

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

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BRIEFING PAPER 3

Integrating EU Charter Housing Rights into EU
Economic Governance and Financial Supervision

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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	Council of Europe, 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 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 and financial governance and 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.

These Briefings seek to demonstrate that, without in any way changing the competences and mandates of EU institutions, there is considerable scope for the Charter to be applied and promoted as part of EU law.

This is the third 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**

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 and Dee Halloran, as well as all who contributed to these publications.

2. Executive Summary

Housing rights are well established in Europe, with clear normative standards, State intervention in housing markets and some direct provision of housing. Many of these rights are now included in the EU Charter placing these within the framework of EU Treaty law. Greater integration of housing rights within the emerging EU economic governance and financial supervisory framework is now required. This Briefing Paper builds on Briefing Papers 1 and 2 and suggests ways in which Charter housing rights could be integrated within the EU architecture on economic governance, financial regulation and supervision.

The social consequences of the financial crash of 2008 demonstrated how the financial services industry can undermine established human rights. Significantly, housing rights advocates, EU legislators, regulators, supervisors and policy makers share many common objectives, often unacknowledged. These include ensuring broad financial and banking stability, effective supervision of lending institutions, prevention of macroeconomic imbalances through house price bubbles, ensuring sustainability of public finances for housing and mortgage systems, and combatting money laundering – often expressed in housing/land speculation in European cities. Indeed, it is entirely appropriate that the ECB, as part of its recently announced strategic review, should examine how it can properly integrate the Charter into its monetary and economic policy objectives and actions.³

Today, regulation of mortgage markets involves centralised macro and micro-prudential measures related to EU and financial institutions stability. Regulation of the conduct of business between financial institutions and their customers is exercised at Member State level, largely under EU rules. The recurrent narrative is about protecting the stability of the EU financial system, building resilience in banks and countering ‘vulnerabilities’. But the EU regulatory framework is missing an essential focus – that of assessing the risk to EU citizens (not necessarily as customers), individually and collectively, from a human rights perspective.

Housing is treated as incidental to the regulation of the financial system – largely about preventing credit fuelled “bubbles” in house prices, viewed as representing threats to financial stability. The ESRB acknowledges that such risks exist in many EU Member States. But there is poor recognition of the role of social and affordable housing, offering choice, stability and balance in housing systems, or how it interacts with macro and micro prudential objectives. Indeed, no EU institutional report on ‘housing market’ issues has considered Charter housing rights, or the key role of social housing, both as an enabler of people-centred housing rights, or as a counter to the ‘vulnerabilities’ of housing systems.

The European Parliament plays a key role in overseeing the application of the Charter within the economic governance and financial supervision framework, with its detailed

³ See <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200123~3b8d9fc08d.en.html>. The review will encompass quantitative formulation of price stability, monetary policy toolkit, economic and monetary analyses and communication practices. Other considerations, such as financial stability, employment and environmental sustainability, will also be part of review.

accountability mechanisms. Indeed, the ECB, ESRB, EBA and other institutions must report and seek approval for their policies from MEPs. The ECON and Civil Liberties, Justice and Home Affairs (LIBE) Committees have a key role in this oversight. MEPs are beginning to counter undue influence exerted by lobbyists from financial corporations on the EU institutional framework, questioning the “cognitive capture” of EU regulatory bodies by the corporations they seek to regulate, but more needs to be done. Indeed, the European Parliament, itself, has set out clear proposals on how the Charter could be advanced within the legal framework regulating EU economic and monetary policy. A better balance of representation from consumer and housing rights organisations is also urgently required within the EU institutional framework.

The European Commission has developed a range of checklists for draft legislation, but it is now time to apply a human and housing rights checklist to the full range of actions by EU institutions, agencies, offices and bodies, including policy reports of the EU economic governance institutions. EU institutions must also recognise the wide range of human rights protections which relate to respect for home in all its policies and practices in this area, from statistical reporting, macro and micro prudential supervision, ECB Opinions on draft national laws or regulations, interactions with national competent authorities, and other areas. After a decade, it is now time for the Charter to be integrated more deeply into EU economic and financial governance and supervision. The potential of EU citizens, civil society organisations and NGOs remains undeveloped in the application of Charter housing rights, but there are many ways to enable greater participation, which would enhance the legitimacy of the actions of the EU institutions.

“The recurrent narrative is about protecting the stability of the EU financial system, building resilience in banks and countering ‘vulnerabilities’. But the EU regulatory framework is missing an essential focus – that of assessing the risk to EU citizens (not necessarily as customers), individually and collectively, from a human rights perspective.”

3. Recommendations

- It is time to recognise that many of the objectives of EU economic governance and financial regulation and supervision correspond with housing rights objectives, albeit emerging from different perspectives. The EU Charter of Fundamental Rights, and its housing rights Articles, must be integrated into the architecture of EU economic governance and financial supervision, if it is to have any meaningful impact in Europe.
- All EU institutions, agencies, offices and bodies must not only respect the rights and observe the principles, but **promote the application of the Charter** within their respective competences and mandates. This entails positive action, and the significant interpretative function of Charter housing rights must be incorporated into EU institutional policy making and action.
- Explicit references to Charter housing rights need to be visible within the legal framework regulating EU economic and monetary policy, and in all reports of the EBA, ECB, ESRB and European Commission on issues which relate to housing.
- The consequences of EU institutional regulatory actions, such as the 'dumping' of increased social and housing expenditure onto Member State budgets, thereby displacing national expenditure on other essential rights, must be considered in ESRB, ECB, EBA or European Commission economic governance and financial supervision reports and actions.
- If EU institutions are serious about advancing social rights and leaving no one behind, they must ensure that the fight against homelessness is not lost within a broader housing agenda (FEANTSA). Housing is a human right, and should not be a globally traded financial asset. The ECB must address its impact on housing rights across Europe, and as a first step, include housing costs within its measurements of price inflation.⁴
- A public statement by the ECB to the European Parliament on how Charter housing rights will be effectively promoted, should follow the current ECB review of monetary policy.
- The procedures on ECB Opinions on draft national legislation must respect national constitutional and European human rights respect for home, with impact assessments for Charter compliance carried out.
- In its assessment of risk, the ESRB must address risk to EU citizens, and advance EU-wide regulatory measures that protect EU home loan borrowers against income loss,

⁴ See Positive Money - <https://www.positivemoney.eu/2020/01/housing-prices-inflation-index/>

illness, or other unforeseen events, which could result in loss of home or homelessness.

- The EU institutional macro and micro prudential policies must address the housing rights of all the income levels, rather than the current focus on the top three levels.
- The ESRB must broaden its treatment of housing as “collateral” or “residential real estate” (RRE), in order to begin to address its Charter housing rights obligations. Equally, the ESRB categorisation of social housing as commercial real estate (CRE) requires attention.
- The ESRB should develop the Basel-related risk weightings on real estate lending, beyond asset quality and borrower solvency, to encourage the socially desirable objectives of the supply of adequate and affordable housing, environmental protection and combatting climate change.⁵
- The ECB *Stocktakes of national supervisory practices and legal frameworks relating to non-performing loans* must address relevant Charter human rights and housing rights, particularly Article 7 on respect for home and Article 47 on access to justice.
- As is required in EU law, reports by the EBA, ECB, ESRB and European Commission on non-performing homeloans must consider the Charter rights of distressed borrowers, and distinguish between home loans and commercial loans, in order to respect and promote Charter housing rights.
- All EU institutions must recognise that social housing is an integral part of Services of General Economic Interest, which not only keeps property bubbles in check, but meets EU major policy objectives of economic stability, combatting climate change, social inclusion and application of Charter housing rights.
- Member States must be enabled to invest in social housing, as suggested in the European Semester Reports, to ensure the realisation of EU Charter housing rights, and this investment should not be inhibited by the EU economic governance rules on budget deficits and borrowing limits.
- The key role for the European Parliament in overseeing the application of the Charter for EU citizens within EU economic governance and financial supervision architecture must be enhanced with sufficient resources available to the ECON and LIBE Committees, and European Parliament support agencies.⁶

⁵ Secours Catholique/Caritas France (2018) *Finance to Citizens*.

<https://www.caritas.org/2018/10/secours-catholique-caritas-france-finance-report/>

⁶ Jourdan, S. and Diessner, S. (2019) *From Dialogue to Scrutiny: Strengthening the Parliamentary Oversight of the European Central Bank* (Brussels: Positive Money).

- The Rule 39 Procedure of the European Parliament requesting an Opinion from the Civil Liberties, Justice and Home Affairs (LIBE) Committee should be used whenever proposals which engage Charter housing rights are being advanced.
- Explicit references on the obligation to respect the rights, observe the principles and promote the application of Charter, should be specifically included, by the European Parliament, in the mandates of the EU Commissioners and European Parliamentary Committees.
- To avoid any perceived prioritisation of the interests of banks and financial institutions over human and housing rights, greater inclusion of citizen and consumer organisations in the consultation process is strongly recommended for all EU institutions.
- EU institutions should develop enhanced forms of consultation, impact assessments, including specific gender impact assessments, and legal scrutiny, with the involvement of independent experts in the field of fundamental rights.
- The European Commission's Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union urgently needs to be updated to take account of the new challenges and institutional reality, particularly after Brexit.⁷
- Improved assessment of Charter compliance for 'executive acts' of economic governance and coordination must be developed.
- The Charter of Fundamental Rights should be integrated within the European Semester process, including the country-specific recommendations and the annual growth survey recommendations, so as to comply with the normative components of the social rights of the Charter.⁸
- The European Commission should promote structured and regulated cooperation with human rights bodies, the relevant bodies of the Council of Europe, the United Nations, and civil society organisations working in the field, whenever a legislative file potentially affects Charter and other housing rights.
- In making macroeconomic decisions, the Council and European Commission must address the full range of civil, political and social rights guaranteed by the European and international human rights law instruments. The conclusion of Memoranda of

⁷ *Resolution of the European Parliament on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework*, 12 February 2019, P8_TA(2019)0079, para 1.

⁸ *Ibid.*, para 18.

Understanding with countries appealing to the ESM should be systematically assessed for their compatibility with the social provisions of the Charter.

- All EU institutions, bodies, offices and agencies should consider:
 - adopting a fundamental rights strategy, with time-bound commitments;
 - including a reference to fundamental rights in a code of conduct for staff;
 - setting up mechanisms ensuring that any violation of fundamental rights be detected and reported, and that risks of such violations be swiftly brought to the attention of the main bodies of the agency;
 - establishing the position of a fundamental rights officer;
 - developing a regular dialogue with civil society organisations and relevant international organisations on fundamental rights issues;
 - ensuring that compliance with fundamental rights becomes a central component of the terms of reference of the collaboration of the EU agency concerned with external actors, including in particular members of national administrations with whom they interact at operational level.⁹

- The role of European Ombudsman in guaranteeing respect for Charter rights, not just in relation to Article 41 on the right to good administration, but also by taking into account the fact that good administration is a cornerstone in securing other fundamental rights, must be respected.

