



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

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BRIEFING PAPER 1

Housing and Housing Rights
in the EU Charter of Fundamental Rights

EU Economic Governance and Financial Supervision

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Contents

1. Introduction	5
2. Executive Summary	6
3. Housing Problems in Europe today	8
- Access, Adequacy, Affordability	
4. Housing Systems and EU Competences	11
- EU Impacts on Housing	
- Housing systems	
- Financialisation of housing	
5. Housing as the “Wobbly Pillar” of EU financial stability	20
- Housing risk	
6. Housing Rights	22
6. The EU Charter of Fundamental Rights (‘the Charter’)	24
- Ten years in Treaty law	
- Inviolable rights	
- Rights and principles	
- Justiciability	
7. Articles of the Charter on housing rights	27
8. Applying the Charter	33
- Fundamental Rights Checklist	
- Impact Assessments	
- Better Regulation #Tool 28	
- European Commission Annual Report on fundamental rights	
- Weaknesses in the approaches	
10. Obligations on EU Institutions to promote the Charter	38
11. Conclusion	40
Appendix 1. Main housing-related systemic causes of homelessness and social exclusion - Fighting homelessness and housing exclusion in Europe – study of national policies. ESPN – DG, Employment, Social Affairs & Inclusion.	41
Appendix 2. Distribution of European population by tenure status, 2017	43
Chart 1. House prices in Europe at new highs	14
Chart 2. Value of Euro-area loans for house purchase	21

For more information

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Terms and Abbreviations

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

1. Introduction

Housing related EU institutional measures are becoming central to the economic, social and environmental sustainability of the Union. After a decade, 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

Housing rights must be respected and promoted by EU Institutions for the benefit of EU Citizens.

This is the first 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 with experts, explore the following diverse topical areas.

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

“It is now time to hold up a human rights mirror to the EU institutions. That mirror is the Charter.”

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

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

2. Executive Summary

An affordable and good-quality home is essential for every citizen's well-being and social participation within the European Union. Yet, in Europe today, an increasing number of EU citizens cannot access adequate and affordable housing to rent or buy. Over 80 million people are overburdened (over 40% of net income) by housing costs. Homelessness is increasing everywhere, with harmful consequences, especially for socially excluded people, persons with disabilities, migrants, some minority groups, and especially Europe's children.

The European Commission has recognised the fact that scarcity of adequate and affordable housing is a growing problem in many European countries. The European Commission has recognised the fact that scarcity of adequate and affordable housing is a growing problem in many European countries. A report to the European Parliament in 2020 estimated that 700,000 people were homeless in 2019, with numbers rising across Europe³. Latvia saw an increase of 389% between 2009 and 2017, and homelessness in Ireland increased by 203% between 2014 and 2018. Housing deprivation is at the heart of poverty and social exclusion, and closely linked to unemployment.

The global financialisation of housing since the 1980s, failure to respect housing rights, and continued focus of European bank lending on rising house and land values are important factors. Indeed, in Europe, housing has again become the 'wobbly pillar' of EU banking stability.

At the same time, the EU Charter of Fundamental Rights⁴ codifies national and international housing rights within EU Treaty law, which must be respected and promoted by EU institutions and agencies, and Member States when implementing EU law. Its 54 articles on dignity, freedom, equality, solidarity, citizens' rights and justice reflect the human rights adopted by EU Member States.

The Charter includes such rights as respect for home, non-discrimination in housing, housing rights for older people and people with disabilities, provision of an adequate supply of housing for families, and a right to social and housing assistance to ensure a decent existence for all. There is a recognition of the role of social housing providers, protection of consumers, and a guarantee that existing rights will not be diminished. While the Charter does not grant stand-alone directly enforceable rights to housing, it is binding on EU institutions – they **must respect and promote** Charter housing rights.

Many view 'housing policy' as entirely a Member State competence, but a great many issues which affect access to, and enjoyment of, housing rights are impacted by the unique architecture of the Economic and Monetary Union. Indeed, a great many elements of

³ <https://www.europarl.europa.eu/news/en/agenda/briefing/2020-01-13/11/housing-urgent-action-needed-to-address-homelessness-in-europe>

⁴ Charter of Fundamental Rights of the European Union, OJ 2010/C 83/02.

Member States housing systems are integrated into EU legal, economic and regulatory developments. While the provisions of the Charter are addressed to EU institutions and to Member States only when they implement Union law, its *vis expansiva* by way of interpretation is very significant.

Yet, applying the Charter to the interpretation of EU legislative, policy-making and regulatory measures remains a challenge for policymakers. Ten years ago, the European Commission developed a Fundamental Rights Checklist and an Impact Assessment procedure for new legislation, but this process is no longer fit for purpose.

Ten years after it becoming legally binding, the EU Charter of Fundamental Rights is not used to its full potential. A June 2019 Eurobarometer on Charter awareness showed that people do not know enough about their Charter rights but would like more information. In 2020, the Commission intends to present a strategy to improve use and awareness of the Charter in the EU so that it becomes a reality for all.⁵

It is now time to hold up a human rights mirror to the EU institutions. That mirror is the Charter. EU Institutions, agencies and bodies must respect the rights, observe the principles and **promote** the application of the Charter within their respective competences and mandates. New approaches to raising the status of Charter rights and its practical implementation in policy and legislation are needed, to advance the vision of a Europe for all.

“While the Charter does not grant stand-alone directly enforceable rights to housing, it is binding on EU institutions – they must respect and promote Charter housing rights.”

⁵ 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-yoursay/initiatives/12269-New-Strategy-for-the-Implementation-of-the-Charter-of-Fundamental-Rights>

3. Housing problems in Europe today

Access, Adequate, Affordable

Housing is central to the economic, social and environmental sustainability of the European Union. An affordable and good-quality home is essential for every person's well-being and social participation.⁶ The majority of Europeans enjoy good-quality, affordable housing, which often acts as their measure of wealth.⁷ Much of this housing was originally developed by the State, contributing to the stock of owner-occupied housing with and without mortgages.⁸

Across Europe, however, there are growing problems of access to adequate and affordable housing, with over 80 million people overburdened by housing costs.⁹ Some 10% of the EU-28 population spent 40% or more of their income on housing, including a quarter of those paying private sector market rents.¹⁰ The waiting lists for subsidised, public and affordable housing grow longer and longer.¹¹ Eurostat shows that 4% of the EU population experienced severe housing deprivation in 2017. Housing deprivation is at the heart of poverty and social exclusion and closely linked with unemployment.

Homelessness is increasing everywhere.¹² According to a report to the European Parliament in 2020, an estimated 700,000 people were homeless in the EU in 2019, with numbers rising across Europe.¹³ Latvia saw an increase of 389% between 2009 and 2017, and homelessness

⁶ European Commission (2017) European Semester Thematic Factsheet: Housing Market Developments, https://ec.europa.eu/info/sites/info/files/file_import/european-semester_thematic-factsheet_housing-market-developments_en.pdf

⁷ According to a World Bank report on housing in the EU – 'a significant part of the wealth created by the dynamism of cities accrued not just to workers through the labor market but also to homeowners through the housing market, in the form of capital gains, thus deepening inequalities within cities and between homeowners in cities and the population living in other regions. The youth and newcomers are especially affected ...' See Inchauste, Gabriela, 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. 17.

⁸ See Appendix 2 in this Briefing. There are significant variations in the level of homeowners with or without mortgages throughout Europe. At one extreme is the Netherlands, where 60% own their home with a mortgage, and on the other is Romania where 96% own their home without having a mortgage.

⁹ In 2017, more than one-quarter of the EU-28 population lived in an owner-occupied home with a mortgage or loan, while 43% lived in an owner-occupied home without a loan or mortgage. As such, 7 out of every 10 persons in the EU-28 lived in owner-occupied dwellings, while 20 % were tenants with a market price rent, and 10.7% were tenants in reduced-rent or free accommodation. See https://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_statistics#Tenure_status

¹⁰ Ibid. Lack of affordable housing is also impacting on the middle-class in Europe – OECD (2019), *Under Pressure: The Squeezed Middle Class*, OECD Publishing, Paris, <https://doi.org/10.1787/689afed1-en>

¹¹ See *European Citizens Initiative – Housing for All*, <https://www.housingforall.eu/>. This states that 'The fiscal framework of the EU and the EU's state aid law are hindering cities and municipalities in their efforts to create affordable and social housing space.'

¹² FEANTSA/Fondation Abbé Pierre, *Fourth Overview of Housing exclusion in Europe 2019*, p. 15.

¹³ <https://www.europarl.europa.eu/news/en/agenda/briefing/2020-01-13/11/housing-urgent-action-needed-to-address-homelessness-in-europe>

in Ireland increased by 200% between 2014 and 2018. In a European Commission/European Social Policy Network (ESPN) study of national housing policies in 2019,¹⁴ the lack of affordable secure social rented housing was identified as the main housing-related systemic cause of homelessness in almost all countries. Several inter-related factors contribute to this problem:

- the insufficient public (municipal and/or social) housing supply;
- rising housing costs in the rental housing market;
- the liberalisation of the housing rental market;
- low or decreasing public investment in the supply of social housing;
- the mismatch between demand and supply of affordable housing, either affecting particular territories or particular groups of households and individuals;
- the impact of the tourism industry on the supply of affordable rental housing.

