB, with specific macro-prudential competences at Union level.³¹

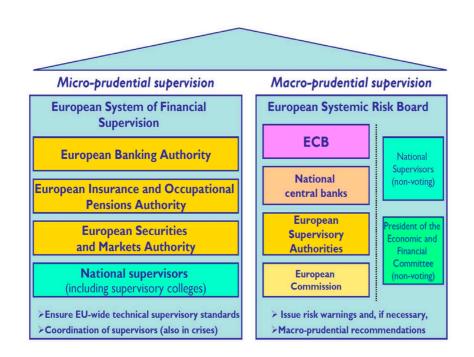


Figure 1. Composition of the European System of Financial Supervision³²

²⁸ Preamble 4 of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, states: '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 ...' ²⁹ See High-Level Group on Financial Supervision in the EU, *The De Larosière Report Regarding the New Structure of European System of Financial Supervision* ('*De Larosière Report*) (2009). https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf

³⁰ The legal basis for this system is Article 114 TFEU on measures that aim at (i) the approximation of national laws, regulations and administrative acts, and (ii) the establishment or functioning of the internal market.

³¹ European Commission, *A Roadmap towards a Banking Union* COM (2012) 510 final 12.9.2012. The Banking Union consists of four pillars: a Single Supervisory Mechanism (SSM); a single rulebook for financial institutions in the single market; harmonised deposit guarantee schemes; and a single European recovery and resolution framework.

³² Based on *De Larosière Report*, p. 47.

The establishment of the ESFS with its constituent agencies – the European Systemic Risk Board (ESRB),³³ and three European supervisory authorities (ESAs): the European Banking Authority (EBA),³⁴ the European Securities and Markets Authority (ESMA),³⁵ and the European Insurance and Occupational Pensions Authority (EIOPA)³⁶ – marked a major development.

The European Supervisory Authorities (ESAs) work primarily on harmonising financial supervision in the EU by developing the Single Rulebook – a set of prudential standards for individual financial institutions – as well as assessing risks and vulnerabilities in the financial sector. All these EU institutions and bodies operate under EU law competences.

The European Systemic Risk Board (ESRB)

One of the most significant institution in relation to housing rights to be established after the financial crash was the ESRB.³⁷ It is responsible for the macro-prudential oversight of the European financial system in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union which can arise from developments within the financial system, and taking into account macroeconomic developments, so as to avoid periods of widespread financial distress.³⁸ The ESRB must contribute to the smooth functioning of the internal market, and thereby ensure a sustainable contribution to economic growth by the

³³ Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (ESRB), OJ L 331, 15.12.2010.

³⁴ EU Regulation No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L331, 15 December 2010, 12. See also Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, OJ L 287, 29.10.2013, p. 5–14.
³⁵ Regulation (EU) No. 1095/2010 establishing the ESMA.

³⁶ Regulation (EU) No. 1094/2010 establishing the EIOPA. See https://ec.europa.eu/info/businesseconomy-euro/banking-and-finance/financial-supervision-and-risk-management/european-systemfinancial-supervision_en. In 2019, the European Parliament endorsed legislation setting out the building blocks for a capital markets union, including a review of the ESFS. See https://europa.eu/rapid/press-release_IP-19-2130_en.htm?locale=en

³⁷ While the ESRB operates through 'soft law', which does not facilitate compliance enforcement, its structures, especially that it is made up of the NCAs of EU Member States and its physical proximity to the ECB, with which it shares many resources, means that it has significant force. See Ferran, E., & Alexander, S.K. 'Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board' (November 4, 2010). University of Cambridge Faculty of Law Research Paper No. 36/2011. Available at SSRN: https://ssrn.com/abstract=1676140 or https://dx.doi.org/10.2139/ssrn.1676140

³⁸ ESRB Regulation (EU) No 1092/2010 Article 2 defines 'systemic risk' as a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructure may be potentially systemically important to some degree. The ESRB Report (2019) *Vulnerabilities in the EU residential real estate sector* identifies two main types of risk:" Direct risks - related to potential losses of lenders from mortgage portfolios in the event of negative economic developments; Indirect risks related to potential adjustments in household consumption in the event of negative economic developments, with further consequences for financial stability and the real economy." These reports suggest that vulnerabilities do not necessarily materialise upon the default of housing loans.

financial sector.³⁹ If the ESRB detects a risk which could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the Union's financial system, it must promptly inform the Council of the European Union of the situation.⁴⁰

The ESRB is comprised of representatives of the ECB, national central banks and supervisory authorities, and the European Commission. There are strong institutional links between the ESRB and the ECB – the ESRB is chaired by the President of the ECB, the ECB provides the ESRB secretariat, the ESRB General Board mirrors the composition of the ECB Governing Council. The ESRB has been entrusted with specific tasks to **coordinate Member States' macro-prudential policies**.

The ESRB has developed regulatory capital requirements in relation to the exposure of banks to real estate (which includes housing).⁴¹ The legal framework for the implementation of these instruments is provided by the EU Capital Requirements Directive (CRD IV) and the Capital Requirements Regulation (CRR), based on the Basel III standards.⁴² According to the ESRB, the macro-prudential toolkit available to national macro-prudential authorities in European countries encompasses two main categories of instrument to address 'real estate' risks: capital-based measures and borrower-based measures.

Capital-based measures determine regulatory capital requirements for the exposure of lenders to real estate, either directly, by imposing higher capital requirements, or indirectly, by affecting variables that enter into the calculation of capital requirements such as probability of default and loss-given-default. Borrower-based instruments directly affect the availability, terms and conditions of lending. Depending on the national laws, the different borrower-based instruments which may be available in individual countries include limits on loan-to-value (LTV), debt-service-to-income (DSTI), and debt/loan-to-income (D/LTI) ratios, amortisation requirements and maturity limits. Activation of these measures is at national discretion and subject to national legal or macro-prudential frameworks.⁴³

The **borrower-related instruments** are also governed by national law, with different institutional set-ups prevailing across Member States.⁴⁴ Some Member States have designated the central bank as the national authority; others the micro-prudential supervisor or a new authority, often in the form of a board or committee composed of members of several institutions, including the Ministry of Finance.⁴⁵ Clearly, the position of housing (regarded as real estate by the ESRB) in the arrangements for ensuring the stability of the European

www.europarl.europa.eu/RegData/etudes/BRIE/2016/587379/IPOL_BRI(2016)587379_EN.pdf

³⁹ Regulation (EU) No 1092/2010, Article 3.