- In terms of measuring the application of housing rights within the EU Charter a human rights based approach should be adopted in the widest sense. i.e. applying to EU institutions and agencies, as well as Member States and international agencies, underpinned by five key human rights principles of Participation, Accountability, Non-discrimination and Equality, Empowerment and Legality.¹⁰

⁹ De Schutter, O. (2016) *The Implementation of the Charter of Fundamental Rights in the EU institutional framework*. European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs.

[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU\(2016\)571397_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU(2016)571397_EN.pdf)

¹⁰ De Schutter/NHRI (2019) *Applying a Human Rights-Based Approach to Poverty Reduction and Measurement*. <http://ennhri.org/wp-content/uploads/2019/11/Applying-a-Human-Rights-Based-Approach-to-Poverty-Reduction-and-Measurement-A-Guide-for-NHRIs.pdf>

4. Human Rights in the new European economic governance landscape

In 2015, the Presidents of the European Commission, European Council, Eurogroup, ECB and European Parliament published the report *Completing Europe's Economic and Monetary Union*.¹¹ It outlined a reform plan to achieve a genuine economic, financial, fiscal and political Union in three stages by 2025. Remarkably, the report did not make any reference to the EU Charter of Fundamental Rights, and the only rights mentioned were property rights.¹² This demonstrates a systemic institutional problem in relation to lack of respect for and promotion of the Charter within the emerging economic governance and financial supervision architecture of EMU.

Financial inclusion

Of course, the financial services industry's engagement with human rights is not just about the damage it caused through the global financial crisis.¹³ The benefits of financial inclusion must also be considered – benefits which have resulted in global poverty being halved in twenty years. Finance is central to the realization of the Sustainable Development Goals (SDG) housing rights in the future.¹⁴ Financial inclusion can help liberate people, through greater independence, autonomy, freedom, security and self-respect, and improved basic living

¹¹ European Union (2015) *The Five Presidents' Report: Completing Europe's Economic and Monetary Union*, https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf.

¹² Neither did it refer to the UN *Guiding Principles on Business and Human Rights*, which are nowhere to be seen in the EU economic governance literature. See Office of the High Commissioner for Human Rights (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹³ Even though financial corporations utilise Charter rights to protect their interests against supervisory decisions. See, for example, van Bockel, B. 'Fundamental rights aspects of the SSM: differentiated standards of protection under the Charter of Fundamental Rights of the EU' in ECB Legal Conference 2015, <https://www.ecb.europa.eu/pub/pdf/other/frommonetaryuniontobankingunion201512.en.pdf>.

¹⁴ Dowell-Jones, M. and Kinley, D. (2011) 'Minding the gap: global finance and human rights', *Ethics and International Affairs* (2011) 25(2), pp. 183–210. These writers suggest that within global finance lies both the power and the wherewithal to improve the lot of the world's poor and marginalised. This is also suggested in Badré Bertrand (2018) *Can Finance Save the World?* (Oakland CA: BK Publishers). Indeed, leading housing rights advocates are demonstrating that there are sub-categories of private investment funds which are interested in funding long-term affordable rental housing, to obtain a modest, but very safe, financial return – see UN Global Compact which supports companies to do business responsibly by aligning their strategies and operations with the Ten Principles on human rights, labour, environment and anti-corruption – and take strategic actions to advance broader societal goals, such as the UN Sustainable Development Goals, with an emphasis on collaboration and innovation – <https://www.unglobalcompact.org/what-is-gc/mission>. For a European example see Javier Burón in Falagán, D.H. (2019) *Innovation in affordable housing in Barcelona 2015–2018* (Ajuntament de Barcelona), p. 125. This utilisation of parts of globalised finance in ways which promote housing rights is set to be truly globalised, with McKinsey Global Institute estimates of mortgage issuance of \$3–400 bn. p.a. globally being needed by 2025, to fund purchases of new affordable housing across the developing world. See McKinsey Global Institute (2014) *A blueprint for addressing the global affordable housing challenge*, https://www.mckinsey.com/~/_/media/McKinsey/Featured%20Insights/Urbanization/Tackling%20the%20worlds%20affordable%20housing%20challenge/MGI_Affordable_housing_Full%20Report_October%202014.ashx.

standards.¹⁵ Financial inclusion has benefits, and the alleviation of poverty 'is the stage upon which human rights and finance so often meet and where their combination of aspirations and tragedy unfolds'.¹⁶

David Kinley points out that the financial system must be viewed as a means not a goal in itself:

*Its object is not just to bake the biggest pie possible, regardless of ingredients and recipe, texture and taste. It must be to slice and serve it in ways that increase the sum of human welfare and happiness: in short in ways that protect, promote, and fulfil the human rights of everyone. ...Finance can enable the good life – a life in which one's individual security, dignity, and worth are recognised and respected.*¹⁷

Householders as “Shock Absorbers”

But there are major challenges for democracy and human rights of the inclusion of household finances (especially mortgages – one of the oldest financial products) within the ambit of modern globalised financial instruments, subject to their forces and dynamics. Human rights harms can be created and magnified in the financial sector. Indeed, the financial crisis showed that a large part of the process that generated the staggering economic, financial and human rights crisis after 2008 lay well beyond the ambit of the traditional human rights violation model, based on citizens as “right holders” and States as “duty bearers.”

Yet, the links between financial regulation, supervision and access to adequate and affordable housing, are quite clear. The recession after 2008 led to a reduction in wages in the public and private sectors, a reduction in welfare expenditure, a sharp rise in unemployment rates (reaching dramatic levels in Greece and Spain), collective redundancies, and a rise in part-time and precarious employment.¹⁸ Under such circumstances, households became the ‘shock absorbers’ of the crisis, and many were unable to repay their mortgages.¹⁹ The specific dynamics of the 2008 crisis, which centred on the mortgage market, led to a wave of mortgage

¹⁵ Kinley, D. (2018) *Necessary Evil – How to Fix Finance by Saving Human Rights* (Oxford University Press), p. 3.

¹⁶ Ibid., p. 24.

¹⁷ Ibid., p. 3.

¹⁸ See Beka, A., ‘The protection of the primary residence of mortgage debtors: Embedding a ‘basic needs’ principle in mortgage repossession proceedings’ in Luca Ratti (ed) (2018) *Embedding the Principles of Life Time Contracts* (The Hague: Eleven Publishing).

¹⁹ Ramsay, I. ‘Two Cheers for Europe: austerity, mortgage foreclosures and personal insolvency policy in the EU’ in Micklitz H.W. and Domurath, I. (eds), (2015) *Consumer Debt and Social Exclusion in Europe* (Abingdon Oxon: Routledge), pp. 189–227, 191. See also Kenna, P. Simón-Moreno, H. Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights. *European Law Journal*. 2019; 25: 608–622. <https://doi.org/10.1111/eulj.12348>; Della Negra, F. ‘The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová’ (2015) 52 *Common Market Law Review*, 10.

arrears and evictions in the peripheral EU Member States – where a mortgage lending and property price boom had taken place.²⁰

Human rights excluded

In the development of the macroeconomic and financial supervisory architecture since 2008, established human rights (particularly socio-economic rights) have been largely ignored.²¹ The priority was to protect the stability of the financial system, rather than the rights of EU citizens.²²

Clearly, the consequences of global financialisation and corporate control of the essentials of an adequate standard of living, the growth of supranational regulatory institutions, and the restructuring of society following the global financial crash, require a fresh approach to the application of socio-economic rights.²³ In any case, most international public law human rights instruments were created before the financialisation of housing. Essential elements of the UDHR ‘adequate standard of living’ have long been “commodified,” and largely provided through industrialised production for large-scale markets. Yet, international human rights are based on a model of individual rights ‘holders’ asserting their rights against nation states as ‘duty bearers’.²⁴ This traditional human rights based approach is based on two objectives:

1. To empower rights-holders to claim and exercise their rights.
2. To strengthen capacity of duty-bearers who have the obligation to respect, protect, promote, and fulfil human rights.

²⁰ A European Commission study in 2016 of the legislative and regulatory framework across EU Member States showed that statistics on evictions were not being consistently collated and did not record or publish statistics on evictions. National courts did not consistently apply human rights protections. See Kenna, P., Benjaminsen, L., Busch-Geertsema, V. and Nasarre-Aznar, S. (2016) *Pilot Project – Promoting Protection of the Right to Housing – Homelessness Prevention in the Context of Evictions* (VT/2013/056). Final report. European Union: European Commission, Directorate-General Employment, Social Affairs and Inclusion, <https://ec.europa.eu/social/BlobServlet?docId=15544&langId=en>. The Report recommended that mechanisms, such as *datio in solutum*, *datio pro solvendo*, mortgage-to-rent and mortgage-to-equity schemes, should be further developed in the context of tackling evictions, and from the perspective of the efficiency of the mortgage market.

²¹ Nolan A., ‘Not fit for purpose? Human rights in times of financial and economic crisis’, *European Human Rights Law Review* (2015) 4, 360–371; O’ Cinnéide, C., ‘Austerity and the faded dream of a social Europe’ in A. Nolan (ed). (2014) *Economic and Social Rights After the Global Financial Crisis* (Cambridge University Press); Kilpatrick, C. and De Witte, B. *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges*, EUI Working Paper LAW2014/05; De Schutter, O. and Dermine, P. (2016) ‘The two constitutions of Europe: Integrating social rights in the new economic architecture of the Union’, CRIDHO Working Paper: <https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO-WP-2016-2-ODS-PD-22.12.2016-C.pdf>; Fabbrini, F. (2016) *Economic Governance in Europe – Comparative Paradoxes and Constitutional Challenges* (Oxford University Press); Fabbrini, F. (2014) *Fundamental Rights in Europe: Challenges and Transformations, in Comparative Perspective* (Oxford University Press).

²² Between 2008 and 2011, European countries spent €4.5tn. or 37% of the European Union’s economic output on financial industry bailouts. See UN Office of the High Commission for Human Rights (2012) *Report on austerity measures and economic and social rights*, p. 7.

²³ Kenna, P. (2008) ‘Globalization and housing rights’, *Indiana Journal of Global Legal Studies* 15(2), 397–469.

²⁴ Kenna, P. (ed.) (2014) *Contemporary Housing Issues in a Globalized World* (Aldershot: Ashgate).

Rights-holders are individuals or social groups that have particular entitlements in relation to duty-bearers. Duty-bearers are state or non-state actors, that have the obligation to respect, protect, promote, and fulfil human rights of rights-holders.²⁵

However, in the globalised and corporate world of today, the value of traditional human rights approaches of individual redress for direct violations, with national or local courts acting as adjudicators, can be limited. Even programmatic approaches which envisage nation states developing 'welfare state' type responses to socio-economic rights obligations are being challenged, both politically and fiscally. State resources are meagre compared with the requirements of contemporary market interventions – particularly in housing.