Housing Europe points out the dangers of ignoring these housing rights issues:

The housing question is at the heart of the growing social divide that we observe in most European societies over the last years. While accessing and sustaining decent accommodation is primarily an issue for those living on low incomes, more and more people are affected by the lack of affordable housing, particularly in big cities, and make their voice heard putting housing de facto on the political agenda. Rising rents have mobilized thousands of people across Europe, while for the first time ever a European Citizens' Initiative has been launched calling for more affordable housing in Europe.

... What has become also evident over the last couple of years is that housing has been used as part of the wider populist, anti-immigration agenda, making the link with the arrival of new populations and supply shortage across Europe while over-looking the pre-existing shortage and under-investment. This narrative has unfortunately hijacked the housing policy in many cases.¹⁵

The Human Rights Commissioner of the Council of Europe has also pointed out that:

Housing is in short supply in Europe today, in spite of increasing demand. In many countries, the overall level of housing construction is lower now than in previous decades, contributing to structural shortages which are especially acute in large

cities. This scarcity of housing is pushing up rents as well as prices, which in most European countries surpass the increase in wages. These trends cause many people

¹⁴ Baptista, I. and Marlier E. (2019) *Fighting homelessness and housing exclusion in Europe – study of national policies*. European Social Policy Network – DG, Employment, Social Affairs & Inclusion <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8243&furtherPubs=yes>

¹⁵ Housing Europe, *The State of Housing in the EU 2019*, p. 6, <http://www.housingeurope.eu/resource-1323/the-state-of-housing-in-the-eu-2019> Housing Europe is the European Federation of Public, Cooperative and Social Housing. Since 1988 it has become a network of 45 national and regional federations, gathering 43,000 housing providers in 24 countries. Together they manage over 26 million homes, about 11% of existing dwellings in Europe. This report points out that the investment gap in the EU is about €57 billion per year.

to gradually be “priced out” of certain neighbourhoods and force them to accept homes of substandard quality or to move to areas where they face poorer prospects of finding work within a reasonable distance, decent education, quality healthcare, and other basic social needs.¹⁶

The fight against homelessness does not stop with housing, as people experiencing homelessness are faced with exclusion in many other areas, including employment and healthcare. The most vulnerable groups (migrants, women, LGBTQI people, people with disabilities) are increasingly more affected by homelessness.¹⁷ FEANTSA has pointed out that if EU institutions are serious about advancing social rights and leaving no one behind, they need to ensure that the fight against homelessness is not lost in a broader housing agenda.

Access to adequate and affordable housing has a major influence on immigrants' employment options, educational opportunities, social interactions, residence situation, family reunification, successful societal integration and citizenship rights. Migrants are generally vulnerable in the housing market, disproportionately dependent on private rentals, more likely to be uninformed of their rights, and to experience discrimination. They also face greater obstacles to accessing public housing or housing benefits, and are more likely to live in substandard and poorly connected accommodation, with less space available and at a higher rental cost burden than the national average.¹⁸

“Some 10% of the EU-28 population spent 40% or more of their income on housing, including a quarter of those paying private sector market rents.”

¹⁶ See *Dunja Mijatović, (2020) Commissioner for Human Rights, Council of Europe: The right to affordable housing: Europe's neglected duty*. Available at: <https://www.coe.int/en/web/commissioner/-/the-right-to-affordable-housing-europe-s-neglected-duty>

¹⁷ See FEANTSA: Homelessness on the European agenda: European Parliament and the European Commission discuss homelessness and Housing First during first European Parliament plenary session of the year - <https://www.feantsa.org/en/news/2020/01/17/homelessness-on-the-european-agenda-european-parliament-and-the-european-commission-discuss-homelessness-and-housing-first-during-first-european-parliament-plenary-session-of-the-year>

¹⁸ European Commission, *Immigrant Housing in Europe: Overview*. <https://ec.europa.eu/migrant-integration/intdossier/ewsi-analysis-immigrant-housing-in-europe>

4. Housing Systems and EU competences

The question of competences is central to the application of housing rights within the multi-level governance arrangements of the EU. The Charter is only applicable in the context of an EU law competence, either by the EU institutions or Member States implementing EU law.¹⁹ The EU can only act within the limits of the powers assigned to it in the Treaties.²⁰ Any competences not conferred on the Union remain with the Member States. There are important principles around subsidiarity and proportionality – although the EU can act in areas where it does not have exclusive competence, when the objectives of the Union would be better achieved at Union level, by reason of the scale or effects of the proposed action.²¹

There are three levels of legally defined competences – (i) exclusive to the EU; (ii) shared between the EU and Member States, and (iii) the supporting, coordinating and complementing powers of the EU. Firstly, when the Treaties confer exclusive competence on the Union in a specific area, only the Union may legislate and adopt legally binding acts.²² Secondly, the Treaties may confer a shared competence between the Union and the Member States, and here the Member States may exercise their competences to the extent that the Union has decided to cease exercising its competence.²³ This applies to the areas of the internal market, social policy, consumer protection, environment – all areas impacting on housing systems. The Member States shall coordinate their economic and employment policies within arrangements provided by the Union, and since housing is such a large part of Member States economies, there is much impact here. Finally, in certain areas the Union has competence to carry out actions to support, coordinate or supplement the actions of Member States without superseding their competences in these areas – this does not include harmonisation of Member States laws or regulations.²⁴

¹⁹ The scope of the application of the EU Charter is set out in Article 51: *The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.*

²⁰ Article 5(2) TEU states: *1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*

²¹ Article 4 TEU.

²² Article 2(1) TFEU. The Member States are able to do so only if so empowered by the Union or for the implementation of Union acts.

²³ Article 2(2) TFEU.

²⁴ Article 2(5) TFEU.

Many view the competences in relation to housing policy as limited to Member States, with the principle of subsidiarity being paramount – and this is strongly defended by Member States in relation to housing as property – with its wealth and political power effects. However, confining the examination of EU actions to the ‘supporting and complementing’ roles, particularly under Article 153 TFEU on social policy, treats housing policy as connected only with social housing, homelessness and social exclusion – which are, of course, important areas where the EU has promoted progressive policies and practices.

But this approach does not encompass issues of market exclusion, internal market rules, housing as a personal asset, consumer protection, mortgage lending and associated risks, the range of EU measures which impact on housing, or the aspect of the enormous levels of housing assets held by European banks. Artificial policy firewalls – segregating market and non-market elements of housing systems are also problematic.

Since, the 1980s and 1990s the privatisation and commodification of public housing across Europe created a high level of owner-occupied housing, which is now attributed to a ‘market’ when in fact no market exists in many places. Only a very small proportion of housing in any Member State is for sale on the ‘market’ at any one time. Housing is almost entirely being used as a home for its occupants, rather than as a commodity for sale in a “market.”²⁵ Indeed, EU institutional promotion of nineteenth-century legal liberalist models of property rights and the sanctity of contract (often promoted as part of the ‘single market’) have led to much disillusionment with the impact of the EU, with citizens becoming increasingly disbelieving about the benefits of EU law. Many EU institutional ‘technical’ approaches to housing ‘markets’ do not refer to or respect European human or housing rights at all.

Thus, treating housing largely in terms of a ‘market’ is completely inadequate for any comprehensive understanding of how the EU institutions have a role in applying housing rights. Indeed, experts have shown how all parts of the housing system are interconnected, and where a sufficient supply of low cost social rental housing is available there is less demand for highly priced owner-occupied or privately rented homes, with all the consequences that entails.²⁶ There is a dynamic interaction between market and non-market elements within housing systems.

Even within the more limited view of housing policy as social housing policy, the EU plays a key role. Eurostat points out that many EU Member States face similar challenges, for example: how to renew housing stocks, how to plan, how to combat urban sprawl, how to promote sustainable development, how to help young and disadvantaged groups to get into the housing market, and how to promote energy efficiency among homeowners.

²⁵ Even in those countries with high numbers of second and holiday homes, only a limited number are for sale at any one time.

²⁶ Kemeny, J. (1992) *Housing and Social Theory* (London: Routledge). Describes the impact of different elements of housing systems on each other, such as private rental and social rental; Kemeny, J. (1981) *The Myth of Home Ownership: public versus private choices in housing tenure* (London: Routledge); Kemeny, J. (1995) *From Public Housing to the Social Market – Rental Policies in Comparative Perspectives* (London: Routledge); Schmid C. (ed) (2018) *Tenancy Law and Housing Policy in Europe* (Cheltenham: Elgar).