⁴⁰ Ibid, Preamble 22.

⁴¹ See ESRB (2019). Overview of national macroprudential measures.

⁴² 'Basel III' is a comprehensive set of reform measures, developed by the Basel Committee on Banking Supervision, to strengthen the regulation, supervision and risk management of the banking sector. See <u>http://www.bis.org/bcbs/basel3.htm</u>.

⁴³ ESRB (2019), p. 14.

⁴⁴ Ibid, p. 5.

⁴⁵ Margerit, A. , Magnus, M. and Mesnard, B. (2017) European Parliament Briefing – The EU macroprudential framework, p. 5,

financial system is important, but only one element of housing systems is recognised – mortgage lending. $^{\rm 46}$

Recognising the relevance of the actions of the ESRB for Charter housing rights requires a different approach to the traditional human rights analysis. Real estate lending across European cities is driving up the cost of housing, and creating a crisis in housing access and affordability crisis in some cities. However, the ESRB approach to risk and vulnerability to the stability of EU financial markets pre-supposes the existence of housing market cycles, with downturns and recessions, involving increasing and high mortgage default rates, and high vacancy rates (i.e. empty homes).⁴⁷ This involves four stages of residential real estate markets - expansion, downturn, recession and recovery.⁴⁸

But the risks addressed by the ESRB are risks to financial institutions, and not to citizens. The ESRB does not consider the effects of its work on housing rights, or how to protect citizens against the risks inherent in its assumptions of housing market cycles. As Sarah Nield has pointed out:

Changes in macro-economic climate in the labour and property market present immediate risk for the mortgage borrower, as do higher divorce rates, and the instability of the modern family. However, evaluating the risks and the prospect of default presents a challenge to economic experts, let alone consumers. A borrower may understand their responsibilities and the risks they face, but is unable to do much about them.⁴⁹

A housing rights approach might propose EU-wide measures that home loan borrowers be protected against income loss, illness, or other unforeseen events (such as regional or global epidemics or other reasons), which could result in income loss and potential home loss. Life insurance is already mandatory in most mortgages.

But part of the policy dissonance lies in the way housing is classified by the ESRB as 'collateral', or residential real estate (RRE).⁵⁰ Indeed, the way social housing is categorised as part of commercial real estate, illustrate the inherent problems for EU institutions in properly

⁴⁶ ESRB (2016) Vulnerabilities in the EU residential real estate sector,

https://www.esrb.europa.eu/pub/pdf/reports/161128_vulnerabilities_eu_residential_real_estate_sect or.en.pdf, p.2.

⁴⁷ ESRB (2019) *Methodologies for the assessment of real estate vulnerabilities and macro-prudential policies: residential real estate*, p. 14. See Appendix 1 this report.

⁴⁸ See Appendix 1 in this Briefing.

⁴⁹ See Nield, S., 'Secured consumer credit in England', chapter 5 in Anderson, M. and Amayeulas, E.A. (eds) (2017) *The Impact of the Mortgage Credit Directive in Europe* (Groningen: Europa Law Publishing). p. 199.

⁵⁰ Residential Real Estate (RRE) means any immovable property available for dwelling purposes, either existing or under construction, acquired, built or renovated by a natural person, including buy-to-let housing. RRE loan means a loan to a natural person secured by a residential real estate property, independent of the purpose of the loan. Owner-occupied housing or property means any residential real estate owned by a natural person for the purpose of providing shelter to its owner.

addressing Charter housing and other rights.⁵¹ The concept of 'cognitive capture' comes to mind.

One measure proposed by experts to address the structural imbalance between supply and demand is adjustment, calibrated at national level, of the Basel-related risk weightings on real estate lending, beyond asset quality and borrower solvency, to encourage the supply of new housing, with higher weightings for loans for buying existing housing.⁵²

The purpose is obviously not to restrict access to housing, in particular for lower income people, but to take into account the fact that, globally, too much credit to desirable urban real estate has caused financial instability and a real estate asset price bubble. Access to a roof for all must be a key issue of public policy, and must involve ambitious action notably in terms of urban planning, land use and credit access for lower income households, as well as affordable rental development for the poorest households ... As far as real estate credit is concerned, action on both bank reserve and capital requirements could help lower the price of certain assets and favour the building of new housing capacity, which could increase the availability of housing in forsaken areas.⁵³

"But the risks addressed by the European Systemic Risk Board (ESRB) are risks to financial institutions and not to citizens. The ESRB does not consider the effects of its work on housing rights, or how to protect citizens against the risks inherent in its assumptions of housing market cycles."

⁵¹ Recommendation of the ESRB of 21 March 2019 (ESRB/2019/3)(2019/C 271/01) amending Recommendation ESRB/2016/14 on closing real estate data gaps states: 'Social housing is a complex segment of the real estate market, as it may take different forms across and within Member States. Given that social housing is not usually built, acquired or renovated by natural persons, it is not classified as RRE, but as commercial real estate (CRE). However, in some countries, in view of financial stability considerations, it is important to monitor the risks stemming from this type of property under a separate breakdown. For this reason, separate breakdowns have been added for these types of loans. In addition, social housing which is owned directly by the State is deemed to be owned for the purpose of conducting the government's purpose and is therefore also classified as CRE. Social housing which is still under construction is also classified as CRE as it is considered as income-producing real estate under development' (p. 37-38). Rental housing refers to real estate which is owned by legal entities (such as professional investors) with the aim of being let to tenants. Such properties are also deemed to be income-producing real estate and as such are classified as CRE. The original Recommendation ESRB/2016/14, which has been amended in March 2019, formally defined CRE as any income-producing real estate, either existing or under development, and excluded (a) social housing, (b) property owned by end users, and (c) buy-to-let housing. See https://www.esrb.europa.eu/pub/pdf/recommendations/esrb.recommendation190819_ESRB_2019-3%7E6690e1fbd3.en.pdf?203c1baf57a535e14c8014027dd90c49.

⁵² See Turner, A. (2016) *Between Debt and the Devil* (New Jersey: Princeton), who suggests that capital requirements should be used to reflect different social risks, such as real estate lending, which should have higher risk weighting.

⁵³ Secours Catholique/Caritas France (2018) *Finance to Citizens*, p. 133–136. <u>https://www.caritas.org/2018/10/secours-catholique-caritas-france-finance-report/</u>This report also suggests using this approach to encourage lending to Green/ Environmentally sustainable projects.