The availability of essential goods and services as consumer items, provided by globalised corporations has led to some reconsideration of the debate. Sunstein, for instance, has suggested that State regulation (or in Europe, regulation by EU-mandated and multi-level agencies) of the quality, availability and cost of essential consumer needs, has emerged as a key political expression of rights protection.²⁶ Micklitz has pointed out that EU Member States developed their own distinctive models of social justice in private law, but the EU has developed a new regulatory private law based on 'access justice,' or justice through access, to counter the negative effects of the EU internal market.²⁷

The importance of the huge body of financial regulation and supervision established since the 2008 crisis (set out in Briefing 2), together with the expansion of complaints systems and financial ombudsman services, demonstrates the nature and extent of the new landscape.²⁸

It is now clear that relying on national or local courts to vindicate socio-economic rights can represent a somewhat cumbersome, lengthy and dated approach. Many national and local courts still interpret housing rights issues in terms of nineteenth century approaches to property and contract law disputes. There is a often failure to recognise such issues as the advanced levels of regulation of 'markets', extent of State provision and intervention in housing systems, the industrialisation of mortgage lending, and the development of EU consumer rights, and of course, the global development of human rights.²⁹

²⁵ See De Schutter/NHRI (2019) Report - Applying a Human Rights-Based Approach to Poverty Reduction and Measurement - <http://ennhri.org/wp-content/uploads/2019/11/Applying-a-Human-Rights-Based-Approach-to-Poverty-Reduction-and-Measurement-A-Guide-for-NHRIs.pdf>

²⁶ Sunstein, C. (1990) *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge: Harvard University Press); Morgan, B. (2007) (ed.) *The Intersection of Rights and Regulation* (Ashgate: London); Moloney, N., Ferran, E. & Payne, J. (2018) *The Oxford Handbook of Financial Regulation* (OUP).

²⁷ Micklitz, H.W. 'Social justice and access in private law', EUI Working Papers Law 2011/02. This means that it is for the European Union to grant access justice to those who are excluded from the market, or who have difficulties in making use of the market freedoms – ensuring that weaker parties have access to the market and to European society. See https://cadmus.eui.eu/bitstream/handle/1814/15706/LAW_2011_02.pdf

²⁸ https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/consumer-financial-services-policy_en

²⁹ See Kenna, P. (2019) 'Mortgage Law Developments in the European Union' *Journal of Law, Property and Society*, 4 (1): 46-79. Available at: https://static.wixstatic.com/ugd/d91411_6743920d872d4ecc900e4a3044a75f0b.pdf

New transnational actors

Integrating human and housing rights into the European regulatory framework offers some potential for the realisation of Charter rights. In the new era of European human rights, the actors are now transnational regulators, EU Member States, European institutions and global financial corporations, rather than individual 'rights holders' and 'duty-bearing' States.

In this context, there are persuasive arguments that the way European financial institutions are regulated and supervised – both internally and externally – should take into account broad human rights dimensions, along with the more traditional perspectives on solvency, financial stability and returns.³⁰ Mary Dowell-Jones asks the testing question:

Could human rights standards and efforts to elaborate the broader dimensions of the corporate responsibility to respect human rights enrich debates on the regulatory architecture and the internal governance of financial institutions, or are such issues too technical to be meaningfully addressed by the human rights architecture?³¹

Little attention has been paid to mapping the direct impact that global financial institutions have on the enjoyment or violation of human rights. But would such a mapping affect the conduct of financial institutions' operations, or influence the development of a comprehensive template that would effectively embed respect for human rights across the operations of today's vast financial institutions?³²

However, there are signs for hope. Making the work of EU institutions relevant for EU citizens – particularly the economic governance institutions – has been recognised as important by Christine Lagarde, President of the ECB:

The ECB needs to be understood by the markets that transmit its policy, but it also needs to be understood by the people whom it ultimately serves. People need to know that it is their central bank, and it is making policy with their interests at heart. One of the priorities of my Presidency, if confirmed, will be to reinforce that bridge with the public. There is much we can learn from those who see the different aspects of monetary policy in their daily lives, be they trade unions, consumer groups, NGOs or other civil society partners. Beyond the regular accountability hearings in front of this

³⁰ See Dowell-Jones, M. 'Financial institutions and human rights', *Human Rights Law Review* 13(3), September 2013, pp. 423–468. She suggests that there has been little active engagement of regulators, policymakers and financial institutions in meaningful dialogue on the changes needed to insulate human rights from the daily activities of financial institutions, and few human rights bodies have risen to this challenge. There has been little active participation from formal human rights bodies at the national or international level in financial sector discussions, and although a few NGOs have started to address regulatory reform, their output remains distant from formal negotiations.

³¹ *Ibid.*

³² *Ibid.*, Conclusion.

[European Parliament] assembly, listening to their voices can only make the ECB's policymaking stronger.³³

Linking human rights and consumer protections

Advancing and respecting human rights through management of macroeconomic and financial risk requires new types of engagement. Human and housing rights are relevant to many areas of economic governance: broad financial and banking stability; regulation issuance and costs of government bonds; control of mortgage derivatives; supervision of lending institutions; risk management of non-performing loans (deciding the balance of risk between lenders and consumers); controlling pro-cyclical exaggerated cycles in financial markets; developing long-term sustainable mortgage systems; preventing macroeconomic imbalances through house price 'bubbles'; ensuring sustainability of public finances for housing; protecting consumer rights in financial services; and even combatting money laundering, which is often expressed through housing speculation in Europe's cities. All of these areas are within the objectives of EU economic and financial governance. Yet, almost all economic governance and regulatory decisions and policies affecting EU citizens are presented as technical issues, avoiding the human rights aspect.

There are, of course, major conceptual, normative, structural and linguistic barriers to the integration of human rights into these structures.³⁴ However, in spite of these difficulties, **many of the objectives of economic and financial regulation and supervision can be seen as corresponding with housing rights objectives, albeit emerging from different perspectives.** The stability of mortgage and housing markets is one of the primary concerns of macroeconomic and financial regulation, an objective which can be achieved only by balanced housing systems. Such stability also constitutes one of the building blocks for the realisation of housing rights. The links between human rights, social housing and consumer protection are slowly being made.³⁵

Acceptable conduct

Of course, governance and supervisory institutions have important parts to play, as they are major elements which are constitutive of markets. They set the boundaries of acceptable conduct, and endeavour to enforce this by sanctioning misdeeds, encouraging greater

³³ Opening Statement by Christine Lagarde to the Economic and Monetary Affairs Committee of the European Parliament, September 4, 2019. <http://www.europarl.europa.eu/cmsdata/186560/Opening%20Statement%20by%20Christine%20Lagarde%20to%20the%20ECON%20Committee-original.pdf>

³⁴ Dowell-Jones (2013) *op. cit.* demonstrates that the three major areas in which human rights have been linked to financial institutions – project finance, ethical investing and CSR – now have high visibility and broad-based industry buy-in, but fail the important test of operational relevance, and can be very easily circumvented by financial market reality.

³⁵ See Kenna, P. Simón-Moreno, H. Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights. *European Law Journal*. 2019; 25: 608–622. <https://doi.org/10.1111/eulj.12348>; See also Benöhr, I. (2013) *EU Consumer Law and Human Rights* (Oxford University Press) suggesting that the inclusion of consumer protection will be pursued as an autonomous social objective of the EU and recent Directives on consumer rights, and this refers to the fundamental rights and principles recognised by the Charter of Fundamental Rights.

engagement and better behaviour within these limits.³⁶ Respecting human and housing rights must be part of the definition of acceptable conduct.

The Charter transcends some of the limitations of earlier non-binding international human rights instruments. Since it is binding on EU institutions and agencies it can be integrated into the EU-wide institutional economic governance and financial supervisory framework, on which the realisation of socio-economic rights for many EU citizens depends. This integration is one way to reinforce that bridge with the public, but there are many challenges to be overcome.³⁷ Ten years after the Charter becoming EU Treaty law, it is time to integrate Charter rights into the EU institutional governance framework so that EU citizens can see that they too are important in the Union.

“Ten years after the Charter’s becoming EU Treaty law, it is time to integrate Charter rights into the EU institutional governance framework so that EU citizens can see that they too are important in the Union.”

³⁶ Kinley, D. (2018) *Necessary Evil – How to Fix Finance by Saving Human Rights* (Oxford University Press), p. 202.

³⁷ See Hoffman-Axthelm, L. and Braun, B. (2017) *Two Sides of the Same Coin – Independence and Accountability of the European Central Bank* (Brussels, Transparency International) which showed there are 22 ECB advisory groups with 517 representatives from 144 different entities: either corporations, companies or associations, mainly trade associations. According to the ECB, these ‘maintain the necessary dialogue with representative associations in civil society’. Yet, there are few consumer or human rights organisations represented.

5. The links between financial supervision and social housing

Financial supervision encompasses regulation of mortgage markets at macro prudential and microprudential level, as well as regulation of conduct of business with customers, which takes place at Member State level. The financial stability of the overall system, as well as that of individual institutions is the dominant influence, which includes building resilience in banks (and their borrowers) as well as countering 'vulnerabilities'. But the EU regulatory framework is missing an essential focus – that of assessing the risk to EU citizens (individually and collectively), and not necessarily as consumers – especially from a human rights perspective.³⁸ Of course, protecting the financial system from risks (including guarding against conduct risks) serves to protect EU citizens from risks of financial misconduct, and there have been some very valuable innovations in this area.³⁹

The treatment of land/housing as a supply and demand issue “market” or “asset” issue forms a major regulatory deficit. The concept of market failure does not begin to explain high housing and land prices in European cities. In any case, State interventions involving the provision of subsidies and some social housing are largely impotent, in the face of enormous globalised financial corporations.

It is now becoming accepted that the interaction between land, property, housing and the financial system shapes the macroeconomy.⁴⁰ Bank lending on these (overpriced) assets forms an integral part of the assumptions of financial stability.⁴¹

³⁸ Nield, S. 'Secured Consumer Credit in England,' in Anderson, M. and Amayuelas, E.A. (eds) (2017) *The Impact of the Mortgage Credit Directive in Europe* (Groningen: Europa Law Publishing,). See also European Economic and Social Committee (2014) *Opinion on Consumer protection and appropriate treatment of over-indebtedness to prevent social exclusion*, INT/726. OJ C 311, 12.9.2014. <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/consumer-protection-and-over-indebtedness>. See also Domurath, I. (2017) *Consumer Vulnerability and Welfare in Mortgage Contracts* (Oxford: Hart).