Questions of social housing, homelessness or integration play an important role within the EU's social policy agenda. The charter of fundamental rights stipulates in Article IV-34 that 'in order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with Community law and national laws and practices'. Within this context, a European Council meeting in Nice in 2000, reached an agreement on a set of common objectives for the EU's strategy against poverty and social exclusion, including two objectives related to housing, namely 'to implement policies which aim to provide access for all to decent and sanitary housing, as well as basic services necessary to live normally having regard to local circumstances (electricity, water, heating, etc.)' and 'to put in place policies which seek to prevent life crises, which can lead to situations of social exclusion, such as indebtedness, exclusion from school and becoming homeless'. This remit was extended in 2010 when the European platform against poverty and social exclusion (COM (2010) 758 final) set out a series of actions to help reduce the number of people at risk of poverty or social exclusion by at least 20 million persons by 2020 (compared with 2008).²⁷

It is important to recognise that many housing rights advocates equate housing rights with shelter and social housing provision, alongside a perception that this requires an individually enforceable obligation on the State to provide a minimum level of shelter and housing for all. Such approaches often avoid the structures and dynamics of the housing systems, where social housing is often part of a 'market' system, without which that system could not function. While the right to housing is regularly seen as the hope for the universal housing of the poor, Angel points out that:

"...there is little merit in a housing policy that solely focuses on the poor, hoping against hope that "the market" will take care of the rest, without paying any attention to whether the market is functioning properly. When the market is not functioning properly, the poor are squeezed as well."²⁸

EU Impacts on Housing Generally

A great many issues which affect 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). *Troika* interventions in EU peripheral Member States, involving the ECB and European Commission, arose directly from, and impacted significantly on, Member States housing policies. 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 ECB regulates the European financial sector, which has a major impact on affordability and access to housing, directly and indirectly, across Member States. The pattern of house purchase costs across the EU is

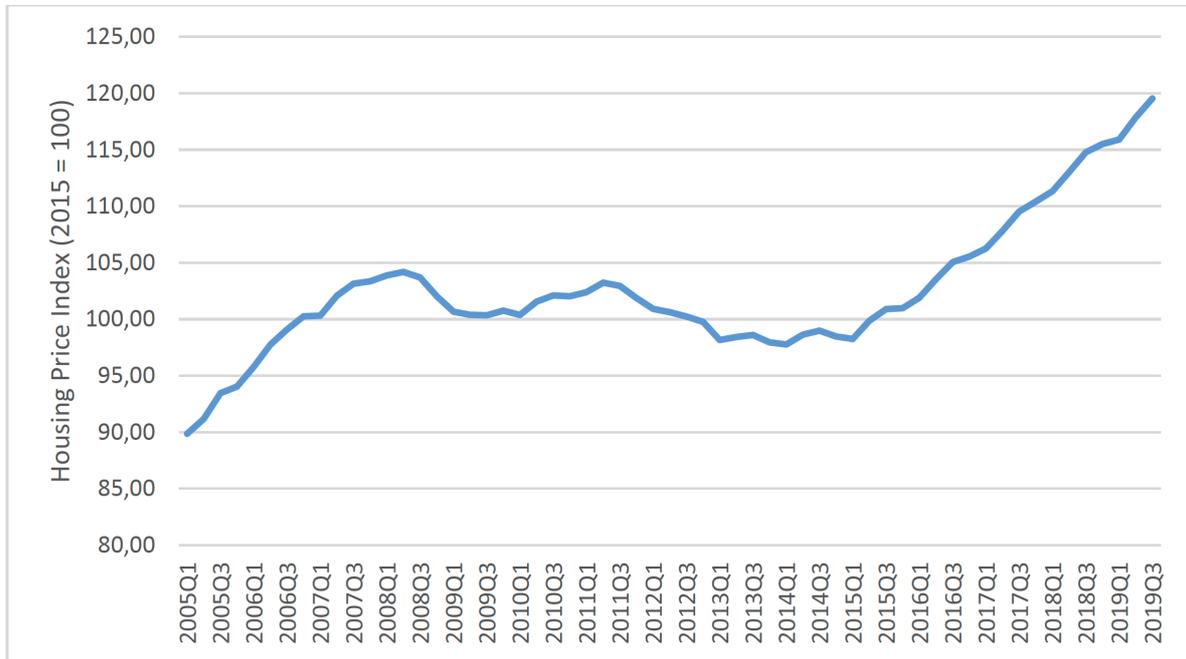
²⁷ https://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_statistics#Tenure_status.

Eurostat collates statistics on housing quality and housing affordability by tenure status.

²⁸ Angel, S. (2000) *Housing Policy Matters*, New York: Oxford University Press. p. 74.

extensively monitored and reveals increases of 20% since 2016 – pointing to increased affordability problems.

Chart 1. Housing prices in the euro area at new highs²⁹



Source: Eurostat.

Indeed, significant EU resources are dedicated to analysing imbalances, risks and ‘bubbles’ in housing markets, with EU-driven rules on capital buffers, sustainable lending levels, loan-to-income and debt service-to-income ratios – essentially restricting mortgage lending to the top income deciles in the population. ECB monetary policy and financial supervision determines mortgage lending rates and levels of lending, and the costs of government bonds impacts on public expenditure on housing. Other significant impacts arise from the rules on the internal market, competition law and State aid, freedom of movement of workers, rights of establishment, consumer protection, social inclusion policies, equality and non-discrimination provisions, standardisation of construction products, public procurement arrangements, and the energy and environmental standards being advanced within the EU.

There are also a significant number of EU resolutions, reports and ‘soft law’ measures relation to European-wide housing policy issues, alongside the broad and diverse *acquis* of documents containing political declarations, political initiatives, drafts, etc., This includes the draft for a European Housing Charter, promoted by a group constituted within the European

²⁹ See Hartwell, C.A. “Financial Risks in Europe: The End of the Beginning’ in Financial Stability in the Euro Area: Assessment of Risks and Policy Options, European Parliament, Policy Department for Economic, Scientific and Quality of Life Policies, Directorate-General for Internal Policies, PE 642.376 - January 2020 (p. 43). Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642376/IPOL_STU\(2020\)642376_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642376/IPOL_STU(2020)642376_EN.pdf)

Parliament,³⁰ and the housing working group (Housing Partnership) in the framework of the Urban Agenda for the European Union, which was made public in December 2018.³¹

Housing systems

So how does all this interact, and what are the implications for EU institutional actions, operating under the three levels of competences?

It is important to understand housing as a system, with many elements, which interact in a dynamic way to create the contemporary European policy challenges of today. One useful model, accepted worldwide, integrates the key areas of housing as property, mortgage lending, regulation, market and social/subsidised housing.³² This model deconstructs contemporary housing systems (which contain market and non-market elements) into five essential elements:

- (a) property rights and exchange regime;
- (b) housing finance regime;
- (c) residential infrastructure regime;
- (d) regulatory regime;
- (e) housing subsidies/social housing regime.³³

Housing rights apply to all these elements of the housing system, and not just the part which relates to subsidised or social housing. Indeed, each element of housing systems involve many EU-wide issues, regulations and institutional impacts and housing rights can be applied within these modern and complex housing systems.³⁴

(a) The establishment of individual and enforceable property rights in land and housing are seen as the cornerstone of liberal democratic modern housing systems:

A functional and effective property rights regime must evolve a set of transparent, predictable, non-discriminatory and stable rules that preserve the rights of individuals to use, invest, maintain, rent, mortgage and sell their land and housing properties without hindrance and with the full protection against arbitrary action by the authorities.³⁵

³⁰ See <http://urban-intergroup.eu/partners/> It defines itself as a group working since 2005 (previously known as Urban- Housing) which constitutes “a cross-party and cross-committee grouping with a horizontal approach to discuss urban related issues, bringing together over 89 MEPs representing most EU Member States, all the political groups at the European Parliament, and working in all the Parliamentary committees. It works with 118 partners from local, regional, national and European level. The draft document of the Charter can be found at <http://www.iut.nu/wp-content/uploads/2017/03/European-Housing-Charter.pdf>

³¹ See the Housing Partnership Final Action Plan at <https://ec.europa.eu/futurium/en/housing/housing-partnership-final-action-plan-0>

³² See Kenna, P. (2011) *Housing Law, Rights and Policy* (Dublin: Clarus Press) chapter 3.

³³ See Angel, *Housing Policy Matters – a Global Analysis*, p. 19. Of course, every country has a different tenure pattern, between owner-occupation with and without mortgage, private and social renting.

³⁴ Kenna, P., ‘Can housing rights be applied to modern housing systems?’, *International Journal of Law of the Built Environment* (2010) 2(2), 103–117.

³⁵ See Angel, *Housing Policy Matters – a Global Analysis*, p. 95.

Across the EU, housing as property is very much guarded by Member States within their competence, but the rights of establishment and freedom of movement of capital, as set out in the Treaties, are enormously significant in relation to ownership of housing.³⁶ Since housing is both an investment good and a consumer good, property rights and housing rights are often juxtaposed. The effects of the global financialisation of housing, and the ‘residential capitalism’ of homeownership has impacted negatively on housing policies, especially on States’ ability to ensure universal access to affordable housing.³⁷ Combatting this social exclusion is clearly part of EU policy approaches.

(b) The housing finance regime requires the creation and maintenance of an effective enforceable lending system and regulatory regime for housing finance, as well as the development of housing finance institutions and sustainable mortgage markets.³⁸ Housing finance is now an EU issue, with monetary policy (and quantitative easing), ECB interest rates and ESRB impacting on access to mortgages – all part of EU economic governance and financial supervision.³⁹ The industrialisation of mortgage lending across Europe, the risks created by mortgage driven housing bubbles, and the effects on national economies and consumers, have prompted EU action. EU action on non-performing loans have major impact on Member State responses to housing need and homelessness, with family homelessness in Ireland arising directly from this approach.⁴⁰

Many EU financial consumer and regulatory measures overlap with housing rights.⁴¹ One of the unique developments in European mortgage law has been the growing integration of EU consumer law with national mortgage law under the harmonising Unfair Contract Terms Directive (UCTD).⁴² This purpose is to be achieved by protecting consumers from the abuse of power by the supplier of goods or services, in particular by standard non-negotiable contracts, such as mortgages.⁴³ The UCTD aims to assist individual consumers by ensuring that unfair terms are not enforceable against them, and a dissuasive principle is contained in Article 7(1):

³⁶ The law relating to land and mortgages has been largely excluded from supra-national EU law making, with each European country cherishing its own property law regime, operating on the *lex sitae* principles. See Van Erp, S. and Akkermans, B. (2012) *Cases, Materials and Text on Property Law* (Ius Commune Casebooks for the Common Law of Europe) (Oxford, Hart), Ch 10. National property law systems are very closed, and the development of European harmonized standards has been slow and indirect. Indeed, Article 345 TFEU specifically precludes Treaty law primacy over national systems of property ownership, and the principles of subsidiarity and proportionality are highly significant. See Van Erp, S. ‘Article 345 TFEU: A framework for European property law’ in Jaume Tarabal Bosch, Elena Lauroba Lacasa (coords.), *El derecho de propiedad en la construcción del derecho privado europeo*, (Tirant lo Blanch, 2018).