The European Banking Authority (EBA)

Within the complex regulation of European mortgage markets, the objective of the EBA is to "protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses'.⁵⁴ The EBA is comprised of the national competent authorities (NCA) of each Member State, and is closely integrated with the domestic NCAs. Since the EBA main decision maker is the Board of Supervisors whose voting members are representatives of national authorities the risk of politicisation of the EBA is high.⁵⁵ Thus, the need for European Parliamentary oversight is great.

The EBA is mandated to assess risks and vulnerabilities in the EU banking sector through, in particular, regular risk assessment reports and pan-European stress tests – areas where Charter housing rights can be impacted. The EBA has adopted the *EBA Code of Good Administrative Behaviour*.⁵⁶

The EBA established the Single Rulebook approach to provide a single set of harmonised prudential rules within a unified regulatory framework for the EU financial sector, leading to a single market in financial services.⁵⁷ The aim is to provide a uniform application of Basel III in all Member States.⁵⁸ The Single Rulebook on prudential rules for financial institutions includes a common definition of non-performing loans and forbearance – and these encompass home loans.

In relation to homeloans, the EBA *Guidelines on arrears and foreclosure* (2015)⁵⁹ provide broad European minimum standards on how financial institutions should give effect to the provisions stated in Article 28(1) of the Mortgage Credit Directive (MCD). This states that: 'Member States shall adopt measures to encourage creditors to exercise reasonable

⁵⁴ Regulation 1093/2010, Article 5. Article 1. States: "...In the exercise of the tasks conferred upon it by this Regulation, the Authority shall pay particular attention to any systemic risk posed by financial institutions, the failure of which may impair the operation of the financial system or the real economy."

⁵⁵ See Babis, V., 'The Single Rulebook and the European Banking Authority' in Fabbrini and Ventoruzzo, p. 281.

⁵⁶ http://www.eba.europa.eu/documents/10180/16082/EBA-DC-006-_Code-of-Administrative-Behaviour_---FINAL.pdf/435054e4-0d54-42cf-ad98-57f87bfb2426.

⁵⁷ See European Banking Authority, 'The Single Rule Book' <u>https://eba.europa.eu/regulation-and-policy/single-rulebook</u>. The provisions of the Single Rule Book are set out in three main legislative acts: Capital Requirements Regulation and Directive (Regulation (EU) No 575/2013 of 26 June 2013, Directive 2013/36/EU of 26 June 2013), which implements the Basel III capital requirements for banks; Deposit Guarantee Scheme Directive (Directive 2014/49/EU of 16 April 2014); and Bank Recovery and Resolution Directive (Directive 2014/59/EU of 15 May 2014), which establishes a framework for the recovery and resolution of credit institutions and investment firms in danger of failing; See Alexander, K. 'The ECB and Banking Supervision: Building Effective Prudential Supervision'? *Yearbook of European Law*, 33 (1) January 2014, p. p. 417-432.

⁵⁸ 'Basel III' is a comprehensive set of reform measures, developed by the Basel Committee on Banking Supervision, to strengthen the regulation, supervision and risk management of the banking sector. See <u>http://www.bis.org/bcbs/basel3.htm</u>.

⁵⁹ See <u>https://www.eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation/guidelines-on-arrears-and-foreclosure</u>.

forbearance before foreclosure proceedings [on homes] are initiated.' ⁶⁰ The EBA *Guidelines* are binding on the addressees, i.e. NCAs, in the sense that there is a "comply or explain" obligation with EBA guidance.

The EBA applies the provisions of the Charter within the context of its mandate, and in particular in its main task of contributing, through the adoption of binding technical standards and guidelines, to the creation of the European Single Rulebook.⁶¹ However, this obligation to promote the rights contained in the Charter has yet to be fully addressed by the EBA.

While there is much EU legislation on consumer law, in relation to financial services, and national authorities are responsible for its enforcement, there are many gaps in its coverage.⁶² In each EU Member State there are NCAs for the protection of consumers' rights in their dealings with credit or financial institutions. To tackle cross-border issues, the actions of such national authorities can be coordinated at EU level.⁶³ The EBA has a role in promoting a transparent, simple and fair internal market for consumer financial products and services. It seeks to foster consumer protection in all EU Member States, by identifying and addressing consumer detriment in the financial services sector. In relation to the Mortgage Credit Directive, the European Commission works with the EBA and an expert group on mortgage credit composed of officials from the national supervisory authorities.⁶⁴ The EBA can also investigate alleged incorrect or insufficient application of EU law by national authorities, in its role on consumer protection, although it does not champion or mobilise consumers.⁶⁵

The development of financial services ombudsman offices across Europe has also been a significant development and many vindicate housing rights, but the link between protecting EU citizens housing rights and their rights as consumers has yet to be fully developed.

"The link between protecting EU citizens housing rights and their rights as consumers has yet to be fully developed"

⁶⁰ Directive 2014/17/EU, of 4 February 2014, on credit agreements for consumers relating to residential immovable property.

⁶¹ Correspondence with author 19/2/2016. See Babis, V., 'The Single Rulebook and the European Banking Authority' in Fabbrini and Ventoruzzo, chapter 10.

⁶² <u>https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en.</u>

⁶³ Art 4(2)(f) TEU states that consumer protection is a shared competence between the Union and the Member States. See Recital 28 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, which provides that supervisory tasks not conferred on the ECB should remain with the national authorities and include consumer protection. See now Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (Text with EEA relevance) *OJ L 345, 27.12.2017, p. 1–26.*⁶⁴ https://ec.europa.eu/info/law/mortgage-credit-directive-2014-17-eu/who-we-work_en

⁶⁵ Regulation 1093/2010, Article 9.