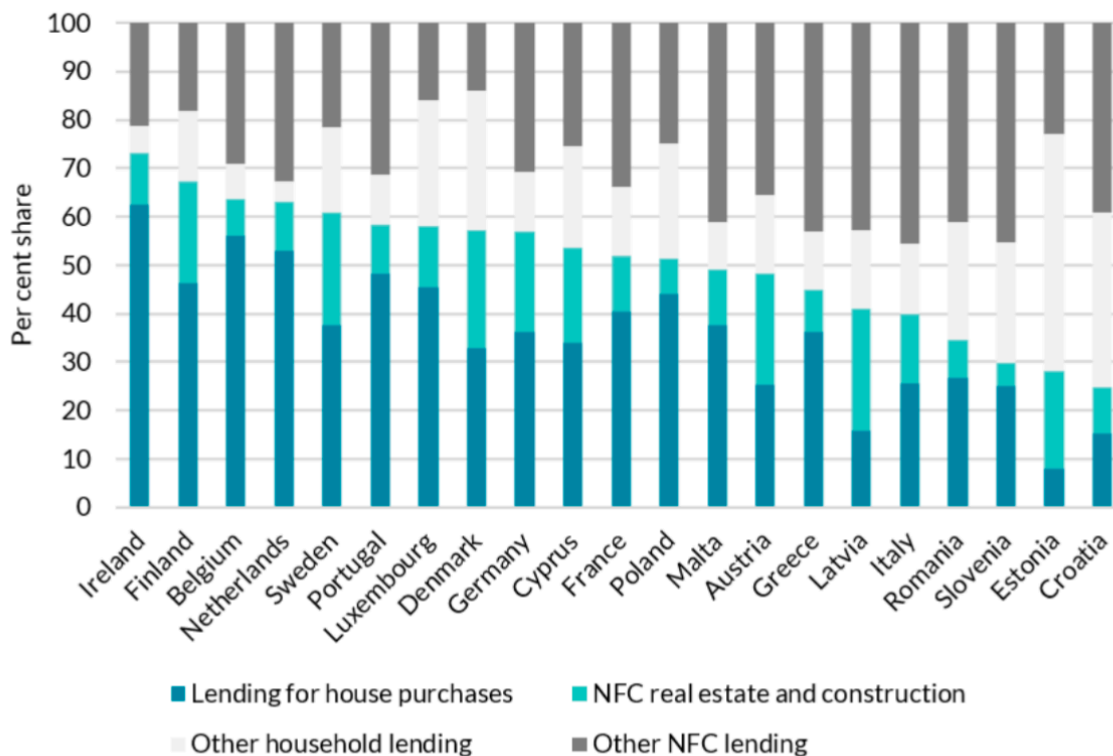
³⁹ See, for example, the UK Financial Conduct Authority (2018) *FCA Mission – Approach to Consumers*. Available at: <https://www.fca.org.uk/publication/corporate/approach-to-consumers.pdf>. See also Central Bank of Ireland, Consumer Protection Code 2012 (updated 2015), which includes references to a “vulnerable consumer”. “Vulnerable consumer” means a natural person who: a) has the capacity to make his or her own decisions but who, because of individual circumstances, may require assistance to do so (for example, hearing impaired or visually impaired persons); and/or b) has limited capacity to make his or her own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health difficulties). <https://centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/4-gns-4-2-7-cp-code-2012.pdf?sfvrsn=6>

⁴⁰ See Ryan-Collins, J., Lloyd, T. and McFarlane, L. (2017) *Rethinking the Economics of Land and Housing* (London: Zed), p. 110. The authors state that mainstream economic theory lacks a coherent analysis of land or the flows of credit it creates, viewing banks as intermediaries lending out deposits, rather than money creators. Since most new mortgage credit is directed to the purchase of existing homes and land, the inevitable result is inflation in prices. The emergence of a model of ‘residential capitalism’ whereby access to mortgage credit and homeownership was widened in the late twentieth century was accompanied by a withdrawal of the state from the supply of housing and a shift towards subsidising individuals’ ability to pay rent or buy a home in the market (p. 192).

⁴¹ Some economic models used here refer to society as comprising only ‘housing entrepreneurs’, ‘non-housing entrepreneurs’ and ‘banks’. See Martin, A., Moral-Benito, E. and Schmitz, T. *The financial transmission of housing bubbles: evidence from Spain*. ECB Working Paper Series No. 2245/February

The following chart, produced by *Banc Ceannais na Éireann* (Central Bank of Ireland) shows the comparatively high level of reliance on housing assets for banking stability.

Figure 1. Share of European bank loans on housing and construction⁴²



High house and land prices

Policies which require the maintenance of high house and land prices, which directly impede the supply of affordable housing contribute to the denial of housing rights for low income households and contribute to homelessness in Europe. Indeed, addressing the policy dissonance between EU policies on macro and micro prudential regulation and those ensuring a supply of adequate and affordable housing, is a key challenge. It can only be addressed by understanding the land–finance positive feedback loop based on rising asset values.⁴³ Policy

2019.

<https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2245~334a97f21d.en.pdf?d34805e046fdb43b126aa61e4b6101c>.

⁴² Lyons, P., Nevin, C. & Shaw, F. Real-estate concentration in the Irish banking system. Financial Stability Notes, Vol. 2019, No.4. Central Bank of Ireland (2019) available at: [https://www.centralbank.ie/docs/default-source/publications/financial-stability-notes/no-4-real-estate-concentration-in-the-irish-banking-system-\(lyons-nevin-and-shaw\).pdf?sfvrsn=4](https://www.centralbank.ie/docs/default-source/publications/financial-stability-notes/no-4-real-estate-concentration-in-the-irish-banking-system-(lyons-nevin-and-shaw).pdf?sfvrsn=4), p. 14.

⁴³ See Ryan-Collins, J., Lloyd, T. and McFarlane, L. (2017) *Rethinking the Economics of Land and Housing* (London: Zed).

measures need to be taken to encourage bank credit creation and savings back to productive activity, and away from property.⁴⁴

Of course, housing policy, regulation, funding and social housing provision are viewed as issues solely within the competence of Member States, although States actions clearly interact and impact on wider EU macro and micro prudential regulation. While the level, quality and demand for mortgage lending is directly related to, and shapes, people's choices in the housing system, it is important to point out that this focus on one element of housing systems – macro- and micro-prudential risk arising from mortgage lending on housing market 'bubbles' – is a weakness of the overall EU institutional regulatory approach. While the pattern of mortgages on residential properties varies widely across Europe⁴⁵, only a small proportion of homes in each Member State are sold every year. A narrow approach is unsuitable for explaining European societies with advanced social protection and social housing systems.⁴⁶

The overall EU institutional approach needs to address the housing rights of all the income deciles, especially those who cannot access any affordable market or social housing. The overall EU institutional macro and micro prudential approach needs to address the housing rights of all the income deciles, rather than the focus on the top three income deciles.⁴⁷ Indeed, there is a fundamental connection between micro and macro prudential objectives, monetary policy and the provision of housing for all.

Towards housing and financial stability

A World Bank report has accepted that State intervention to ensure a sufficient supply of affordable and adequate housing is essential to avoid distortions and instability in housing markets.⁴⁸ The ESRB report *Vulnerabilities in the EU residential real estate sector* (2019) also recognised that housing market dynamics and vulnerabilities are connected with various social and economic policies, and that macroprudential policy must be complemented by actions in other areas to ensure financial stability.⁴⁹ But the connection between wider housing

⁴⁴ Secours Catholique/Caritas France (2018) *Finance to Citizens*, p. 133–136

<https://www.caritas.org/2018/10/secours-catholique-caritas-france-finance-report/>; Turner, A. (2016) *Between Debt and the Devil* (New Jersey: Princeton) both suggest that regulatory capital requirements should be used to reflect different social risks, such as real estate lending, which should have higher risk weighting.

⁴⁴ Secours Catholique/Caritas France (2018) *Finance to Citizens*, p. 133–136.

⁴⁵ Total outstanding residential loans for the twenty-eight EU countries amounted to some €7 trillion in 2017, amounting to 26% of EU-area GDP. See <https://hypos.org/app/uploads/sites/3/2018/09/HYPOSTAT-2018-FINAL.pdf>, p. 116. See Appendix 2 in Briefing Paper 2, for the extent of homes with mortgage across EU Member States.

⁴⁶ See Christophers, B. 'Centring housing in political economy', in Aalbers, M. (ed.) (2016) *The Financialization of Housing* (London: Routledge).

⁴⁷ Population incomes are divided into deciles or tenths, and Eurostat provides regular reports based on these. Yet, EBA, ECB, ESRB or Commission reports on housing do not refer to these at all, revealing major limitations in the methodologies behind the regulatory actions.

⁴⁸ Inchauste, G. et al. (2018), *Living and Leaving: Housing, Mobility and Welfare in the European Union*. The World Bank, Washington DC, <http://pubdocs.worldbank.org/en/507021541611553122/Living-Leaving-web.pdf>, p. 22.

⁴⁹ ESRB (September 2019) *Vulnerabilities in the EU residential real estate sector report*, p. 10, https://www.esrb.europa.eu/pub/pdf/reports/esrb.report190923_vulnerabilities_eea_countries~a4864b42bf.en.pdf.

policy and financial stability is not well understood, and the ESRB has not addressed wider housing policy - which is narrowly viewed as within the competence of Member States. Yet, moving towards EMU, it is clear that high house prices, high rents and high land values are a significant element of the pillar of EU banking and financial stability, underpinned, of course, by ECB monetary policy on low interest rates and quantitative easing.⁵⁰

Concept of balance

But stability is all about balance. Balanced housing systems, offering choice, flexibility, security, affordability and adequacy in housing are not just segments of financial markets. Having a sufficient supply of social housing helps to smooth out the cyclical nature of the property 'market,' and lessen the likelihood of property bubbles, which destabilise economies. It can also lead to the application of housing rights, already recognised by EU Member States. Housing systems include market provided housing and social or subsidised housing in every modern State. This concept of balance in housing systems/markets, in the context of housing rights, has been addressed by the EU Committee of the Regions (2012):

*[It] is interested to note that the **balance in housing markets has been recognised as one of the potential indicators of the macroeconomic surveillance** scoreboard in the framework of the new European Semester, given the importance of housing markets for increasing financial and economic stability at European level;
... that high-quality, affordable housing is a basic necessity for all citizens of the European Union, and that very often it is local and regional authorities that are people's main contact for meeting this need;
... even if the European Union has no specific competence in housing policy, it is necessary to explain the impact that European policy can have on housing, in view of i) the importance of housing in meeting the European Union's major policy objectives as set out above (economic stability, efforts to combat climate change, and social inclusion), ii) the horizontal social clause laid down in Article 9 of the Treaty on the*

⁵⁰ According to the *Financial Times* the biggest "reason of all for Ireland's housing disaster has to be Europe's ongoing experiment with quantitative easing and ultra-low interest rates. This has a double-whammy effect on property prices. Investors are lured into the market by a search for returns in an otherwise low-yield environment. And housebuyers are encouraged to buy with cheap mortgages." "Ireland's political mess rooted in QE house price fallout - borrowing restrictions and rent caps will not solve runaway property inflation" – Patrick Jenkins, *Financial Times* 17 February 2020. The ESRB (September 2019) *Vulnerabilities in the EU residential real estate sector* report stated that the cross-country assessment concluded that 19 European countries presented vulnerabilities, which warranted further risk analysis as well as an assessment of macroprudential policies to address these vulnerabilities. In Denmark, Netherlands, Luxembourg, and Sweden certain vulnerabilities were identified as a source of systemic risk to financial stability. A recent study also shows that the approach to individual and collective enforcement of bank loans in the Member States shows significant variation between the Member States – see Steffek, F. (2019) *Analysis of Individual and Collective Loan Enforcement Laws in the EU Member States*, European Commission. Available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/growth_and_investment/documents/191203-study-loan-enforcement-laws_en.pdf

*Functioning of the European Union and iii) Article 34 of the Charter of Fundamental Rights;*⁵¹

A Report to the European Parliament on social housing in the EU (2013) captured housing's institutional and systemic value:

*[A]ffordable, adequate and secure accommodation is a suitable tool for achieving social justice and cohesion, and investment in affordable housing is a precondition for enhanced labour mobility and increased employment opportunities, while the construction and renovation of social housing is crucial for achieving the targets of meeting the housing demand, providing for affordable housing for broad levels of the population, boosting economies, **keep property bubbles in check**, combat energy poverty and ensuring tax income of Member States ... whereas social housing policy is an **integral part of services of general economic interest** by helping to meet housing needs, facilitate access to property, promote the quality of living space, improve existing living space and adapt housing expenditure to the family situation and resources of the occupiers, while leaving scope for effort on their part.*⁵²

Housing Europe points out that there is a €57bn. investment gap in affordable housing in Europe.⁵³

In the context of EU law, there are further obligations on governance institutions in both fields – to act in line with Articles 3(3) TEU,⁵⁴ as well as Articles 33(1), 34 and 36 of the Charter. The specific contribution of social housing to financial stability can be measured by the extent to which it contributes to balanced, stable housing systems, providing all categories of workers with a dwelling that corresponds to their needs, within reasonable commuting distance from their place of work.⁵⁵

⁵¹ [Bold added] Opinion of the Committee of the Regions 'Towards a European agenda for social housing' (2012/C 9/02), <https://www.eesc.europa.eu/sites/default/files/resources/docs/cor-opinion-on-towards-a-european-agenda-for-social-housing.pdf>, paras 2–5.