³⁷ See Ryan-Collins, J., Lloyd, T. and McFarlane, L. (2017) *Rethinking the Economics of Land and Housing* (London: Zed), p. 223.

³⁸ See Angel, *Housing Policy Matters – a Global Analysis*, Chap 8.

³⁹ These are covered in more detail in Briefing 2.

⁴⁰ See Briefing 3.

⁴¹ 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>

⁴² Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21 April 1993.

⁴³ Micklitz, H.W. & Reich, N. ‘The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive,’ 51 CMLR 2014, pp. 771 – 808.

Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

The application of the UCTD to mortgages largely emanated from a series of Spanish mortgage possession cases referred to the CJEU for clarification on the compatibility of Spanish mortgage law and procedure with EU consumer law. In the iconic *Aziz*⁴⁴ case, the CJEU held that the UCTD precluded national legislation (such as that which applied in Spain) that limited the power of the court to stay mortgage enforcement proceedings, pending a decision on whether the mortgage contains unfair terms.⁴⁵

Similarly, the Mortgage Credit Directive (MCD)⁴⁶ was introduced in 2014 to address the excesses of irresponsible lending, and protect the EU banking system from further risks. It aims to limit the risks to the lender and, possibly, to protect consumers at the initiation and enforcement of the mortgage. The creditor is obliged to provide consumers with pre-contractual information and to carry out a creditworthiness assessment. Article 28 MCD establishes a number of measures on arrears and foreclosure, in the event of debtor's default, and national law cannot prohibit the *datio in solutum* (non-recourse) mortgages being offered. Article 28.5. MCD establishes that "Where after foreclosure proceedings outstanding debt remains, Member States shall ensure that measures to facilitate repayment in order to protect consumers are put in place". The Directive leaves discretion as its application, but yet the Directive is a binding harmonising measure.⁴⁷

The UN has held that States must adopt appropriate legislative measures to ensure that mortgage enforcement procedures contain appropriate safeguards before evictions take place.⁴⁸

(c) The third element for modern housing systems is an effective residential infrastructure regime. This involves a mixture of EU and Member State legislation and enforcement systems relating to housing quality, public health, control of environmental issues, water and sanitation measures, and planning controls on urban land development and supply.

⁴⁴ Case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya*.

⁴⁵ See Beka, A. (2018) *The Active Role of Courts in Consumer Litigation* (Cambridge, Intersentia). Beka highlights the 'active consumer court' doctrine developed in the CJEU which requires national courts to raise of their own motion mandatory rules of EU consumer contract law, notably those relating to unfair terms, resulting in increased procedural protection in mortgage possession proceedings involving the primary family residence of the mortgage debtor, and the development of human rights issues in this context.

⁴⁶ Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010. OJ L 60, 28.2.2014, p. 34–85.

⁴⁷ See M. Anderson and E. Arroyo i Amayuelas (eds.), *The Impact of the Mortgage Credit Directive in Europe* (Europa Law Publishing, 2017): Domurath, I. 'Mortgage Debt and the Social Function of Contract' (2016) 22 *European Law Journal* 758.

⁴⁸ UN CESCR, Communication No 2/2014, Views adopted by the Committee at its fifty-fifth session (1–19 June 2015 Spain) UN Doc E/C.12/55/D/2/2014.

(d) The fourth and most important element of this approach for EU Member States is the regulatory regime, and this has become a sophisticated tool, even if it “has arisen through a series of unrelated acts”.⁴⁹ The mixture of EU and Member State laws, zoning, planning, and building control measures are critical elements in the development of housing systems.

(e) Housing subsidies and social housing are important elements in sustainable housing systems.⁵⁰ Similarly, investment of capital in housing is part of overall government investment policy (percentage of GDP). But the levels of Member State investment in social and subsidised housing is subject to the EU economic governance regulations, as well as the rules on State Aid and Public Procurement.⁵¹

The impacts of EU actions on rented housing can be most visible in the way the financialisation of housing through REITS and investment funds use EU regulations to acquire and blocks of rented housing and increase rents, as well as the well-publicised actions of ECB supervised banks seeking vacant possession of buy to let mortgages, creating homelessness of tenants.

Thus, the EU institutions impact on many elements of Member State housing systems, beyond ‘social housing policy’. The relevant EU competences are much wider than those related to supporting and complementing social policy. But the integration between EU action and housing is most obvious in the area of housing finance. There is often an institutional policy failure to recognize these links, and the dynamic interconnectedness of all the elements in Member State housing systems.⁵²

Financialisation of Housing

Much of the underlying problem can be traced to the financialisation of housing since the 1980s. This shifted the focus of some Member States and the EU towards viewing housing in market terms, reducing public provision.⁵³ Globalised finance, investing in land and housing

⁴⁹ See Angel, *Housing Policy Matters – a Global Analysis*, p. 150.

⁵⁰ Ibid, Chap 9.

⁵¹ See Briefing 2.

⁵² Letter to author from Central Bank of Ireland, part of the European System of Central Banks (13/2/2020): “You may wish to note that the Central Bank’s role in this regard relates to ensuring stability of economic growth and to ensure a functioning financial services system that sustainably serves the needs to the economy and its consumers. As part of delivering our mandate, the mortgage measures were introduced in February 2015 to enhance the resilience of both borrowers and lenders, and to reduce the risk of unsustainable credit-house price spirals from developing in the future. The objective of the mortgage measures is *not* to target house prices. Housing market policy issues like taxes, building regulations and planning policy, rental market regulations, and the delivery of social and affordable housing are outside the Central Banks’s remit. Financial sector regulations cannot address wider issues in the housing market, currently reflected in the relative shortage of housing supply which must be addressed by other targeted policies.” The European System of Central Banks (ESCB) consists of the European Central Bank (ECB) and the national central banks (NCBs) of all 27 Member States of the European Union (EU). The process of decision-making in the Eurosystem is centralised through the decision-making bodies of the ECB, namely the Governing Council and the Executive Board.

⁵³ This financialisation and its effect on housing rights is well described by Leilani Farha in UN Doc. A/HRC/34/51, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*. 27 February-24

(described as real estate) across EU cities, has impacted on the physical and political landscape.

Historically low interest rates, and increased liquidity (arising from ECB monetary policy measures) have catalysed the search for 'safe' assets, and property/real estate/housing in European cities is highly attractive for investors.⁵⁴ One UN report pointed out that: *'Housing and urban real estate have become the commodity of choice for corporate finance, a "safety deposit box" for the wealthy, a repository of capital and excess liquidity from emerging markets and a convenient place for shell companies to stash their money with very little transparency.'*⁵⁵

But it does not have to be this way. As *The Economist* pointed out:

... Not everywhere is afflicted with every part of the housing curse. Tokyo has no property shortage; between 2013 and 2017 it put up 728,000 dwellings—more than England did—without destroying quality of life. The number of rough sleepers has dropped by 80% in the past 20 years. Switzerland gives local governments fiscal incentives to allow housing development—one reason why there is almost twice as much home-building per person as in America. New Zealand recoups some of homeowners' windfall gains through land and property taxes based on valuations that are frequently updated.

Most important, in a few places the rate of home ownership is low and no one bats an eyelid. It is just 50% in Germany, which has a rental sector that encourages long-term tenancies and provides clear and enforceable rights for renters. With ample supply and few tax breaks or subsidies for owner-occupiers, home ownership is far less alluring and the political clout of NIMBYs is muted. Despite strong recent growth in some cities, Germany's real house prices are, on average, no higher than they were in 1980.⁵⁶

March 2017. The financialisation of housing. Para 67: 'Policy responses to the financialization of housing have tended to prioritize support for financial institutions over responding to the needs of those whose right to adequate housing is at stake.' See also Aalbers, M. (2016) *The Financialization of Housing* (London: Routledge).

⁵⁴ See Positive Money Europe, 13 February 2020 " Why the ECB needs to look at helicopter money now" <https://www.positivemoney.eu/2020/02/ecb-helicopter-money/>

⁵⁵ Report of the UN Special Rapporteur on the Financialisation of Housing (2017) UN Doc. A/HRC/34/51, <http://unhousingrapp.org/user/pages/04.resources/Thematic-Report-3-The-Financialization-of-Housing.pdf>

⁵⁶ *The Economist*. 16 January 2020. 'Home Ownership is the West's biggest economic-policy mistake.'