ECB Opinions on draft national legislation

One significant aspect of the ECB macro-prudential role involves the obligation on Member States to consult the ECB on proposed regulatory measures or on national legislation, to ensure that it contributes to the achievement of the objectives of the ECB, is in line with ECB policies, and **preserves confidence and stability in the financial markets**.⁶⁶ The ECB must be consulted on the national proposals and it may give an Opinion.⁶⁷

Many of the ECB Opinions on draft Member State legislation address areas of housing rights and the Charter of Fundamental Rights, but there is no evidence that the Charter is considered at all in this process, nor are any Charter-related impact assessments carried out by the ECB in its actions in this EU law role.⁶⁸

"Many of the ECB Opinions on draft national legislation address areas of housing rights and the Charter of Fundamental Rights, but there is no evidence that the Charter is considered at all in this process, nor are any Charter-related impact assessments carried out."

https://www.ecb.europa.eu/ecb/legal/pdf/en_opinion_con-2019-

⁶⁶ Articles 127(4) and 282(5) TFEU. While ECB Opinions have no binding force, the system established by Decision 98/415/EC is designed to ensure that national legislation is adopted only after due consideration of the ECB's Opinion. See ECB (2015) *Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions*,

https://www.ecb.europa.eu/pub/pdf/other/consultationguide201510.en.pdf ⁶⁷ Article 282(5) TFEU states: 'Within the areas falling within its responsibilities, the European Central Bank shall be consulted on all proposed Union acts, and all proposals for regulation at national level, and may give an opinion'. See, for instance, Opinion of the ECB of 18 February 2019 on court orders for possession of principal private residences (CON/2019/8),

<u>8_ie_on_court_orders_for_possession_of_principal_private_residences_.pdf</u>. The obligation to consult the ECB under Decision 98/415/EC is precise and unconditional, which means that individuals can rely on it before national courts. Therefore, national courts can be asked to rule on the validity or enforceability of a national provision adopted without consulting the ECB, and a request for a preliminary ruling on this can be addressed to the Court. *Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions* (2015), p. 27. ⁶⁸ This approach may well be contrary to the judgment in Case T-107/17, *Steinhoff v ECB* EU:T:2019:353, in particular para 95.

5. EU Macroeconomic Co-ordination

The principle of EU economic coordination was established in the Treaty of Rome 1957, and after the Maastricht Treaty the need for closer economic coordination increased, leading to Articles 121⁶⁹ and 126 TFEU. Article 2(3) TFEU provides that 'The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.' Article 5(1) TFEU provides that 'The Member States shall coordinate their economic policies within the Union. To this end the Council shall adopt measures, in particular broad guidelines for these policies.'

This means that there is not a policy of EU economic integration (compared to policies around the internal market), but one of *coordination*, and the EU competences are limited. Member States, their Parliaments and their governments remain masters of economic decisions in this area, and in those governing bodies resides the democratic legitimacy of those decisions.⁷⁰ There is no EU veto on national budgets, and the European Commission does not impose technocratic economic policy rules on elected Member State governments – a situation very different to the legally binding rules on monetary policy. However, the Union and its institutions are entrusted with strong surveillance competences over the Member States.⁷¹

The economic coordination role within EU institutions is largely exercised by the European Commission and the ECB. The Commission operates within the context of promoting the single market in goods and services, as well as under the TSCG in the EMU, through oversight of national budgets and its macroeconomic surveillance tool – the macroeconomic imbalance procedure (MIP). The rules-based framework at EU level is now complemented by binding provisions at national level, or the legal internalisation and developing harmonisation of sound budgetary policies.⁷²

Article 136 of the Lisbon Treaty introduced stronger coordination and increased fiscal surveillance in the euro area. The Treaty was followed by two EU legislative packages, known as the 'six-pack',⁷³ which introduced a new macroeconomic surveillance tool, and the 'two-pack,'⁷⁴ which added new rules for coordinating Member States' budgets.

⁶⁹ Article 121(1) TFEU states 'Member States shall regard their economic policies as a matter of common concern and shall coordinate them with the Council'.

⁷⁰ de Gregorio Merino, A. 'The institutional architecture of economic union', in Fabbrini and Ventoruzzo, p. 15.

⁷¹ Set out in Articles 2(3), 5(1) and 120–126 TFEU. This coordination framework solely concerns public authorities and does not create any rights for individuals.

⁷² Beginning with Directive 2011/85/EU on requirements for budgetary frameworks of the Member States.

⁷³ This comprised five Regulations and one Directive. See https://europa.eu/rapid/pressrelease_MEMO-11-898_en.htm. Regulation 1173/2001; Regulation 1174/2011; Regulation 1175/2011; Regulation 1176/2011; Regulation 1177/2011; Directive 2011/85.

⁷⁴ Regulation (EU) No 473/2013 of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area and Regulation No 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit for Member States of the euro.

The six-pack reform introduced the MIP to detect harmful macroeconomic imbalances, prevent their emergence and ensure the correction of existing imbalances.⁷⁵ Becoming operational in 2012, MIP widened the scope of the surveillance framework beyond fiscal policies to cover other potential sources of macroeconomic imbalances that had previously been neglected.

This entailed, inter alia, a greater focus on macro-structural and macro-financial issues relevant to macroeconomic stability, such as external imbalances, productivity, competitiveness, the **housing market and private indebtedness**. In addition, public finance developments, notably government debt, are also analysed under the MIP given their relevance to overall macroeconomic stability. In that respect, the MIP has complemented other surveillance instruments and provided the basis for prioritising policies not dealt with by the SGP but which are of relevance for the orderly development of public finance. The analytical basis to detect imbalances has been enhanced, and processes to monitor economic developments and policy action have been put in place. While the scope of MIP surveillance has remained anchored on aspects relevant for macroeconomic stability, it has also been gradually expanded to take into account broader implications relating to adjustment, such as those affecting employment and social developments.⁷⁶

At the level of public finance, or fiscal governance, lies the Stability and Growth Pact (SGP), the budgetary pillar of EMU. The Treaty on Stability, Coordination and Governance (TSCG) strengthened the SGP, requiring that a 'corrective arm'⁷⁷ be applied when a Member State is in an 'excessive deficit' position, and a 'preventative arm' be applied to the monitoring of other Member State budgets.

The **preventative arm** focuses on the structural fiscal position of Member States, to prevent an occurrence of excessive government deficit and to promote the surveillance and coordination of economic policies. The Commission calculates each country's medium-term objective (MTO) every three years, allowing some flexibility.⁷⁸ Euro-area Member States must submit an annual 'stability programme' and non-euro area Member States must submit a 'convergence programme'. The 'fiscal' opinion of the Council on these has become part of the European Semester. The first of the European Semester Country-Specific Recommendations (CSRs) provides an assessment of the Member States' compliance with the requirements of the preventative arm.

⁷⁵ See Regulation No 1176/2011 on the "prevention and correction of macroeconomic imbalances", and Regulation No 1174/2011 on the "enforcement measures to correct excessive macroeconomic imbalances", with the main Treaty basis in Articles 121 and 136 of the Treaty on the functioning of the European Union.