⁵² European Parliament (2013) *Report on social housing in the European Union* (2012/2293(INI)) Committee on Employment and Social Affairs. A7-0155/2013, p. 7–8, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0155+0+DOC+PDF+V0//EN>.

⁵³ Housing Europe, *The State of Housing in the EU 2019*. p. 6.

⁵⁴ Article 3(3) TEU states: "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."

⁵⁵ European Parliament (2016) *Research for REGI Committee – Services of General Interest in the Funding Period 2014–2020*. PE573.411. p. 103, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573411/IPOL_STU\(2016\)573411_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573411/IPOL_STU(2016)573411_EN.pdf)

“The specific contribution of social housing to financial stability can be measured by the extent to which it contributes to balanced, stable housing systems, providing all categories of workers with a dwelling that corresponds to their needs, within reasonable commuting distance from their place of work.”

6. The Charter within EU economic governance and financial supervision

Olivier De Schutter has pointed out that the role of the Charter of Fundamental Rights in the economic governance of the EU raises, first of all, a legal question - whether the Charter applies in this framework.

*The answer is clearly affirmative as to all the acts adopted by the EU institutions, including not only the Commission and the European Central Bank, but also the Council of the EU and the European Council, all of which have a role to play in various parts of the new economic architecture...*⁵⁶

CJEU Case Law – Reviewing actions of EU Institutions

Although having limited effect in promoting the application of the Charter, the CJEU has reviewed the legality of acts of EU institutions, bodies, offices and agencies under Article 262 TFEU. Following *Pringle*,⁵⁷ the CJEU began to consider the impact on Charter rights of the actions of EU institutions.

In *Ledra*,⁵⁸ it was held that the European Commission retained its role as guardian of the Treaties, even when acting in the framework of the European Stability Mechanism (ESM). The CJEU clarified that EU institutions, including the ECB, must respect the Charter even when facing a crisis, and must bear in mind the consequences in terms of their liability to individuals.⁵⁹ In this case, the CJEU held that a violation of Article 17 of the Charter was justified in order to ensure the stability of the banking system of the euro area as a whole, rendering the Commission's conduct lawful.⁶⁰

The CJEU has held that the European Union may incur non-contractual liability only if a number of conditions are fulfilled, namely (i) the unlawfulness of the conduct alleged to have been carried out by the EU institution, (ii) the fact of damage and (iii) the existence of a causal link between the conduct of the institution and the damage complained of.⁶¹

⁵⁶ De Schutter, O. (2016) 'The Implementation of the Charter of Fundamental Rights in the EU institutional framework', European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, p. 38.

⁵⁷ Case C-370/12 *Thomas Pringle v Government of Ireland*.

⁵⁸ Case C-8/15 P *Ledra Advertising v Commission and ECB*. (20/9/2016). See also Case T-290/13 *CBMG v European Commission and ECB*; Joined cases C-105/15 P – C-109/15P *Mallis v European Commission and ECB*. This case held that the Eurogroup is an informal grouping of the euro area finance ministers and its acts could not be attributed to the Commission or the ECB.

⁵⁹ 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>.

⁶⁰ See also Case C-258/14 *Florescu and Others v Casa Judet, eana de Pensii Sibiu and Others*, Markakis, M. and Dermine, P. 'Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: Florescu', *CMLR* (2018) 55, 643–672.

⁶¹ See Craig, P. & De Búrca, G. (2015) *EU Law: Text, Cases, and Materials*, (Oxford University Press); Case T-107/17, *Frank Steinhoff and others v ECB* (2019). This non-contractual liability is quite limited and is not suggested here as a useful avenue for developing Charter application or institutional

In the *Ledra* case the CJEU has reiterated that there is no limit to the applicability of the Charter with respect to EU institutions (compared with Member States), and there is an obligation on EU institutions, not just to respect, but also to *promote* the application of the Charter.⁶² However, only Article 17 on property rights has been considered in this context, as yet, and it is clear that promoting the application of the Charter through individual litigation has limited impact at structural or institutional level.

“The CJEU has reiterated that there is an obligation on EU institutions not just to respect but also to *promote* the application of the Charter”

accountability. For the wider perspective, see Dermine, P., ‘The End of Impunity? The Legal Duties of “Borrowed” EU Institutions under the European Stability Mechanism Framework: ECJ 20 September 2016, Case C-8/15 to C-10/15 *Ledra Advertising et al. v European Commission and European Central Bank*, *European Constitutional Law Review* (June 2017) 13(2), pp. 369–382.

⁶² Opinion of AG Wahl in *Ledra Advertising* case (Joined Cases C-8/15 P, C-9/15 P and C-10/15 P), para 85.

7. The European Parliament and the Charter

The democratic accountability of EU regulatory systems could be more effective, with an active role for MEPs in the mobilisation of established European human and housing rights. MEPs can play a key role in displacing some of the misconceptions which lay the blame for the weak financial position of European banks on EU citizens, rather than on financiers.

Firstly, there is a key role for the European Parliament in overseeing the application of the Charter for EU citizens,⁶³ especially in examining the Annual Reports of the Commission on the implementation of the Charter, and particularly the housing rights within it.⁶⁴ Yet, a recent report to the European Parliament pointed out that while the powers of the EU are very extensive in the field of economic governance, and can greatly affect human rights, the Charter is blatantly neglected:

... Several instruments shaping the EU economic and monetary policy have been adopted outside the Union framework, subtracting the EU institutions from political responsibility while assigning them, however, strong roles of surveillance and implementation. Decisions and choices made without a proper assessment of the human rights' dimension, and by giving full priority to macroeconomic factors and conditionality, have already had deep repercussions on civil, economic and social rights, as also highlighted by the European Committee on Social Rights.... the Ledra Advertising judgment of the CJEU should become the watershed for mainstreaming the Charter into the EU economic governance framework as well as into its intergovernmental dimension, becoming the benchmark for assessing the legitimacy of the measures proposed and adopted in this field.⁶⁵

Clearly, Charter rights must be properly or fully applied within the new EU financial regulatory architecture, especially in the approval or monitoring of this architecture by the European Parliament.⁶⁶

Secondly, a significant and underused mechanism exists in Rule 39 of the Rules of Procedure of the European Parliament (2019) on respect for fundamental rights which provides that the European Parliament Committee on Civil Liberties, Justice and Home Affairs must be

⁶³ Annual Report to the Parliament, European Parliament Study (2015) *The impact of the crisis on fundamental rights across Member States of the EU*. Comparative analysis, Policy Department C: Citizens' Rights and Constitutional Affairs, European Union, Brussels; European Parliament (2018), *Respect for fundamental rights in the European Union* – PE RI(2017)600415.

⁶⁴ https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en.

⁶⁵ European Parliament (2019) *Report on the implementation of the Charter of Fundamental rights of the European Union in the EU institutional framework 2017/2089(INI)* PE629.691, https://www.europarl.europa.eu/doceo/document/A-8-2019-0051_EN.html, p. 5; See also De Schutter, O. and Dermine, P. (2016), 'The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union', Institute for Interdisciplinary Research in Legal Sciences (JUR-I), Centre for Philosophy of Law (CPDR), CRIDHO Working Paper 2016/2.

⁶⁶ European Parliament (2018), *Respect for fundamental rights in the European Union* [http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600415/IPOL_PERI\(2017\)600415_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600415/IPOL_PERI(2017)600415_EN.pdf).

consulted and submit an opinion when a legislative proposal does not comply with the fundamental rights of the Union.⁶⁷ This presents a key challenge for the application of the Charter by the Parliament, especially in situations where a proposed complex measure of financial regulation fails to respect human rights.

Thirdly, the ESRB is accountable to the European Parliament under Article 19 of the ESRB Regulation. At least annually, in connection with the publication of the ESRB's Annual Report, and more frequently in the event of widespread financial distress, the Chair of the ESRB must be invited to a hearing in the European Parliament, separately from the Monetary Dialogue between the Parliament and the President of the ECB.⁶⁸ Moreover, the Chair of the ESRB must hold confidential oral discussions at least twice a year, behind closed doors, with the Chair and Vice-Chairs of ECON on the ongoing activity of the ESRB.⁶⁹

Fourthly, the EBA is accountable to the European Parliament.⁷⁰ MEPS may question whether policy measures, such as the proportionality of those advanced in relation to NPLs, given that such loans are now a small percentage of bank liabilities. Housing rights issues arise where the EBA does not distinguish home loans, where citizens housing rights are engaged, from commercial loans.⁷¹ One report of the European Court of Auditors in 2019 showed that 'stress tests' on European banks by the EBA largely relied on self-reporting by banks, and that NPL risks were not treated as significant.⁷² To avoid the perceived prioritisation of the interests of banks and financial institutions over human and housing rights, European Parliamentary oversight in this area becomes critical for the protection of citizens, as well as greater inclusion of citizen and consumer organisations in the consultation process.

⁶⁷ http://www.europarl.europa.eu/doceo/document/RULES-9-2019-07-02_EN.pdf. '1. In all of its activities, Parliament shall fully respect the rights, freedoms and principles recognised by Article 6 of the Treaty on European Union, and the values enshrined in Article 2 thereof. 2. Where the committee responsible for the subject matter, a political group or Members reaching at least the low threshold are of the opinion that a proposal for a legislative act, in whole or in part, does not comply with the fundamental rights of the European Union, the matter shall, at their request, be referred to the committee responsible for the protection of fundamental rights. 3. That request shall be submitted within four working weeks of the announcement in Parliament of the referral to the committee responsible for the subject matter. 4. The opinion of the committee responsible for the protection of fundamental rights shall be annexed to the report of the committee responsible for the subject-matter.' 'Low threshold' means one-twentieth of Parliament's component Members or a political group.