5. Housing as the “Wobbly Pillar” of EU financial stability

Housing serves a dual role, acting both as an investment asset and a consumer good or home. However, its investment status has taken on a powerful European dimension. The role of housing (regarded as real estate by the ESRB) in the stability of the European financial system is significant:

Developments in the residential real estate sector can have significant implications for financial stability and the real economy. Residential real estate (RRE) represents a major part of households’ wealth and constitutes a major source of collateral for lenders. Moreover, mortgages often make up large parts of banks’ balance sheets, and are the largest and most common form of debt among households. Furthermore, housing construction is typically an important component of the real economy, as a source of employment, investment and growth. Experiences show that systemic risk relating to RRE –stemming from excessive risk-taking, high leverage, misaligned incentives and boom/bust tendencies, etc. –may lead to significant risks to domestic financial stability and serious negative consequences for the real economy, as well as potentially leading to negative spillovers to other countries. Vulnerabilities in RRE may manifest themselves through direct effects –through losses of capital or funding among lenders –and indirect effects in terms of foregone economic output, which may have second-round effects on the financial system. The underlying sources of such vulnerabilities differ. However, they often emerge from domestic structural features, from social and economic policies (e.g. tax deductibility of mortgage interest payments), from cyclical developments, or combinations thereof.⁵⁷

According to the European Systemic Risk Board (ESRB), in September 2019, housing and real estate loans amounted to more than 40% of total bank loans in 13 EU Member States and over 50% in Denmark and Ireland.⁵⁸

Housing Risk

But housing is becoming the ‘wobbly pillar’ of EU banking stability, and its central place in the land/credit cycle (often referred to as the financial cycle) poses a risk to economic sustainability and financial stability, and *vice versa*.⁵⁹ This ‘addiction’ to property-related lending means that any Member State’s housing policy measure could impact on EU banking stability. There is a signal that not all is well. Recent trends have shown that similar effects are occurring in Europe since late 2018 as happened in the United States in 2004 and 2005. This involves increased lending for house purchase loans, with growth of

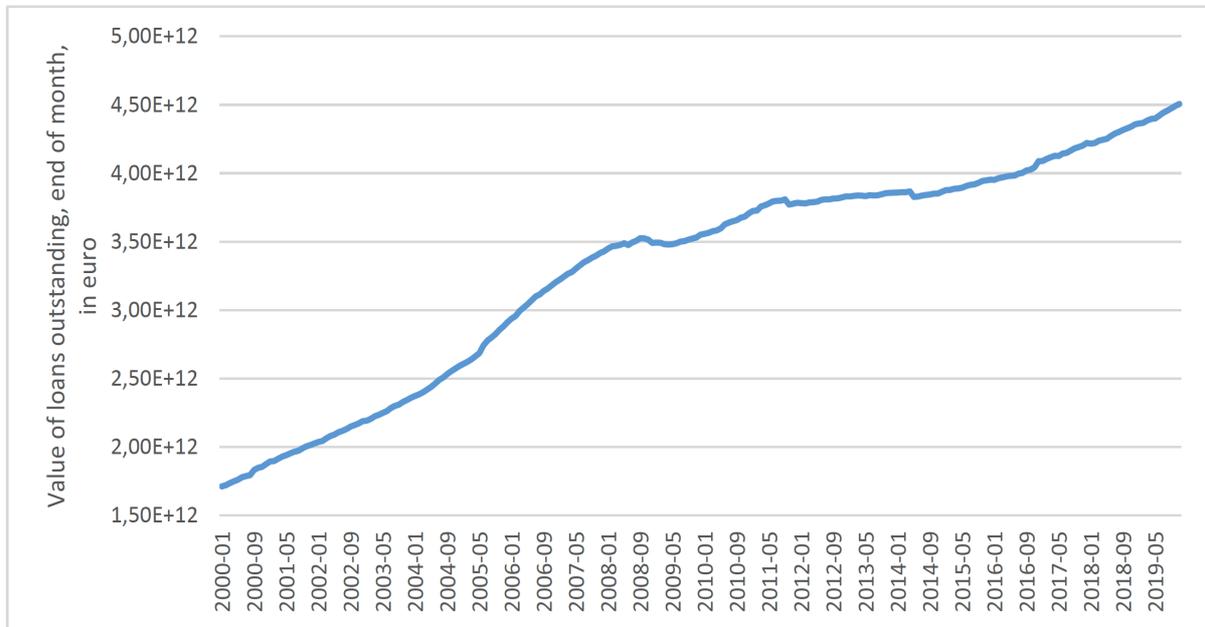
⁵⁷ ESRB (November 2016) *Vulnerabilities in the EU residential real estate sector*, https://www.esrb.europa.eu/pub/pdf/reports/161128_vulnerabilities_eu_residential_real_estate_sector.en.pdf, p.2.

⁵⁸ See ESRB (September 2019) *Vulnerabilities in the EU residential real estate sector*, https://www.esrb.europa.eu/pub/pdf/reports/esrb.report190923_vulnerabilities_eea_countries~a4864b42bf.en.pdf, p. 5/6.

⁵⁹ Ryan-Collins, J., Lloyd, T. and McFarlane, L. (2017) *Rethinking the Economics of Land and Housing* (London: Zed), p. 110.

loans in this area over 20 % in late 2019 alone.⁶⁰ The following Chart shows that the value of loans for house purchase has increased by 30% between 2009 and 2019, but 12% in the period 2016-2019.

Chart 2. Volume of euro area loans for house purchases⁶¹



Source: ECB.

“Housing serves a dual role, acting both as an investment asset and a consumer good or home. However, its investment status has taken on a powerful European dimension.”

“This ‘addiction’ to property-related lending means that any Member State’s housing policy measure could impact on EU banking stability.”

⁶⁰ See Hartwell, C.A. “Financial Risks in Europe: The End of the Beginning’ in Financial Stability in the Euro Area: Assessment of Risks and Policy Options, *op cit.* p. 42.

⁶¹ *Ibid.*, p. 44.

https://sdw.ecb.europa.eu/quickview.do?jsessionid=75DCD99733307FEBC06AEA041EB62299?SERIE_S_KEY=117.BSI.M.U2.N.A.A22.A.1.U2.2250.Z01.E

6. Housing Rights

Housing rights have been established across European constitutions, laws and policies for more than a century. The Universal Declaration on Human Rights (1948) refers to housing rights as part of the right to an adequate standard of living.⁶² The International Covenant on Economic, Social and Cultural Rights (1966), adopted by all European countries, obliges States to ensure minimum core shelter obligations, as well as the progressive realisation of housing rights.⁶³ This includes legal security of tenure; availability of services, materials and infrastructure; affordability; habitability; accessibility; housing in a suitable location; culturally appropriate housing; and protection from eviction.⁶⁴ Other housing rights enshrined in human rights instruments include children's rights and the rights of persons with disabilities to independent living in the community.⁶⁵

Housing rights obligations require States to undertake consistent and coordinated measures to resolve institutional shortcomings and structural causes of lack of housing.⁶⁶ Generally, States establish regulatory standards for housing systems in national law which correspond to the main elements of housing rights, provide subsidies for those unable to secure affordable housing to rent or buy, and undertake direct provision of housing for those excluded from the market, or where no market provision exists.

Housing rights recognised in different ways

All EU Member States have adopted the European Social Charter (ESC) of the Council of Europe⁶⁷ and the European Convention on Human Rights (ECHR),⁶⁸ which recognise housing rights in different ways. The European Committee on Social Rights of the Council of Europe (ECSR) has pointed out that, although not based on an 'obligation of results', ESC human rights application must be practical and effective, rather than purely theoretical.⁶⁹ In a model which could be applied to socio-economic rights implementation generally, the ECSR has held that States must:

⁶² Universal Declaration of Human Rights, UNGA Resolution 2200A (XXI) UN Doc A/810. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. Article 25.

⁶³ Art 11 International Covenant on Economic, Social and Cultural Rights (1966) UN Doc. A/6316.

⁶⁴ UN Doc. E/C.12/1771/4, UNCESCR. *General Comment No. 4. The Human Right to Adequate Housing*, Geneva. See also UN-Habitat (2009) *The Right to Adequate Housing*, UN Factsheet 21/Rev 1, pp. 8–12; UN Committee on Economic, Social and Cultural Rights (UN CESCR), General Comment No 7 (1997).

⁶⁵ Kenna, P. (2005) *Housing Rights and Human Rights*. (Brussels: FEANTSA).

⁶⁶ UN CESCR, General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1 of the Covenant) 14 December 1990, UN Doc. E/1991/23.

⁶⁷ Council of Europe, ETS No 35: European Social Charter, Turin, 18 October 1961. (Revised) Council of Europe, Strasbourg 3 May 1996, mainly Articles 16, 30 and 31.

⁶⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005. Rome, 04/11/1959. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>

⁶⁹ Collective Complaint *FEANTSA v France* No. 39/2006, paras 55–56. 'Adequacy' in housing was defined in *ERRC v Italy* (Collective Complaint No. 27/2004) as a dwelling that is structurally secure, safe from a sanitary and health point, i.e. that possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity; is not overcrowded; and has secure tenure supported by law.

- a. Adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the [European Social] Charter;*
- b. Maintain meaningful statistics on needs, resources and results;*
- c. Undertake regular reviews of the impact of the strategies adopted;*
- d. Establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;*
- e. Pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.⁷⁰*

A number of provisions of the EU Charter of Fundamental Rights were directly inspired by the ESC, and it can be expected that the CJEU would take into account the Council of Europe interpretations given to the ESC.⁷¹

“Housing rights have been established across European constitutions, laws and policies for more than a century.”

⁷⁰ *FEANTSA v France*, Collective Complaint No. 39/2006.

⁷¹ See De Schutter, O. (2016) *The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights – Study for the AFCO Committee European Parliament*, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf), p. 40.