⁷⁶ European Commission (2020) *Economic governance review*, COM202(55 final), p. 12. However, this report points out that the MIP has not generated the political traction necessary to sustain reform ambition in Member States where imbalances exist, and the links with other surveillance strands have not always been fully exploited.

⁷⁷ Based on Article 126 TFEU and Protocol 12 on the EDP and Regulation 1467/97.

⁷⁸ Article 121 TFEU and Regulation No 1466/97. Member States can deviate from agreed mediumterm budgetary objectives (MTO) in two situations – growth-enhancing public investments, and to deal with the impact of adverse economic events.

Within **the corrective arm**, or excessive deficit procedure (EDP), the objective is to encourage and if necessary compel a Member State to reduce an identified deficit.⁷⁹ The rule is that Member State budget deficits should not exceed 3% of GDP, and government debt should not exceed 60% of GDP.⁸⁰ Since January 2014, signatories to the TSCG agreed to incorporate a 'budget-balanced' rule into their national constitutional and legal framework, with legally binding medium-term budgetary objectives enshrined in national law. Under the TSCG or Fiscal Compact (an international treaty) most EU Member States must also limit structural deficits to 0.5% of GDP (or to 1%, if their debt-to-GDP ratio is well below 60%).⁸¹

There is a 'general escape clause' as part of the SGP, which was activated in March 2020, as a result of the coronavirus pandemic, which caused a major economic shock.

Another significant development has been the emergence of the Euro Group – based on informal meetings of Finance Ministers of euro-area Member States – as a powerful actor, although it is not an official EU institution, body, office or agency.⁸² This Group, has, since 2009, dealt with the management of assistance to Ireland, Portugal, Greece, Cyprus and Spain.⁸³

The Council of the European Union (an official EU institution) has also exercised an increasingly visible role, through the 'informal' Euro Summits.⁸⁴ The role of the European Parliament is limited to that of Economic Dialogue.

The role of the European Commission is shared with the Council in executing the economic policy of the Union, with the Council having the primary role in adopting any relevant decisions.⁸⁵ The European Commission holds the right of initiative for most of the Council decisions regarding the preventative and corrective arms of the SGP, and the Council adopts the broad guidelines for economic policies and the multilateral surveillance procedure on the basis of recommendations from the Commission. Some powers of general budgetary surveillance are also vested in the Commission, for example, in relation to Member States' obligations to avoid excessive deficits.⁸⁶

⁷⁹ Based on Article 126 and Regulation No 1467/97.

⁸⁰ In some Member States, such as Ireland, GDP is not an accurate representation of national income levels due to the activities of globalised corporations based in the country.

⁸¹ Since 2015, some limited flexibility is allowed to deal with economic shocks or in relation to eligible investments – national expenditures on projects co-funded by the EU under the Structural and Cohesion policy (including projects co-funded under the Youth Employment Initiative), Trans-European Networks and the Connecting Europe Facility, as well as co-financing of projects also co-financed by the EFSI. See also Keppene, J.P., 'Fiscal rules' in Fabbrini and Ventoruzzo, pp. 56–71.
⁸² See Joined Cases C-105/15P to C-109/15P. *Mallis v Commission and ECB* [2016]. The notion of an EU 'institution' subject to the control of the CJEU is wider in relation to claims of non-contractual liability under Article 340 TFEU than the notion of institutions, bodies, offices and agencies set out in Article 263 TFEU (which does not include the Eurogroup).

⁸³ See Hoffman-Axthelm, L. (2019) *Vanishing Act: The Eurogroup's Accountability* (Brussels: Transparency international).

⁸⁴ Article 12 of the TSCG sets out the rules for the organisation, composition and functioning of the Euro Summits.

⁸⁵ Article 126(10) TFEU. Responsibility for making the Member States observe budgetary discipline rests with the Council.

⁸⁶ Article 126(3) TFEU. The European Commission has also been given a major role in the management of the various intergovernmental financial assistance agreements after 2008

The European Stability Mechanism (ESM) was established to assume the tasks previously fulfilled by the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM) in providing, where needed, financial assistance to euro-area Member States.⁸⁷ The conditions of such assistance programmes involve specific reforms in relation to the recipient State's economy, and focus on fiscal consolidation, structural reforms and financial sector reforms.⁸⁸ In *Pringle*⁸⁹ it was established that the ESM was not a part of the official institutions of the EU, but that the tasks conferred on the Commission and the ECB within the ESM Treaty do not alter the essential character of the powers conferred on those institutions by the EU Treaties.⁹⁰ The Commission retains its role of guardian of the Treaties within the framework of the ESM Treaty, including the Charter.

The Post-Programme Surveillance reports prepared by the European Commission following the exit of Member States from the ESM programmes are used to complement the surveillance under the MIP, the SGP, and the European Semester, of economic policy coordination.⁹¹ These areas of surveillance cover many areas where Charter rights apply, although such rights are not considered as part of the procedures. One example of the relevance of EU economic governance on housing rights can be seen in the 44-page European Commission report on post-programme surveillance of macroeconomic imbalances in Ireland (2019); the document contained some 78 references to housing, demonstrating the central position of housing for banking and financial stability.⁹²

There are strong arguments in favour of allowing Member States to invest in social housing, as suggested in the European Semester Reports, to contribute to the stability of housing systems, and to ensure the realization of EU Charter housing rights. Equally, there are strong

⁸⁷ See European Council Decision 2011/199/EU amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro, adding the following paragraph: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality'. The Irish loan programme comprised € 67.5 billion in total including EFSF, IMF and bilateral loans.8The Portuguese programme comprised programme comprised €76.3 billion in total including EFSF and IMF. ⁸⁸ Fiscal consolidation – measures to cut government expenditure, by reducing public administration costs and improving its efficiency, and to increase revenue through privatisations or tax reform: Structural reforms - measures to boost potential growth, create jobs and improve competitiveness; Financial sector reforms - measures to strengthen banking supervision or recapitalise banks. See https://www.esm.europa.eu/assistance/lending-toolkit#lending_toolkit. Loans within a macroeconomic adjustment programme were granted to Cyprus, Greece, Ireland and Portugal, and loans for indirect bank recapitalisation were granted to Spain. See Zoppè, A. & Dias, C. (2020) The European Financial Stabilisation Mechanism: Main Features, Directorate-General for Internal Policies, Economic Governance Support Unit (EGOV) European Parliament, PE 645.718-April 2020. https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/645718/IPOL_BRI(2020)645718_EN.pdf ⁸⁹ Case C-370/12 *Pringle* [2012].