⁶⁸ The absence of Charter rights in the European Parliament Monetary Dialogue is noticeable.

⁶⁹ The failure to consider Charter rights is most evident in the ESRB report *Resolving non-performing loans in Europe* (July 2017), which avoided addressing the fact that many of these loans were loans secured on residential loans and recovery actions would lead to loss of home, thereby engaging EU citizens' established human rights. See

https://www.esrb.europa.eu/pub/pdf/reports/20170711_resolving_npl_report.en.pdf

⁷⁰ See Regulation 1093/2010, Article 3. Accountability of the Authorities.

⁷¹ See EBA (2019) *Report on NPLs – Progress made and challenges ahead*, https://eba.europa.eu/sites/default/documents/files/document_library/Risk%20Analysis%20and%20Data/Risk%20Assessment%20Reports/2019/Final%20EBA%20Report%20on%20NPLs-for%20publication_final.pdf

⁷² European Court of Auditors (2019) *EU-wide stress tests for banks: Unparalleled amount of information on banks provided but greater coordination and focus on risks needed*, https://www.eca.europa.eu/Lists/ECADocuments/SR19_10/SR_EBA_STRESS_TEST_EN.pdf. See also Langenbucher et al. (2017) *EU Mapping 2017: Systemic overview on economic and financial legislation*. Study for European Parliament ECON Committee. PE 607.325, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2017\)607325](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)607325).

Fifthly, the European Parliament can play a key role in challenging many of the misconceptions about how money and credit is created with all the consequences for EU-driven measures to pursue distressed homeloan consumers. One aspect of EU institutional approaches is the claim that EU banks act as intermediaries, lending out deposits from savings placed with them, for mortgages.⁷³ In the ECB Webpage - 'Spotlight on financial stability' the following passage appears:

*Stability is all about balance. The financial system features a complex web of dependencies and interactions between different actors. Banks and insurance companies act as intermediaries by directing funds from those willing to lend or invest to those who want to borrow.*⁷⁴

This narrative, promoted by many in the EU financial regulatory system is used to justify the eviction of distressed borrowers from their homes.⁷⁵ Countering this misconception – that banks simply act as middlemen – is not just a theoretical matter, but one which is vital if we are ever to achieve our vision of a fairer money and banking system, because falsehoods like this have “dangerous real-life consequences”.⁷⁶

The implications of all this for housing rights advocates are not immediately obvious. The arguments that banks acts as intermediaries for savings becomes part of political, moral and punitive arguments promoted by financial corporations to demonise homeloan borrowers and financial services consumers in arrears, even if this occurs through unforeseen events such as a recession, illness or public health crisis. This debilitates mature debate, and the question of the rights of those at risk of losing their homes is avoided in the reports of EU institutions. Instead, the notion of benevolent intermediaries is endorsed, creating an ideological firewall against any socially beneficial forbearance measures, restructuring of mortgage markets or other measures to comply with Charter obligations, which might be advanced by EU regulators or legislators.

At an ideological and political level, it places the blame for any financial crisis and stability risks, not on reckless corporate lenders, but on the “feckless” borrower – undermining respect

⁷³ See Positive Money 'Battle with the BBC to correct this misconception', <https://positivemoney.org/2019/05/battle-with-the-bbc/>. See also Mazzucato, M. (2018) *The Value of Everything – Making and Taking in the Global Economy* (London: Penguin), chapter 2 where she. Mazzucato points out that it was only after the 2008 crisis that the Bank of England admitted that 'loans create deposits', and not vice versa (p. 116). For a clear explanation of this misconception see Michael M., Radia, A. & Thomas, R. 'Money creation in the modern economy', *Bank of England Quarterly Bulletin* (2014), Qtr 1, <https://www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/2014/money-creation-in-the-modern-economy.pdf?la=en&hash=9A8788FD44A62D8BB927123544205CE476E01654>.

⁷⁴ https://www.ecb.europa.eu/explainers/tell-me-more/html/financial_stability.en.html.

⁷⁵ See Hockett, R.C. and Omarava, S.T., 'The Finance Franchise', *Cornell Law Review* (2017) 102, 1143. Introduction. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820176.

⁷⁶ See Positive Money 'Battle with the BBC to correct this misconception', <https://positivemoney.org/2019/05/battle-with-the-bbc/> Ibid. "Take the global financial crisis as an example. Rather than shrewdly lending out people's savings, in the run-up to 2008 banks were creating new money and, since they were not constrained by the existing money stock, they fuelled a housing bubble which burst."

for EU citizens, consumer protection and human rights. There is an urgent need for Charter rights to be integrated into these EU institutional reports.

“The arguments that banks acts as intermediaries for savings becomes part of political, moral and punitive arguments promoted by financial corporations to demonise homeloan borrowers and financial services consumers in arrears, even if this occurs through unforeseen events such as a recession, illness or public health crisis..”

8. The European Parliament and the ECB

The European Parliament plays a key role in the oversight of the ECB. MEPs can ensure that Charter rights are protected for EU citizens in the current and future macroeconomic, regulatory and supervisory roles of the ECB. Indeed, the ECB has been shown to be responsive to MEP questions and engagement.⁷⁷

Dawson and others suggest that over a short period the ECB saw its powers increase exponentially: through the introduction of outright monetary transactions and the public sector asset purchase programme; through becoming part of the 'Troika' negotiating conditionality on Member State bailout programmes; and as chief banking supervisor under SSM – performing seemingly conflicting tasks and being required to be both independent and accountable.⁷⁸ Curtin points out that the ECB emerged from the financial crisis of 2008 not only as the institutional 'winner' but also as the most central – and powerful – supranational institution of our times. EU citizens 'see' the ECB today in light of its role in promoting austerity, and its involvement in the Troika and in the economic decision making of troubled Member States.

In between the grandiose concept of ECB 'independence' and the more performative ECB 'accountability' lies 'transparency'. There is a need to take the related concepts of transparency and (democratic) accountability more seriously across the range of ECB practices, both in conceptual terms and in their relationship to one another.⁷⁹ Of course, the ECB is included among the institutions, bodies, offices and agencies of the EU, and it must apply EU law (including the Charter) within its areas of competence.⁸⁰

The ECB must support the achievement of the objectives of the Union, which include combatting social exclusion and promoting social justice and protection, among others. 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. There has been no public statement by the ECB to the European Parliament on how these rights will be effectively promoted by the

⁷⁷ Maricut-Akbik, A. (2018) *Holding the Supervisor to Account: The European Parliament and the European Central Bank in Banking Supervision* (Jacques Delors Institute Berlin), https://www.delorsinstitut.de/2015/wp-content/uploads/2018/11/20181119_Banking-Supervision_Adina.pdf. This analysis shows MEPs demonstrated a poor track record in asking relevant questions to the ECB, and highlights the problematic format of public hearings held by the Chair of the ECB Supervisory Board. The format does not facilitate a coordinated agenda of questions and follow-ups, organised by topic and raised in sequence, and there is a paradox between the strong interest of MEPs in information about specific banks and the professional secrecy requirements of the SSM legal framework, which keep individual supervisory decisions confidential. However, ECB Banking Supervision has been open to engaging with questions about the organisation and the decision-making procedures of the SSM, but there are as yet no measurable indicators on the performance of the ECB as a bank supervisor, which MEPs and the public at large could use to assess its track record.

⁷⁸ Dawson, M., Bobić, A. & Maricut-Akbik, A., 'Reconciling independence and accountability at the European Central Bank: The false promise of proceduralism', *European Law Journal* (2019) 25, 75–93.

⁷⁹ Curtin, D., 'Accountable independence' of the European Central Bank: Seeing the logics of transparency', *European Law Journal* 23 (1–2), pp. 28–44.

⁸⁰ Case C-11/00 *Commission v European Central Bank* [2003].

ECB, unlike the Commission, which has issued a strategy in this regard.⁸¹ Therefore, it is crucial that the ECB and related EU and Member State bodies are helped to address the Charter in their actions and decisions, particularly through the preparation of comprehensive Impact Assessments on fundamental social rights.

In terms of accountability to the European Parliament, the ECB is accountable through the interinstitutional agreement on democratic accountability and oversight of the tasks conferred on the ECB within the framework of the SSM.⁸² Members of the European Parliament can address written questions to the ECB.⁸³ Parliament is consulted on the nomination of the President, Vice-President and other Members of the ECB Executive Board. The ECB addresses an annual report to European Parliament on its activities and on monetary policy for both the previous and current year, and the European Parliament may hold a general debate and deliver an opinion on the report.⁸⁴ The President of the ECB, or another Member of its Governing Council, appears before the European Parliament's Committee on Economic and Monetary Affairs (ECON) at least once every three months to answer questions on the economic outlook, and to justify the conduct of monetary policy in the euro area - the Monetary Dialogue.⁸⁵ There is an obligation on the ECB to inform the European Parliament of the principles and kinds of indicators or information it is generally using in developing acts and policy recommendations, with a view to enhancing transparency and policy consistency.

The question arises as to what resources are available to the Parliament and MEPs to effectively fulfil their key role of promoting Charter obligations on those who control economic and financial governance and supervision in the EU. Positive Money recommends that:

An ECON sub-committee relating to the ECB could be comprised of 19 to 25 MEPs, representative of the political groups within the EP. In the limiting case, membership could be capped at 2.5 years (renewable), to ensure that all ECON members have the opportunity to participate over the course of the legislature. In the same spirit, the sub-committee's chairs and coordinators could consist of the Annual Report rapporteurs and shadows, which would imply an annual rotation in sub-committee leadership.⁸⁶

"In between the grandiose concept of ECB 'independence' and the more performative ECB 'accountability' lies 'transparency'."

⁸¹ European Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', COM (2010) 573 Final, 19 October 2010.

⁸² Interinstitutional Agreement between the Parliament and the ECB (2013/69/EU).

⁸³ https://www.ecb.europa.eu/explainers/tell-me-more/html/ecb_independent.en.html

⁸⁴ Article 284(3) TFEU and Article 15.3 of the ECB Statute.

⁸⁵ See <http://www.europarl.europa.eu/committees/en/econ/banking-union.html?tab=Banking%20Supervision>.

⁸⁶ Jourdan, S. and Diessner, S. (2019) *From Dialogue to Scrutiny: Strengthening the Parliamentary Oversight of the European Central Bank* (Brussels: Positive Money), http://www.positivemoney.eu/wp-content/uploads/2019/04/2019_From-Dialogue-to-Scrutiny_PM_Web.pdf p. 15. The full set of ECB 'main accountability channels' vis-à-vis the European Parliament are set out on p. 8. Positive Money also suggests that the ECON Committee could make better use of the quarterly hearings with the ECB President (the Monetary Dialogue) by means of a more stringent preparation, a reduction in size, and a more flexible allocation of speaking time.

9. Applying the Charter

As set out in Briefing Paper 1, a variety of methods of applying the Charter have been developed over the past decade. The European Commission has developed arrangements for incorporating fundamental rights into the legislative process through (i) its Strategy for the effective implementation of the Charter by the EU (2010), which developed a Fundamental Rights Checklist (ii) the Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments (2011) and (iii) the Better Regulation Package #Tool 28 on fundamental and human rights.