7. The EU Charter of Fundamental Rights ('the Charter')

10 Years Old

The Charter was established as Treaty law in 2009,⁷² through Article 6(1) TEU,⁷³ making human rights more visible in Europe.⁷⁴ Its 54 articles on dignity, freedoms, equality, solidarity, citizens' rights and justice reflect the human rights adopted by EU Member States.⁷⁵

The Charter goes beyond the ECHR and national constitutions in terms of the extent of rights included. The non-binding nature of international human rights within dualist States can be transcended where Charter articles - binding under EU law, with their corresponding rights instruments, are invoked.⁷⁶ The ECHR 'margin of appreciation' does not exist as a concept in the Charter, where the effectiveness and equivalence of EU law are the primary considerations.⁷⁷ Indeed, the applicability of EU law entails application of the Charter. This represents a 'codification' of fundamental rights jurisprudence, but also an extension of binding EU law into areas of 'solidarity' and socio-economic rights hitherto avoided by EU law, with rights to petition the European Parliament, rights of access to documents, protection of personal data, rights to good administration and access to the European Ombudsman, among the fundamental rights now affirmed.⁷⁸

Inviolable Rights

Articles of the Charter recognise that human dignity is inviolable and must be respected and protected. The Charter contains rights to respect for family life and home, primacy of the best

⁷² "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

⁷³ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01.

⁷⁴ "...it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."

⁷⁵ See Peers, S., Herve, T., Kenner, J. and Ward, A. (eds) (2014) *The EU Charter of Fundamental Rights – A Commentary* (Oxford: Hart Publishing); European Union Agency for Fundamental Rights – 'Charterpedia' – <https://fra.europa.eu/en/charterpedia>

⁷⁶ The rights and principles enshrined in the Charter stem from the constitutional traditions and international conventions common to the Member States; the European Convention on Human Rights; the Social Charters adopted by the Community and the Council of Europe; and the case law of the Court of Justice of the Union and the European Court of Human Rights. See Case C-617/10, *Fransson*, at para. 21; Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal and Volker Willmeroth als Inhaber der TWI Technische Wartung und Instandsetzung Volker Willmeroth e. K. v Maria Elisabeth Bauer and Martina Broßonn*, EU:C:2018:871.

⁷⁷ See Cafaggi, F. and Iamiceli, P., 'The principles of effectiveness, proportionality and dissuasiveness in the enforcement of EU Consumer Law: The impact of a triad on the choice of civil remedies and administrative sanctions', *European Review of Private Law* 3 (2017), 575–618.

⁷⁸ Bojarski, L., Schindlauer, D. and Wladasch, K. (2014) *The Charter of Fundamental Rights as a Living instrument – Manual*, http://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_manual_0.pdf

interests of children, adequate supply of housing for families (in the widest sense), access to services of general economic interest (which includes social housing), fair procedures in protection of rights,⁷⁹ and a right to social and housing assistance so as to ensure a decent existence for all who lack sufficient resources.⁸⁰

Article 51 on the field of application of the Charter establishes clearly that it applies primarily to the institutions, agencies, offices and bodies of the Union, in line with the principle of subsidiarity.⁸¹ The EU institutions, agencies, offices and bodies must respect the rights, observe the principles and promote the application of the Charter within their respective competences and mandates. It is incontrovertible that any act produced by EU institutions having legal effects vis-à-vis third parties must comply with the Charter.⁸² The EU Agency for Fundamental Rights has recently pointed out that the Charter, in its entirety, addresses and is applicable to the institutions, bodies, offices and agencies of the Union.⁸³

“Article 51 on the field of application of the Charter establishes clearly that it applies primarily to the institutions, offices, agencies and bodies of the Union, in line with the principle of subsidiarity.”

Rights and Principles

It is widely accepted that EU law follows the maxim *'ubi ius ibi remedium'* (where there is a right there is a remedy), and this is underpinned by Article 47 of the Charter. However, the distinction between rights and principles in the Charter determines the extent to which each Charter article is justiciable.⁸⁴

⁷⁹ See *Access to Justice and the ECB – A Study of ECB Directly Supervised and other Mortgage Possession Cases in Ireland* (2018).

⁸⁰ Kenna, P., 'Housing rights after the Treaty of Lisbon – Are they Minimum Core Obligations?' (2014) 3(1) *Cyprus Human Rights Law Review* 13.

⁸¹ Article 51(2) states: 'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'

⁸² Ward, A., 'Article 51 – Field of Application', in S. Peers et al. (eds) (2014) *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing), 1426. EU institutions are defined in Article 13(1) TEU as the European Parliament, the European Council, the Council, the European Commission (hereinafter referred to as 'the Commission'), the Court of Justice of the European Union, the European Central Bank, the Court of Auditors. For a full list see: https://europa.eu/european-union/about-eu/institutions-bodies_en

⁸³ Opinion of the European Union Agency for Fundamental Rights – 4/2018 [Charter of Fundamental Rights] *Challenges and opportunities for the implementation of the Charter of Fundamental Rights*, p. 15.

⁸⁴ Article 52(5) of the Charter states: 'The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.'

Principles are not automatically justiciable, as they do not grant subjective rights to persons affected. They pertain to the realm of objective law, and consist of duties which are binding on the EU institutions (and the Member States when implementing EU law).⁸⁵ Examples of housing rights-related principles recognised in the Charter include Articles 25, 26, 36 and 37. In some cases, an article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34.⁸⁶

Justiciability

In any case, the UN Special Rapporteur on the right to adequate housing has pointed out that ‘the outdated division of the right to housing into justiciable and non-justiciable components, negative and positive rights, must be firmly rejected’.⁸⁷ The Charter, as a binding source of primary EU law, has the potential to overcome some of the national constitutional law conundra in the enforcement of socio-economic rights, arising from separation of powers doctrines, and endless debates about the justiciability of socio-economic rights.

“The Charter, as a binding source of primary EU law, has the potential to overcome some of the national constitutional law conundra in the enforcement of socio-economic rights.”

⁸⁵ Lock, T. ‘Rights and principles in the EU Charter of Fundamental Rights’, *CMLR*(2019) 56, 1201–1226.

⁸⁶ See Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds) (2014) *The EU Charter of Fundamental Rights – A Commentary* (Oxford: Hart Publishing).

⁸⁷ Ten key normative principles are identified which States must satisfy to ensure that all components of the right to housing are subject to effective remedies. See UN Doc. A/HRC/40/61. *Access to justice for the right to housing. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context.*

8. Articles of the Charter containing housing rights

The *Explanations Relating to the Charter of Fundamental Rights* (the *Explanations*) clarify the meaning of each Charter article and its links to other human rights instruments and associated jurisprudence.⁸⁸ In this context, there is much jurisprudence regarding the nature and extent of the Charter housing rights.

Article 7 of the Charter, which states that ‘Everyone has the right to respect for his or her private and family life, home and communications’, corresponds to Article 8 of the ECHR.⁸⁹ The development of ECtHR jurisprudence on Article 8 in relation to housing rights has led to significant standards and positive obligations:

*The loss of one’s home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.*⁹⁰

The CJEU has also held that under EU law, the right to accommodation, as a fundamental right guaranteed under Article 7 of the Charter, must be taken into consideration by a court when addressing EU law issues, such as the implementation of Directive 93/13 on unfair contract terms in consumer contracts – as applied to mortgage possession cases.⁹¹ Thus, the proportionality of the interference with the right to respect for home must be applied in any institutional or Charter interpretation of EU primary or secondary law.

Article 17 on the rights to property provides that while everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions, the use of property may be regulated by law for the general interest.⁹² Significantly, Article 17 of the Charter reflects the “social function” or legitimate limitation on the enjoyment of property already established in Article 1 of Protocol 1 of the ECHR,⁹³ and indeed, within similar provisions in the constitutions of Germany, Ireland, Italy and Spain. This means that Member States, or the EU, can delimit property rights without the need for compensation. Juli Ponce suggests that the European

⁸⁸ *Explanations to the Charter of Fundamental Rights* (OJ 2007/C 303/02), 7. Article 52(7) of the Charter states: ‘The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.’

⁸⁹ Article 8 of the ECHR states: ‘Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

⁹⁰ ECtHR judgment, 13 May 2008. (Application no. 19009/04), para. 50.

⁹¹ Case C-34/13 *Kusionova v SMART Capital* [2014] para 65.

⁹² Possessions have been held to include an offer of social housing. *Telyatyeva v. Russia*, ECtHR, App. No. 18762/06.

⁹³ See ECtHR *James and Others v. the United Kingdom*, 21 February 1986 (Appl. No. 8793/79); ECtHR *The Holy Monasteries v. Greece*, 9 December 1994 (Appl. No. 13092/87 and 13984/88).

Court of Human Rights accepts that eliminating 'social injustices' through democratic legislative powers justified these limitations on property rights. The Charter similarly recognises the right to property, including the possibility to regulate its use by law, insofar as it is necessary for the general interest. All these references to the social function of property, which allows for the regulatory delimitation of the right to property of land and housing, could be explicitly incorporated in future EU legislation concerning housing.⁹⁴

Indeed, the CJEU has already applied these principles in relation to Article 17 in the *Ledra*⁹⁵ case where it held Charter property rights are subject to restrictions of the general interest – in this case ensuring the stability of the euro banking system.⁹⁶ The *Libert*⁹⁷ case established that policy measures to guarantee sufficient social housing for low-income or otherwise disadvantaged sections of the population can constitute overriding reasons in the public interest, and therefore justify restrictions on property rights.⁹⁸

Article 21 of the Charter prohibits discrimination on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. This provision has been held to have horizontal effect, ie. it can apply between private parties where there is an EU law issue involved.⁹⁹

Article 25 of the Charter on the rights of the elderly [sic] states: 'The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life', and corresponds to Article 23 of the Revised European Social

⁹⁴ See Ponce-Solé, J. 'The European Union Role in Ensuring Access to Affordable Housing and in Fighting Against Urban Segregation and Gentrification Moving Forward,' *European Journal of Human Rights*, 2019, Issue 5., 311-334, at 326.