 ⁹⁰ Joined Cases C-8/15P to C-10/15P *Ledra Advertising (and others) v Commission and ECB* [2016].
 ⁹¹ Post-programme surveillance (PPS) starts automatically after the end of financial assistance programmes and continues until at least 75% of financial assistance has been repaid. PPS is biannual in terms of reporting and missions. The objective of the PPS is to assess the economic, fiscal and financial situation to ensure the Member State maintains its capacity to service its debt to the EFSM, EFSF and bilateral lenders. While there is no policy conditionality under PPS, the Council can issue recommendations for corrective measures following a proposal from the Commission.
 ⁹² <u>https://www.sipotra.it/wp-content/uploads/2019/04/Post-Programme-Surveillance-Report-Ireland-Autumn-2018.pdf</u>

arguments to exclude this capital investment from the TSCG rules on budget deficits and borrowing limits, particularly in the context of economic recovery and the extent of homelessness and unaffordable housing across European cities.

6. European Commission – European Semester

Following the economic and financial crisis of 2008 the EU strengthened its economic governance framework to better detect, prevent and correct problematic economic trends, such as excessive government deficits, public debt levels or macroeconomic imbalances and risks to stability – including the housing market and private indebtedness in each Member State. This also marked a shift in policy approaches towards prioritising the stability of the European financial system. The rules are applied in the context of the European Semester, an annual cycle of coordination and surveillance of the EU's economic policies.⁹³ Thus, housing issues made their way onto the EU economic governance regime as part of the surveillance arrangements to protect the stability of the euro.

Every year, the President of the European Commission outlines political, economic and social priorities in a State of the Union Speech to the European Parliament. The ensuing debate provides input to the Annual Growth Survey (AGS) for each Member State, published by the Commission, containing policy guidance (for the following year) around investment, structural reforms and fiscal consolidation. This process draws on the MIP reports, which identify the emergence of potentially harmful macroeconomic imbalances that could adversely affect economic stability in a particular Member State, the euro area, or the EU as a whole – including housing markets.⁹⁴ The MIP Scoreboard identifies countries that warrant in-depth study to determine whether potential imbalances are benign or problematic. One of these indicators is year-on-year changes in house prices, relative to a Eurostat consumption deflator, with a threshold of 6% calculated from a house price index base of 2015 prices.⁹⁵ Many Member States house prices have exceeded these levels.⁹⁶

In 2018, a new MIP indicator was added by EU institutions – 'gross non-performing loans, domestic and foreign entities (% of gross loans)' although this did not differentiate between home loans and other loans.⁹⁷

⁹³ The main legal foundation for the Stability and Growth Pact (SGP) is in Articles 121 (multilateral surveillance), Art 126 of the TFEU (excessive deficit procedure) and Protocol No 12 on the excessive deficit procedure. As part of the multilateral surveillance under Article 121 TFEU, in April of each year, each Member State has to submit a stability programme (euro area Member States) or a convergence programme (non-euro area Member States) to the Commission and the Council. The basis for the calculations must be the most likely macro-fiscal (or more prudent) scenarios. The Council adopts an Opinion, and can ask Member States to adjust their programmes. The Opinion forms an integral part of the Country-Specific Recommendations adopted by the Council for each European Semester. The SGP provides for the possibility of imposing sanctions when the Member State concerned does not take appropriate adjustment action.

⁹⁴ See <u>https://ec.europa.eu/info/node/4320/</u>

⁹⁵ These 14 indicators are complemented by 25 auxiliary indicators providing additional information. The scoreboard is designed to capture the most relevant internal and external aspects of macroeconomic imbalances through a limited set of relevant indicators of high statistical quality. See <u>https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-</u> <u>economic-governance-monitoring-prevention-correction/macroeconomic-imbalance-</u> <u>procedure/scoreboard_en.</u>

⁹⁶ See

https://ec.europa.eu/eurostat/tgm/graph.do?tab=graph&plugin=1&pcode=tipsho10&language=en&to olbox=data

⁹⁷ https://ec.europa.eu/info/sites/info/files/economy-

finance/technical_note_proposal_mip_aux_indicators_revision_2018_final.pdf.

In 2019, the Annual Growth Survey stated that 'To reinforce the social dimension of the Union and foster upward convergence towards better living and working conditions, it is necessary to turn the principles proclaimed in the European Pillar of Social Rights (EPSR) into action, at both European and national levels.'⁹⁸ The Commission prepares a Staff Working Document on euro-area recommendations, and, in 2019, this included a reference to the EPSR.

The draft Commission Joint Employment Report analyses the employment and social situation in Europe, and the policy responses by Member States. The Joint Employment Report also monitors Member States' performance in relation to the European Pillar of Social Rights.⁹⁹ The Commission publishes its opinions on the Draft Budgetary Plans of euro-area Member States and a Country Report for each Member State analysing its economic situation and progress with implementing the Member State's reform agenda. In 2020 the Country reports also included a new annex setting out the individual Member States' performance in relation to the UN Sustainable Development Goals (SDG).¹⁰⁰ Following Member States' submissions, the Commission presents annual Country-Specific Recommendations (CSRs), which are endorsed by EU leaders, and the Council, for incorporation by Member States into their reform plans and national budgets.

It is important to point out that the European Commission, through the European Semester, provides Member States with policy support, guidance and orientation on how to design

content/EN/TXT/HTML/?uri=CELEX:52017DC0674&from=EN#footnote1.