There are also the Guidelines on methodological steps to be taken to check fundamental rights compatibility at Council preparatory bodies (2015).⁸⁷ In addition, since 2010 the Commission has prepared an Annual Report for the European Parliament on the application of the Charter. The Annual Report monitors progress in the areas where the EU has powers to act, showing how the Charter has been taken into account in actual cases, notably when new EU legislation is proposed.

The Fundamental Rights Checklist offers a prototype for an Economic Governance Checklist which could accompany any proposal, recommendation, policy document or research report. While there are limitations to this Checklist, which adopts a ‘violations’ approach rather than one which promotes the Charter, as is required in EU law, publications by ECB, ESRB, EBA and European Commission on non-performing homeloans (NPLs) could consider Charter rights in this way.⁸⁸ Clearly, the quality of loan portfolios is linked to the economic cycle, and it is clear that when there is a slowdown in the economy the level of NPLs increases.⁸⁹ While modification of distressed mortgage contracts has become acceptable as a response in the US since 2008, and in Ireland and Spain since 2013,⁹⁰ the links between such modification and human rights are obscure, and the purpose may be more attuned to protecting bank assets than realising human rights. However, the impact of the coronavirus pandemic and

⁸⁷ Council of the European Union (2015) *Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council preparatory bodies*, 5377/15: <http://data.consilium.europa.eu/doc/document/ST-5377-2015-INIT/en/pdf>

⁸⁸ See Final draft - Implementing Technical Standards on Supervisory reporting on forbearance and non-performing exposures under article 99(4) of Regulation (EU) No 575/2013. In Ireland, some 70% of distressed home loan borrowers at risk of losing their homes had no access to legal representation. See Kenna, P. (2018) *Access to Justice and the ECB – A Study of ECB Supervised and other Mortgage Possession Cases in Ireland* (Centre for Housing Law, Rights and Policy, NUI Galway), <https://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Access-to-Justice-and-the-ECB-Report-CHLRP-2018.pdf>.

⁸⁹ Jiménez, G. and Saurina, J., ‘Credit Cycles, Credit Risk, and Prudential Regulation’, *International Journal of Central Banking* (2006) 2(2), May. See also EBA (2019) *Report On NPLs – Progress Made and Challenges Ahead*, which shows that since 2015 NPLs have reduced by over 50%, https://eba.europa.eu/sites/default/documents/files/document_library/Risk%20Analysis%20and%20Data/Risk%20Assessment%20Reports/2019/Final%20EBA%20Report%20on%20NPLs-for%20publication_final.pdf.

⁹⁰ Stanley Fischer: Housing and financial stability, Vice Chair of the Board of Governors of the Federal Reserve System, at the DNB (Netherlands Bank) – Riksbank (Sveriges Riksbank) Macprudential Conference Series, Amsterdam, Netherlands, 20 June 2017. BIS. <https://www.bis.org/review/r170628c.pdf>; Andritzky, Jochen R. (2014) IMF Working Paper WP/14/226. (Washington: IMF)

subsequent recession is creating a new climate for the treatment of NPLs, and human rights considerations are becoming more significant.

The ECB *Stocktakes of national supervisory practices and legal frameworks relating to non-performing loans* could address relevant Charter human rights and housing rights, thus complying with obligations to respect and promote the Charter, particularly Article 7 on respect for home and Article 47 on access to justice. Under SSM the ECB or national competent authorities could monitor the level of evictions by the ECB's directly supervised lenders from NPL homes and the consequences of such evictions for households and children. Both the EBA *Guidelines* and the ECB *Guidance* could incorporate a Charter rights checklist. Similarly, ECB other EU institutional reports on 'housing market' issues could include a checklist of Charter housing rights.

The consequences of EU institutional regulatory actions, such as the 'dumping' of increased social and housing expenditure onto Member State budgets, displacing national expenditure on other essential rights, could be considered as part of ESRB, ECB, EBA or European Commission Charter based Impact Assessments.⁹¹ Indeed, the Commission new strategy on for an effective application of the the Charter which aims at "improving awareness and effective use of the Charter in the EU so that it becomes a reality for all" could very easily be advanced by its application in this way.⁹²

EU Agency for Fundamental Rights (FRA)

The EU Agency for Fundamental Rights (FRA), established in 2007 in Vienna, plays a major role in monitoring the situation of fundamental rights in the EU and provides valuable information to civil society groups, NGOs and human rights advocates. The FRA is tasked with the collection, analysis, dissemination and evaluation of information and data related to fundamental rights. It also conducts research and scientific surveys, and publishes annual and thematic reports on fundamental rights.⁹³

⁹¹ EU-driven action on NPLS leading to lender possession and sales of home in most cases will result in significant social costs being dumped on the State in rehousing the household, as well as personal costs of uprooting a settled place in the community, and the effect on the stability of the lives of any children.

⁹² See European Commission (2020) Roadmap – *New Strategy for the Implementation of the Charter of Fundamental Rights* - <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12269-New-Strategy-for-the-Implementation-of-the-Charter-of-Fundamental-Rights>

⁹³ Charterpedia is an online compilation created by the Civil Liberties, Justice and Home Affairs Committee of the European Parliament (LIBE) and taken over by the European Union Agency for Fundamental Rights in 2008. It contains a compilation of international, European Union and national constitutional law in the area of fundamental rights, linked to the topics, chapters and articles of the Charter. See <https://fra.europa.eu/en/charterpedia>.

9. What is needed now?

The EU institutional strategies for the effective implementation of the Charter are largely confined to the law-making process, when, in fact, Charter rights are engaged in a whole variety of ways by EU institutions. Thus, it is time to update the application and deepen the promotion of the Charter:

At present, scant attention is being paid to the social provisions of the Charter in the tools developed in the new economic governance architecture of the Union. This is a major gap, and it breeds suspicion and hostility towards attempts to improve economic coordination in the Union. Vague references to "social fairness" are not a substitute for an approach based on social rights.⁹⁴

De Schutter Report

The Report by Olivier de Schutter sets out a number of methods to integrate the Charter into the operations of EU institutions.⁹⁵ All EU institutions, bodies, offices and agencies should consider:

- adopting a fundamental rights strategy, with time-bound commitments;
- including a reference to fundamental rights in a code of conduct that could define the duties of their staff;
- setting up mechanisms ensuring that any violation of fundamental rights be detected and reported, and that risks of such violations be swiftly brought to the attention of the main bodies of the agency;
- establishing the position of a fundamental rights officer, reporting directly to the management board to ensure a certain degree of independence vis-à-vis other staff, in order to ensure that threats to fundamental rights shall be immediately addressed, and that the fundamental rights policy of the organization shall be constantly upgraded;
- developing a regular dialogue with civil society organisations and relevant international organizations on fundamental rights issues;
- ensuring that compliance with fundamental rights becomes a central component of the terms of reference of the collaboration of the agency concerned with external actors, including in particular members of national administrations with whom they interact at operational level.

The Report also proposed that the Charter of Fundamental Rights should be integrated within the European Semester Country Specific Recommendations. The Annual Growth Survey

⁹⁴ De Schutter, O. (2016) 'The Implementation of the Charter of Fundamental Rights in the EU institutional framework', European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs. Study for the AFCO Committee; [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU\(2016\)571397_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU(2016)571397_EN.pdf), p. 26.

⁹⁵ Ibid., p. 9.

recommendations, which the Commission submits to the Council, should take into account the normative components of the social rights of the Charter.⁹⁶

The De Schutter Report also supports the view adopted by the CJEU that the conclusion of Memoranda of Understanding with countries appealing to the ESM should be systematically assessed for their compatibility with the social provisions of the Charter.⁹⁷

European Parliamentary Resolution

Following the De Schutter Report, the European Parliamentary *Resolution on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework* in 2019 was passed.⁹⁸ The Resolution:

... Strongly believes that the Commission's Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (COM(2010)0575) constituted an initial effort after the entry into force of the Charter, but urgently needs to be updated; welcomes the annual reports on the application of the Charter by the Commission, and calls for a review of this strategy, which was elaborated in 2010, in order to update it to take account of the new challenges and institutional reality, particularly after Brexit.⁹⁹

The European Parliamentary Resolution also recalls that the procedures established by the EU institutions to assess the compatibility of legislative proposals with the Charter are mainly of an internal nature. It called for enhanced forms of consultation, impact assessments, including specific gender impact assessments, and legal scrutiny with the involvement of independent experts in the field of fundamental rights. It also called on the Commission to promote structured and regulated cooperation with human rights bodies, such as the FRA, the European Institute for Gender Equality (EIGE), the relevant bodies of the Council of Europe and of the United Nations, and civil society organisations working in the field, whenever a legislative file potentially promotes or negatively affects fundamental rights. The Resolution noted that the European Ombudsman plays a relevant role in guaranteeing respect for fundamental rights in the context of the Charter, not only in relation to Article 41 on the right to good administration as such, but also by taking into account the fact that good administration is a cornerstone in securing other fundamental rights.

⁹⁶ This is not to diminish the significant promotion of social rights by the Commission, such as in relation to Roma, minimum incomes, disabilities and other areas in the Country Specific Reports and other work.

⁹⁷ De Schutter, O. (2016), p. 26.

⁹⁸ *Resolution of the European Parliament on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework*, 12 February 2019, P8_TA(2019)0079. This Resolution recognises in Preamble A that: 'whereas the Charter encompasses, in line with the requirements of international human rights law and of its Article 51, both negative (non-violation) and positive (active promotion) obligations which should be equally fulfilled in order to give full operational character to its provisions'.

⁹⁹ *Resolution of the European Parliament on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework*, 12 February 2019, P8_TA(2019)0079 para 1.

In terms of mainstreaming the Charter into EU policies the European Parliamentary Resolution:

...Reaffirms that all legal acts adopted by the Union must fully comply with all of the Charter's provisions, including its social provisions; stresses the importance of incorporating explicit references to the Charter within the legal framework regulating EU economic and monetary policy; stresses that recourse to intergovernmental arrangements does not relieve the EU institutions of their obligations to assess the compatibility of such instruments with EU law, including the Charter.¹⁰⁰

The Resolution also called on the Commission to ensure that the European Semester process, including the country-specific recommendations and the annual growth survey recommendations, comply with the normative components of the social rights of the Charter.¹⁰¹

The Resolution called on the Commission and the Council to make macroeconomic decisions, having due regard to fundamental rights assessments, based on the full range of civil, political and social rights guaranteed by the European and international human rights law instruments.¹⁰²

Common minimum standards of protection

The European Parliamentary Resolution stated that the European Parliament:

[I]s concerned that different interpretations concerning the application of the provisions of the Charter by the EU institutions, bodies, offices and agencies of the Union and the Member States are detrimental to the added value brought by the Charter, namely that of representing a set of common minimum standards of protection to be applied horizontally to all institutional actors and policies and activities connected to the EU sphere.¹⁰³

Promoting Charter housing rights

Further methods of advancing the promotion of Charter housing rights could include:

- Detailed and explicit recognition of the application of Charter articles – including 'principles' contained in the Charter – to the EU economic governance and financial

¹⁰⁰ Ibid., para 16.