⁹⁵ Joined Cases C-8/15P to C-10/15P *Ledra Advertising (and others) v Commission and ECB* [2016].

⁹⁶ "Para 69. "It must be remembered that the right to property guaranteed by that provision of the Charter is not absolute and that its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union (see judgments of 16 November 2011, *Bank Mellat v Council*, C-548/09 P, EU:C:2011:735, paragraph 113, and of 12 May 2016, *Bank of Industry and Mine v Council*, C-358/15 P, EU:C:2016:338, paragraph 55). Para. 70. Consequently, as is apparent from Article 52(1) of the Charter, restrictions may be imposed on the exercise of the right to property, provided that the restrictions genuinely meet objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed... Para. 71. As is apparent from Article 12 of the ESM Treaty, the adoption of a memorandum of understanding such as that resulting from the negotiations between the Cypriot authorities and, in particular, the Commission corresponds to an objective of general interest pursued by the European Union, namely the objective of ensuring the stability of the banking system of the euro area as a whole."

⁹⁷ Joined Cases C-197/11 and C-203/11, [2013].

⁹⁸ Para 51. *The objective of the regime set out in Book 5 of the Flemish Decree, as a regional planning measure, is thus to guarantee sufficient housing for the low-income or otherwise disadvantaged sections of the local population.* Para 52. *In that regard, it must be noted that such requirements relating to social housing policy in a Member State can constitute overriding reasons in the public interest and therefore justify restrictions such as those established by the Flemish Decree (see *Woningstichting Sint Servatius*, paragraphs 29 and 30, and Case C-400/08 *Commission v Spain* [2011] ECR I-1915, paragraph 74)."*

⁹⁹ See Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257; Case C-569/16, *Stadt Wuppertal v. Maria Elisabeth Bauer* and Case-570/16, *Volker Willmeroth v. Martina Broßonn*, EU:C:2018:871. The term 'property' here is not the same as in Article 17, and translated from the French can mean socio-economic status.

Charter on the right of elderly persons to social protection, which often requires housing provision.¹⁰⁰

Article 26 of the Charter on the integration of persons with disabilities obliges the Union to recognise and respect the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community. The *Explanations* state that this Article is based on Article 15 of the European Social Charter. Since the EU has ratified the UN Convention on the Rights of Persons with Disabilities, the right to independent living for persons with disabilities will be relevant in relation to housing.¹⁰¹

Article 33(1) of the Charter states in identical wording to Article 16 of the ESC that: ‘The family shall enjoy legal, economic and social protection’; Article 16 ESC states:

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.

In this context, **Article 16 of the Council of Europe ESC** refers to State obligations to ensure the provision of an adequate affordable supply of housing, of a habitable standard, for families. However, the ECSR considers that, as with many other provisions of the ESC, Articles 16 and 31, though different in personal and material scope, partially overlap with respect to several aspects of the right to housing – even though many States have not ratified Article 31.¹⁰²

The Committee [ECSR] recalls its previous case law to the effect that in order to satisfy Article 16 states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and include essential services (such as heating and electricity). The Committee [ECSR] has stated that adequate housing refers not only to a dwelling which must not be substandard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the

¹⁰⁰ Article 23 RESC States: *With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:— to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: (a) provision of housing suited to their needs and their state of health or of adequate support for adapting their housing.*

¹⁰¹ See Report of the UN Special Rapporteur on the Right to Adequate Housing -The right to housing of persons with disabilities - <https://www.ohchr.org/EN/Issues/Housing/Pages/TheRighttoHousingofPersonsWithDisabilities.aspx>. See also Training Guide -

https://www.ohchr.org/Documents/Publications/CRPD_TrainingGuide_PTS19_EN%20Accessible.pdf

¹⁰² Article 31 RESC states: *With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1. to promote access to housing of an adequate standard; 2. to prevent and reduce homelessness with a view to its gradual elimination; 3. to make the price of housing accessible to those without adequate resources.*

*family in residence. Furthermore, the obligation to promote and provide housing can extend to security from unlawful eviction.*¹⁰³

Article 34(3) of the Charter provides:

In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

The *Explanations Relating to the Charter of Fundamental Rights* state that Article 34(3) of the EU Charter draws on Articles 30 and 31 of the Revised Social Charter. In relation to Articles 30 and 31 of the ESC, there is a corpus of jurisprudence from the ECSR through its Conclusions and its Decisions on Collective Complaints.¹⁰⁴ However, the *Explanations* state that the Union must respect Article 34(3) in the context of policies based on Article 153 TFEU, which relates to the combating of social exclusion. Article 34(3) has been used in the interpretation of EU secondary law which related to an aspect of social and housing assistance.¹⁰⁵

Article 36 of the Charter, which is linked to Article 14 TFEU, states that ‘The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.’ Such services are a founding value of the EU, and one closely connected with the European model of society, the promotion of social cohesion, the notion of EU social citizenship and the exercise of fundamental social rights. Article 36 of the Charter represents a novelty in international law since no similar provisions on access to public services are contained in either the ECHR or other international legal instruments concerning the protection of fundamental rights.¹⁰⁶ Erika Szyszczack has pointed out that the inclusion of Article 36 was a radical move to extend the concept of fundamental rights beyond minimal ideas of social rights, and towards ideas of universal access to social and welfare benefits, as well as to basic utilities.¹⁰⁷ Services of general economic interest (SGEI) form a major building block of the EU social market economy, and social housing is regarded as an SGEI.¹⁰⁸

¹⁰³ *ERRC v Greece*, Council of Europe, Collective Complaint No. 31/2005, para 16.

¹⁰⁴ See Council of Europe (2018) *Digest of the Case Law of the European Committee of Social Rights* - <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>

¹⁰⁵ Case 571/10, *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* (2012). The Court considered that ‘in so far as the [housing] benefit in question in the main proceedings fulfils the purpose set out in that article of the Charter, it cannot be considered, under European Union law, as not being part of core benefits within the meaning of Article 11(4) of Directive 2003/109’.

¹⁰⁶ See Gallo, D. ‘Article 36 of the Charter and access to public services: scope, extent and limits of a sui generis provision’, e-Pública Vol. 5 No. 2, Julho 2018 (052-069). Available at: <http://www.scielo.mec.pt/pdf/epub/v5n2/v5n2a05.pdf.p.58/59>. Article 36, and other Charter articles, bring together the dimension of social rights, competition law and the free market, and aim to balance neoliberal principles with the concept of social and territorial cohesion.

¹⁰⁷ See Peers, S., Herve, T., Kenner, J. and Ward, A. (eds) (2014) *The EU Charter of Fundamental Rights – A Commentary* (Oxford: Hart Publishing). It has been argued that a refusal of access to a SGEI could undermine the right to human dignity as set out in Chapter 1 of the Charter.

¹⁰⁸ Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest

However, Ponce-Solé has pointed out that the exceptions to EU rules on competition and other areas which SGEIs have “can apply only if the services in question enjoy, in advance and by legal act, been attributed a mission of general interest”.¹⁰⁹ Thus, it is thus necessary to make explicit at the national level that a particular activity is categorised as an SGEI in order to apply Article 106 TFEU.

This has occurred in Spain, for instance, with the 2007 Catalan Right to Housing Act (and in subsequent regional laws), whose Article 4 states that:

Services of general interest

1. The activities linked with the provision of housing intended for social policies are hereby configured as a service of general interest, in order to guarantee dignified and adequate housing for all citizens.

2. For the purposes of standardisation with European norms in the field of housing, housing that the present Act defines as intended for social policies shall be considered as social housing, both when it results from processes of new construction or renovation and when it is acquired by virtue of social programmes of mediation or conveyance.¹¹⁰

This Charter Article reinforces the obligation for EU institutions and agencies to consider the effect of their policies and actions on social housing, in light of its status as an SGEI.

The CJEU has ruled that social housing is a service of general interest, which may, in fact, justify limitations on the enjoyment of property rights.¹¹¹ Thus the interpretative function of the Charter housing rights must be engaged and respected.

“Services of general economic interest (SGEI) form a major building block of the EU social market economy, and social housing is regarded as an SGEI by the CJEU to the extent that it can justify limitations on property rights.”

Article 38 of the Charter states that Union policies shall ensure a high level of consumer protection, and this refers more to a broad approach than to any of the individual rights.¹¹²

(notified under document C(2011) 9380) (Text with EEA relevance) 2012/21/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012D0021&from=EN>; Joined Cases C-197/11 and C-203/11, *Libert and Others* [2013].

¹⁰⁹ Communication from the Commission – Implementing the Community Lisbon programme – Social services of general interest in the European Union, 26 April 2006, COM(2006) 177 final.

¹¹⁰ See Ponce-Solé, J. The European Union Role in Ensuring Access to Affordable Housing and in Fighting Against Urban Segregation and Gentrification Moving Forward, *European Journal of Human Rights*, 2019 Issue 5., 311-334, at 320.

¹¹¹ Joined Cases C-197/11 and C-203/11, *Libert and Others* [2013].

¹¹² Art 4(2)(f) TFEU states that consumer protection is a shared competence between the Union and the Member States. 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>

Article 47 of the Charter on the right to an effective remedy and to a fair trial corresponds with Article 6(1) ECHR. The *Explanations* also provide that:

With regard to the third paragraph, it should be noted that in accordance with the case law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECtHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11).