⁹⁸ The European Pillar of Social Rights (EPSR) developed pursuant to Article 3 TFEU, sets out 20 key principles and rights to support fair and well-functioning labour markets and welfare systems. Principle 19 on Housing and Assistance for the Homeless states: 'a. Access to social housing or housing assistance of good quality shall be provided for those in need; b. Vulnerable people have the right to appropriate assistance and protection against forced eviction; c. Adequate shelter and services shall be provided to the homeless in order to promote their social inclusion.' See Commission Staff Working Document - Establishing a European Pillar of Social Rights Brussels, 26.4.2017 SWD(2017) 201 final. A Social Scoreboard monitors Member State performance in relation to the EPSR - see https://composite-indicators.jrc.ec.europa.eu/socialscoreboard/#socialdimensions. The Preamble to the EPSR states that "Nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting principles and rights as recognised, in their respective fields of application, by Union law or international law and by international agreements to which the Union or all the Member States are party, including the European Social Charter of 1961.' The Fundamental Rights Agency has pointed out that the weakness of the EPSR is its nature as a non-legally-binding text of rights and principles. For the rights and principles of the EPSR to be legally enforceable it would require dedicated measures or legislation to be adopted at national level. See https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018fundamental-rights-report-2018_en.pdf at p. 21. The EPSR does not make substantial reference to the European Social Charter which has been adopted by all EU Member States. See De Schutter (2019) The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order, https://rm.coe.int/study-on-the-european-pillar-of-social-rights-and-the-role-of-the-esc-/1680903132. 99 See https://eur-lex.europa.eu/legal-

¹⁰⁰ UN SDG Goal 11: 'Making cities safe and sustainable means ensuring access to safe and affordable housing, and upgrading slum settlements' (2015–2030). The Commission Work Programme 2020 *A Union that strives for more*, COM(2020) 37 final, states at p. 2: "...we will put the United Nations Sustainable Development Goals at the heart of our policymaking. They will guide our work across all sectors, both in our internal and external action, and will show our commitment to sustainable development at home and abroad. As part of this, we will refocus the European Semester by integrating the Sustainable Development Goals and put forward our approach to the overall governance and implementation of the goals."

efficient national policies aimed at ensuring citizens' access to affordable and accessible social housing by stressing housing supply shortage, dysfunctional housing markets, macroeconomic imbalances and insufficient stock of social housing.¹⁰¹

The European Commission Semester Report in 2019 recognised the role of housing in EU economic governance:

Developments in the housing market can affect financial stability and thereby require action in some Member States. Housing is often the main asset held by households, and, at the same time, housing-related lending accounts for a large share of total lending in the economy. Moreover, scarcity of adequate and affordable housing is a growing problem in several Member States. On that account, Ireland, Luxembourg, the Netherlands, Sweden, and the United Kingdom are recommended to reduce bottlenecks to housing supply and remove distortions in their housing markets. As large private debt levels can amplify movements in the housing market, reducing the high indebtedness of households is important for financial stability ...¹⁰²

Difficulties were identified arising from lack of affordable housing specifically in relation to Bulgaria, Hungary, Italy, Lithuania, Malta and Spain. Homelessness was mentioned in eleven Country-Specific Reports.

The Commission Semester Report (2019) showed that housing deprivation remained a significant challenge in several Member States. Around 25% or more of the population in Portugal, Cyprus and Slovenia reported problems related to housing. Housing-related expenditure accounted for a significant share of household disposable income in a number of Member States. The housing cost overburden rate was highest in Greece, with 40.5% of the population living in a household where the total housing costs (net of housing allowances) represented more than 40% of the total disposable household income. This was considerably higher than in any other EU Member State, with the figure for Bulgaria being 20%, and for Romania, Germany and Denmark 15%. By contrast, less than 5% of the average of the population in Finland, Estonia, Ireland, Cyprus and Malta were living in a household with a housing cost overburden – but this aggregate figure does not identify sections of the population which faced a higher housing cost overburden. In most countries, the housing cost overburden was significantly higher for tenants paying a market rent (28% EU average) than for owners with a mortgage or loan (5.4% EU average).

 ¹⁰¹ Commissioner Nicolas Schmit, speech to European Parliament, "Housing First as urgent action to address the situation of homeless people in Europe" (debate), Monday, 13 January
 2020 – Strasbourg. Available at: <u>https://www.europarl.europa.eu/doceo/document/CRE-9-2020-01-13-ITM-017_EN.html</u>

¹⁰² Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *2019 European Semester: country-specific recommendations*, Brussels, 5.6.2019 COM (2019) 500 Final, <u>https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0500&from=EN</u> p. 14.

The monitoring of planned budgets by the Commission involves measuring against the requirements of the SGP and Country-Specific Reports.¹⁰³ European housing systems are monitored regularly (although only in terms of markets)¹⁰⁴ by the European Commission, as part of the MIP. This showed in 2019 that house prices were accelerating in most Member States, with several cases pointing at over-evaluation.¹⁰⁵

The European Semester process explicitly recognises the obligations set out in the EPSR, but there is no engagement with Charter rights at all. Indeed, housing is referred to by the term 'housing market' in the CSR overview, and is included as part of the financial sector category, alongside financial services, access to finance, and private indebtedness.¹⁰⁶ A recent European Parliament report suggests:

... there is a need to get a stronger involvement of the European Parliament and national parliaments in the European Semester process. The creation of an institutional dialogue with all stakeholders, and especially the Commission, social partners, civil society, both at the European and national level, may provide a boost to democratic legitimacy and increase the ownership of reforms.¹⁰⁷

"It is important to point out that the European Commission, through the European Semester, provides Member States with policy support, guidance and orientation on how to design efficient national policies aimed at ensuring citizens' access to affordable and accessible social housing by stressing housing supply shortage, dysfunctional housing markets, macroeconomic imbalances and insufficient stock of social housing."

¹⁰³ The adoption of the annual Country-Specific Recommendations follows a 'comply-or-explain' principle, whereby Member States must justify changes to the original proposals from the Commission.

¹⁰⁴ European Commission (2017) *European Semester Thematic factsheet: Housing market Developments*, <u>https://ec.europa.eu/info/sites/info/files/file_import/european-semester_thematic-factsheet_housing-market-developments_en.pdf.</u>

¹⁰⁵ See ECON Committee, *Implementation of the Macroeconomic Imbalance Procedure: State of play -September 2019*, p. 4. There are internal imbalances in Bulgaria, Czechia, Ireland, Netherlands, Portugal and Slovenia,

http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/497739/IPOL_IDA(2016)497739_EN.pdf. ¹⁰⁶ COM (2019) 500 Final, p. 17.