¹⁰¹ Ibid., para 18. The 2020 Report of the Commission - *Economic governance review*, also suggests that there may be scope to further strengthen the European Semester as a tool for policy coordination in view of a better integrated surveillance and in the context of new emerging challenges. See European Commission (2020) *Economic governance review* COM(2020) 37 final, p. 19. https://ec.europa.eu/info/sites/info/files/economy-finance/com_2020_55_en.pdf

¹⁰² *Resolution of the European Parliament on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework*, 12 February 2019, P8_TA(2019)0079, para 20.

¹⁰³ Ibid., para 41.

supervision architecture and reports.

- Improved assessment arrangements for Charter compliance for 'executive acts' of economic governance and coordination.
- Effective application of the obligation to respect the Charter rights, observe the Charter principles and promote the Charter, to be specifically included by the European Parliament in the mandate of the EU Commissioners and European Parliamentary Committees.
- Impact Assessments of the Commission to reflect binding nature and full extent of Charter rights and principles.
- Improved democratic oversight and participation of citizens in monitoring of Charter rights.

In terms of measuring the application of housing rights within the EU Charter it is important that a human-rights-based-approach is adopted in the widest sense, i.e. applying to EU institutions and agencies, as well as Member States and international agencies.¹⁰⁴ This approach is underpinned by five key human rights principles, also known as PANEL: Participation, Accountability, Non-discrimination and Equality, Empowerment and Legality.

- **Participation** – everyone is entitled to active participation in decision-making processes which affect the enjoyment of their rights.
- **Accountability** – duty-bearers are held accountable for failing to fulfil their obligations towards rights-holders. There should be effective remedies in place when human rights breaches occur.
- **Non-discrimination and equality** – all individuals are entitled to their rights without discrimination of any kind. All types of discrimination should be prohibited, prevented and eliminated.
- **Empowerment** – everyone is entitled to claim and exercise their rights. Individuals and communities need to understand their rights and participate in the development of policies which affect their lives.
- **Legality** – approaches should be in line with the legal rights set out in domestic and international laws.¹⁰⁵

Public representatives, NGOs, civil society organisation, national human rights institutions and others all have a role to play. In order to engage EU citizens in defining and creating housing rights application, it is vital to have the participation of citizens and others impacted by housing rights denial in the design, implementation and assessment of EU housing rights application strategies.¹⁰⁶

¹⁰⁴ See De Schutter/NHRI (2019) Report Applying a Human Rights-Based Approach to Poverty Reduction and Measurement - <http://ennhri.org/wp-content/uploads/2019/11/Applying-a-Human-Rights-Based-Approach-to-Poverty-Reduction-and-Measurement-A-Guide-for-NHRIs.pdf>

¹⁰⁵ Ibid.

¹⁰⁶ A similar approach is suggested to that proposed in the De Schutter/NHRI (2019) Report - *Applying a Human Rights-Based Approach to Poverty Reduction and Measurement*. <http://ennhri.org/wp-content/uploads/2019/11/Applying-a-Human-Rights-Based-Approach-to-Poverty-Reduction-and-Measurement-A-Guide-for-NHRIs.pdf>

“At present, scant attention is being paid to the social provisions of the Charter in the tools developed in the new economic governance architecture of the Union. This is a major gap, and it breeds suspicion and hostility towards attempts to improve economic coordination in the Union.”

11. Citizens, civil society and NGOs

The Council of the European *Conclusions on the Charter of Fundamental Rights after 10 Years: State of Play and Future Work*,¹⁰⁷ asked the Commission to revise the 2010 strategy for the effective implementation of the Charter, especially how use and awareness of the Charter can be improved in Member States. The Conclusions 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”.¹⁰⁸

The results of a Special Eurobarometer survey on Charter awareness (2019) show that only 42% of respondents had heard of the Charter and only 12% know what it is.¹⁰⁹ The Commission Work Programme 2020 *A Union that strives for more*,¹¹⁰ states that it “will also put forward a new Strategy for the Implementation of the Charter of Fundamental Rights with focus on awareness raising at national level”.

Housing is one of the defining issues of our time for European citizens. EU Charter housing rights are central to the enjoyment of EU Charter human rights. As we have seen Member States housing systems incorporate EU law, both in terms of the actions of EU institutions, and in the implementation of EU law measures by Member States. In fact, EU economic governance and financial regulation not only impacts on national housing markets, but is constitutive of them.¹¹¹ While some housing measures are entirely based on national or local laws, a great many areas of housing now relate to issues of shared legal competences between EU Member States and the EU. Of course many elements of national housing systems are governed by Member States implementing EU Directives and regulations, and of course, the rules on competition, public procurement and state aid are EU driven. Clearly, EU citizens access to, and enjoyment of, housing are impacted by EU institutions and actions, within the economic governance and financial supervision architecture of the Union (as set out in Briefing 2). EU institutional approaches must embrace the wider objectives of the EU Charter of Fundamental Rights including housing rights.

¹⁰⁷ 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, <https://data.consilium.europa.eu/doc/document/ST-12357-2019-INIT/en/pdf>. The Conclusions emphasised that “the realisation of fundamental rights, ensuring compliance with the fundamental rights set out in the Charter, is a precondition for the achievement of the Sustainable Development Goals and for the fulfilment of the commitment to leave no-one behind” (p. 5).

¹⁰⁸ Ibid, para 14.

¹⁰⁹

<https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/86863>

¹¹⁰ COM(2020) 37 final, at p. 8. https://ec.europa.eu/info/sites/info/files/cwp-2020-publication_en.pdf

The Report states that a non-legislative *New Strategy for the Implementation of the Charter of Fundamental Rights* is scheduled for Q4 2020.

¹¹¹ For instance, the levels of State expenditure on housing are subject to the EU institutional macro-economic rules, and restrictions on State aid for services of general economic interest. The risks to EU financial stability from the real estate sector (which is mainly housing) is extensively monitored by EU economic governance institutions. The ECB regulates the European financial sector, which has a major impact on affordability and access to housing, directly and indirectly, across Member States.

The Eurobarometer survey in 2019 on the Charter showed that respondents would turn to a variety of institutions or bodies if they felt that their Charter rights were being violated. Only one third would turn to a court, one third to an ombudsman or independent body, and one third to an EU institution. This shows the limited confidence in legal systems and courts for promoting the Charter.¹¹²

There are a variety of mechanisms enable citizens, social movements and advocates to assist European institutions to integrate Charter rights into their work. This can involve contribution to Impact Assessments, effective consultation with human rights agencies and organisations, and mainstreaming of housing rights into operational plans. Citizens, social movements and advocates can also strengthen the implementation of housing rights through a variety of arrangements, such as questions and Resolutions at the European Parliament; requesting that the Rule 39 procedure be engaged whenever proposals which engage Charter rights are being advanced; engaging the Petitions procedure;¹¹³ engaging the offices of the Court of Auditors¹¹⁴ and European Ombudsman; engaging national human rights institutions; complaints as well as infringement proceedings directed to the Commission as the guardian of the Treaties;¹¹⁵ requesting preliminary references to the CJEU to clarify the impact of the Charter on national law. While there are many ways of ensuring the accountability of the EU economic governance arrangements, the EU institutional decision-making process was not viewed as being subject to judicial review until the *Ledra* decision.

European Citizens' Initiative

The European Citizens' Initiative (ECI) is an important instrument of participatory democracy in the European Union, allowing one million EU citizens residing in at least one-quarter of the Member States to invite the Commission to submit a proposal for a legal act to implement the EU Treaties. Since the application of Regulation (EU) No 211/2011 establishing detailed procedures and conditions for the ECI, four initiatives have been successfully submitted to the Commission.

¹¹²

<https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/86863>

¹¹³ Article 227 of the TFEU and Article 44 of the Charter.

¹¹⁴ This EU institution is also bound by the obligation to respect and promote the Charter.

¹¹⁵ De Schutter, O. (2017) *Infringement proceedings as a tool for the enforcement of fundamental rights in the European Union*, Open Society, European Policy Institute, <https://www.opensocietyfoundations.org/sites/default/files/infringement-proceedings-as-tool-for-enforcement-of-fundamental-rights-in-eu-20171214.pdf>.

12. Conclusion

So how can the human and housing rights in the Charter effectively impact on EU economic governance? The legacy of human rights protection from the EU financial crisis is not inspiring to date. EU Member States introducing austerity measures in the wake of the Eurozone crisis were found by international bodies – such as the UN High Commissioner for Human Rights, the Council of Europe Commissioner for Human Rights and the International Labour Organization – to be violating international human rights.¹¹⁶ But the Charter could have had a positive human rights effect. As an example, Poulou suggests that ‘the application of the Charter in the making of financial assistance conditionality would have the added value of inducing actors preparing lending conditions to carefully assess the compatibility of the proposed measures with human rights standards, and would thus minimise the risk of a blind subordination of conditionality to purely market-driven choices’.¹¹⁷

There is a major *lacuna* in the EU approach, as it clearly fails to consider the many Charter housing rights which must be respected and promoted in all these regulatory, supervisory and coordinating actions and impacts. Since the Charter codifies existing housing rights, it provides an avenue for these to be applied within the EU institutional and legal architecture. The mapping of these rights onto the EU institutional competences and mandates is one significant task awaiting human rights advocates in Europe. In this context, it is important to delineate the competences which are exclusive to the Union, and those which are shared between the Member States and the Union. Articles 2 to 6 TFEU set out the division of competences between the EU and Member States, and because economic coordination, financial regulation and supervision oscillate between EU and shared competences, these can become disconnected from social (and housing) provision policies, for which Member States are seen as retaining competence. Recognising that national housing systems are composed of many interactive and dynamic elements, many of which involve the integration of EU-wide actions and regulation, enables policymakers to engage Charter housing rights.

These Briefings seek to demonstrate that, without in any way changing the competences and mandates of EU institutions, there is considerable scope for the Charter to be applied and promoted as part of EU law. EU fundamental rights should not be seen as purely pre-political standards, but also as objects of deliberation and debate, connecting individuals to the political sphere and encouraging the elaboration of new law. It is the very possibility of positively elaborating rights – and not just supervising their execution – that sets the EU apart from other international bodies attempting to guarantee or ‘monitor’ rights protection.¹¹⁸

¹¹⁶ Council of Europe, *Safeguarding Human Rights in Times of Economic Crisis*, Issue Paper (Council of Europe, 2013); United Nations Human Rights Office of the High Commissioner, *Report on Austerity Measures and Economic and Social Rights*, May 2013, E/2013/82. On Greece, see International Labour Office, *Report on the High Level Mission to Greece (19–23 Sept. 2011)*; Human Rights Council, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, Cephias Lumina, 25th session, 7 March 2014, A/HRC/25/50.

¹¹⁷ Poulou, A., ‘Financial assistance conditionality and human rights protection: what is the role of the EU Charter of Fundamental Rights?’, *Common Market Law Review* (2017) 54, 991 at 1015.

¹¹⁸ Dawson, M. (2017) *The Governance of EU Fundamental Rights* (Cambridge University Press), p. 8.

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