¹⁰⁷ See Codogno, L. (2020) *Macroeconomic Imbalances Procedure: has it worked in practice to improve the resilience of the euro area?* p. 21. Economic Governance Support Unit (EGOV) Directorate-General for Internal Policies, PE 634.403. available at:

https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/634403/IPOL_IDA(2020)634403_EN.pd f

8. Conclusion

The legal division of competences between EU institutions and Member States – with the EU institutions having *exclusive* competence in relation to monetary policy and a *coordinating* role in relation to economic policy – has important implications for asserting housing rights. However, these lines of demarcation are not entirely sturdy, and an overarching objective emerged in the *Pringle* case – that of protecting the financial stability of the euro area as a whole.¹⁰⁸

The application of the obligations to respect and promote the Charter in this emerging EU institutional architecture is as yet, undeveloped. Within the economic governance and financial supervisory framework, housing is viewed as a set of 'markets', with concepts of market failure, risk to financial stability, and behavioural economics providing orthodox principles. This has created a unique language and narrative around macro-prudential policy and definitions of systemic risk in EU policy making.¹⁰⁹ But how does reducing risks to European banks and strengthening their resilience correspond with respecting and promoting the rights of EU citizens under the Charter? In this context, Lamandini *et al.* have suggested:

A declaration that the Union 'recognizes and respects' the right to social and housing assistance to 'ensure a decent existence', or a recognition that 'Vulnerable people have the right to appropriate assistance and protection against forced eviction' may not seem like easily actionable rights, but should at least be enough to compel an explanation from the authorities running the NPL scheme about what are they doing to minimize the social impact of enforcements and foreclosures and to what extent a homestead exemption from foreclosure must be granted.¹¹⁰

There is a major gap in the democratic and human rights oversight of EU economic governance and financial supervision which is not explicitly aligned with the EU Charter or the EU social objectives.¹¹¹ Worse still, these arrangements raise questions of legitimacy arising from the EU institutions' prioritisation of the protection of corporate interests over the rights of citizens.

¹⁰⁸ See Case C-370/12 *Thomas Pringle v Government of Ireland,* para 5: 'The stability mechanism will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro area as a whole as have been experienced in 2010, and hence help preserve the economic and financial stability of the Union itself'.

¹⁰⁹ Rubio, M. (2017) *The role of macro-prudential policies in prevention and correction of asset imbalances in the Euro Area*, Economic Governance Support Unit, Economic and Monetary Affairs Committee: <u>http://www.europarl.europa.eu/committees/en/ECON/home.html</u>

¹¹⁰ Lamandini, M., Lusignani, G. and Ramos Munoz, D., 'Does Europe have what it takes to finish the banking union', *Colum. J. Eur. L.* (2018) 24(2), 233–290 at 285–286. This relates to Art 34(3) of the Charter which states: 'In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices'.

¹¹¹ For a clear summary of these economic governance measures see Boldi, D. (2019) European Parliament Briefing: *Thematic Digest on Economic Governance in the EU.* Economic Governance Support Unit, DG for Internal Policies - PE 634.402-December 2019: <u>https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/634402/IPOL_BRI(2019)634402_EN.pdf</u>

What is notable about this governance arrangement is its reliance on executive actors: mainly the European Commission and the Council of the EU, but also the ECB at times. Within these institutions, it is mainly the economic and finance bodies (Directorate-General for Economic and Financial Affairs (DG ECFIN) and the Economic and Financial Affairs Council (EDOFIN)) in control. Furthermore, there are no fundamental rights mechanisms whatsoever to regulate or guide the actions of these economic and finance bodies. The mainstreaming activities of the European Commission, part of its strategy on the effective implementation of the Charter are nowhere to be seen. There are no checklists, impact assessments, preparatory consultations, targeted recitals on rights or explanatory memorandums on rights impact – all of the specific mechanisms that the European Commission has established on rights are absent. The Annual Growth Surveys, Country-Specific Recommendations, In-depth Reviews, and the other output documents that form the backbone of the operation of the EMU governance framework make almost no reference to any fundamental rights.¹¹²

Despite the technical nature of the competences and mandates given to EU institutions in relation to economic governance and financial supervision, the core obligation to respect and promote the Charter cannot be ignored.¹¹³ The 'chilling' effect of this technical language and discourse about the dangers of 'risks' to European financial stability can act to silence human rights advocates. This EU 'technical' approach acts as a linguistic and ideological barrier against the inclusion of democratic and human rights based approaches in the EU governance architecture. The sustainability and completion of the European Banking Union will have wider societal effects – but can these be reconciled with the availability of adequate and affordable housing for all? Since all EU Member States have accepted a range of international and national housing rights instruments, as well as the Sustainable Development Goals, one of which obliges States to ensure access to safe and affordable housing for all, how will these objectives be integrated into EMU?

One major problem is that there is no feedback loop for the incorporation of human rights issues within the EU economic governance or financial supervision system. There is no clear avenue for using Charter rights to insert European human rights standards and values into the EU governance and supervision discourse. This is leading to an absence of human rights 'legitimacy' within EU decision-making in this area. At an immediate level, ECB Opinions on draft national legislation, must respect national constitutional and European human rights respect for home. Yet, the place of social rights is not lost for EU leaders. The incoming President of the European Commission has stated: *'I believe it is high time that we reconcile the social and the market in today's modern economy*.¹¹⁴

¹¹² Pye, R., 'The European Union and the advance of fundamental rights in the Eurozone: A critical perspective', *European Journal of International Relations* (2018) 24(3), 567–589 at 573.
¹¹³ See Zilioli, C., 'Justiciability of central banks' decisions and the imperative to respect fundamental rights' in ECB Legal Conference 2017, p. 101,

https://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf. ¹¹⁴ See Ursula von der Leyen (2019) 'A Union that strives for more – My agenda for Europe', p. 9, <u>https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-</u> <u>commission_en.pdf.</u>

Significant EU resources are dedicated to analysing imbalances, risks and 'bubbles' in housing markets. Suggested solutions include capital buffers, sustainable lending levels, loan-to-income and debt-service-to-income ratios – measures that essentially restrict mortgage lending to the top income deciles in the population. The fact that the ECB licenses and franchises financial institutions to create vast amounts of credit, based on lending against rising house and associated land prices, has enormous effects on the ability of Member States to implement holistic, tenure-neutral, and inclusive housing policies, and ensure a supply of adequate and affordable housing for all. The EU Charter of Fundamental Rights can provide some new ways of squaring the circle.

"There is a major gap in the democratic and human rights oversight of EU economic governance which is not explicitly aligned with the EU Charter or the EU social objectives. Worse still, these arrangements raise questions of legitimacy arising from the EU institutions' prioritisation of the protection of corporate interests over the rights of citizens."

Appendix 1.

ESRB characteristics of residential real estate market cycles¹¹⁵



¹¹⁵ ESRB (2019) *Methodologies for the assessment of real estate vulnerabilities and macro-prudential policies: residential real estate*, p. 14.