Significantly, the CJEU has relied on the fundamental right of effective judicial protection laid down in Article 47 in assessing the principle of effectiveness of the protection available to consumers in mortgage possession cases under the EU Unfair Contract Terms Directive in Spain.¹¹³

Article 53 of the Charter states that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Member States' constitutions. Thus, the Charter cannot be used to diminish existing housing rights protection.

¹¹³ Case C-169/14, *Morcillo and Abril García v Banco Bilbao*, EU:C:2014:2099, para 51.

9. Applying the Charter

The European Commission is the guardian of the Treaties, including the Charter, and its *Strategy for the effective implementation of the Charter* (2010) states:

The objective of the Commission's policy following the entry into force of the Lisbon Treaty is to make the fundamental rights provided for in the Charter as effective as possible. The Union must be exemplary in this respect. The Charter is not a text setting out abstract values, it is an instrument to enable people to enjoy the rights enshrined within it when they are in a situation governed by Union law. This is why the Commission will focus its efforts on the effective implementation of the Charter.¹¹⁴

When proposing a new legislative initiative, the European Commission is expected to address its compatibility with fundamental rights.¹¹⁵

Fundamental Rights Checklist

The *Strategy for the effective implementation of the Charter* states that fundamental rights may, under certain conditions, be subject to limitations, but these limitations must be provided for in law, respect the essence of the said rights, observe the principle of proportionality, be necessary and effectively meet objectives.¹¹⁶ The Fundamental Rights Checklist (below) was created in 2010 for evaluating EU legislative proposals.

1. What fundamental rights are affected?
2. Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)?
3. What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?
4. Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)?
5. Would any limitation [negative impact] of fundamental rights be formulated in a clear and predictable manner?
6. Would any limitation of fundamental rights: – be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)? – be proportionate to the desired aim? – preserve the essence of the fundamental rights concerned.¹¹⁷

¹¹⁴ COM (2010) 573 Final, p. 3.

¹¹⁵ European Commission, *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of fundamental rights*, COM/2009/0205 final; European Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM (2010) 573 Final.

¹¹⁶ COM (2010) 573 Final, p. 4.

¹¹⁷ COM (2010) 573 Final, p. 7.

Impact Assessments¹¹⁸

Charter-related Impact Assessments have been proposed as one means of ensuring the application of the Charter. While major weaknesses have been identified in this approach (see below) the value of these Commission Impact Assessments was evident in the recent draft Directive on secondary markets for non-performing loans (NPLs).¹¹⁹ Originally, it was proposed that an ‘accelerated extrajudicial collateral enforcement’ mechanism (i.e. evictions without judicial supervision) would be created across the EU for NPLs. The Impact Assessment suggested that the proposed Directive be amended, and that enforcement against loans granted to consumers or to enforce collateral ‘which consists in the first residence of the business borrower or sole entrepreneur’ be excluded from the scope of the Directive – ‘based on social considerations’.¹²⁰ The Impact Assessment also showed that of the ten largest investors in global distressed debt, nine were domiciled in the US and one in Canada. However, the housing rights of the EU citizens involved were not fully considered in the Impact Assessments in this instance.

Better Regulation Package Tool #28

The Better Regulation Package #Tool 28 on fundamental and human rights already alludes to the need for a wider approach to human rights Impact Assessments.¹²¹ This provides that:

*Fundamental rights afford basic legal protection for political, social, procedural rights to individuals and legal entities. They cover a wide range of issues from human integrity, property and privacy rights, rights to conduct business, to free movement, equal treatment, children's rights, rights of persons with disabilities, rights of citizens in their dealings with the EU institutions, procedural safeguards and much more. Respect for the Charter of Fundamental Rights of the European Union (the Charter) in Commission acts and initiatives, is a binding legal requirement. EU legal acts can be challenged before national courts as well as the European Court of Justice for failure to respect the Charter. The need to ensure compliance and promotion of fundamental rights is not limited to legislative proposals but **should be considered in all Commission acts and initiatives**. To help in the implementation of this obligation, the Commission has developed an assessment methodology based on a Fundamental Rights Checklist which should be used by all Commission departments. The*

¹¹⁸ European Commission, Staff Working Paper, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments* SEC(2011)0567.

¹¹⁹ Proposal for a directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral. 14.3.2018 SWD (2018) 75 Final.

¹²⁰ See Commission Staff Working Paper, Impact Assessment, *The development of secondary markets for non-performing loans by removing undue impediments to loan servicing by third parties and the transfer of loans* (Part 1/2) and *Accelerated extrajudicial collateral enforcement* (Part 2/2). Accompanying the document Proposal for a directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral. 14.3.2018 SWD (2018) 75 Final. See Impact assessment – COM (2018) 135 final 2018/0063(COD), p. 15/16,

<https://service.betterregulation.com/sites/default/files/upload/2018-03/PART-2018-151537V1%282%29.pdf> However, the ‘first residence’ was still included in the part of the proposed Directive relating to NPLs to be sold, and the security ‘enforced’ in an EU cross-border context.

¹²¹ Better Regulation Package – Tool#28 Fundamental rights and human rights, https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-28_en_0.pdf.

fundamental rights analysis contributes to better policy definition and public acceptance of Commission initiatives and facilitates the legal analysis of compliance with the Charter of a subsequent draft legislative proposal.

There is a Fundamental Rights Checklist contained within the Tool #28 framework, which essentially repeats the 2010 checklist but adds the following consideration:

*Finally, if the examination concludes that the need to attain the general interest objective would justify maintaining a policy option that would cause an **interference** to one or several fundamental rights, it should be considered which safeguards would be necessary to ensure that the negative impact would not amount to a violation of the fundamental right.¹²²*

This Better Regulation Package states that Charter rights are of relevance to all EU policies and to the institutions, and not just to the Commission. Indeed, the model (presented below) for the European Council, of methodological steps to be taken, to check fundamental rights compatibility at Council preparatory bodies, provides an example of how Charter housing rights could be considered by other EU institutions:¹²³

*Examine whether the proposal is in line with the Charter.
Check the exact content of relevant fundamental rights with the help of the following methods:*

- 1. Check the Charter, the Explanations relating to the Charter, the case law of the Court of Justice of the European Union as well as the case law of the European Court of Human Rights, for example through its ECHR factsheets, and other relevant sources for understanding the Charter (see Annex II and III). After having identified which fundamental rights may be affected in general, the next step is to ascertain the exact content of those fundamental rights. The content of fundamental rights should be identified first of all on the basis of the Charter and the Explanations relating to the Charter ...*
- 2. Check the thematic fundamental rights reports, publications and handbooks produced by the institutions, bodies, offices and agencies of the European Union and by the Council of Europe, and make use of the expertise of the European Union Agency for Fundamental Rights. Reports and publications of the European Union Agency for Fundamental Rights, the European Data Protection Supervisor or the Commission's annual reports on the application of the Charter, for example, as well as human rights handbooks of the Council of Europe can help provide an understanding of the content of the relevant fundamental rights (see Annex III)...*

¹²² Ibid.

¹²³ Council of the European Union (2015) *Guidelines on methodological steps to be taken to check fundamental rights compatibility at Council preparatory bodies*, <https://data.consilium.europa.eu/doc/document/ST-5377-2015-INIT/en/pdf>

3. *Check the proposal to assess whether it limits fundamental rights and whether this limitation is in compliance with the Charter. After having assessed the content of a fundamental right, it is possible to determine whether the proposal limits the fundamental right concerned. For that purpose it may be useful to highlight the basic questions regarding the limitation of fundamental rights (see Annex IV)*
 - a) *May the fundamental rights at issue be subject to limitations? Is this limitation provided for by law?*
 - b) *Does it respect the essence of the rights and freedoms?*
 - c) *Does it genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others?*
 - d) *Subject to the principle of proportionality, are the limitations necessary?*

4. *In case of doubt*
 1. *Use the expertise of national experts in the capitals. It is important to make full use of the expertise, knowledge and experience of experts working in the Member States. Contact national experts to clarify outstanding concerns or questions and to gain a better understanding of related national or EU-level legislation.*
 2. *Inform the FREMP Working Party or other preparatory body specialising in a specific fundamental right ...*

European Commission Annual Report on fundamental rights

Since 2010, the European Commission has published an Annual Report on the application of the fundamental rights and freedoms in the Charter. This 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 and notably when new EU legislation is proposed. The Annual Report is based on the actions of EU institutions and the analysis of letters from the general public, and on questions and petitions from the European Parliament. It provides an opportunity for an annual exchange of views with the European Parliament.¹²⁴

Weakness in these approaches

A number of shortcomings in the current arrangements for applying the Charter by EU institutions have been identified.¹²⁵ A Resolution of the European Parliament in 2019 suggested that the Commission's Strategy of 2010 urgently needs to be updated to take into

¹²⁴ https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en: the EU-funded Ch@rter Click! Project has created a practical toolkit, checklist and tutorial aimed at assisting victims of fundamental rights violations and legal practitioners in determining whether the Charter can provide protection in a specific case, see https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/incorporating-fundamental-rights-eu-legislative-process_en

¹²⁵ See De Schutter, O. (2016).

account new challenges.¹²⁶

Impact Assessments do not ensure that fundamental rights are mainstreamed in the EU's decision making process.¹²⁷ The Commission relies on its Legal Service and DG Justice to assess the compatibility of legislative proposals, and these are not always specialists in fundamental rights. Legislation may also change as it progress through Committees, and no new assessment is carried out. A further concern is the limited participation of civil society organizations, representatives of those potentially affected by the measures, or people or organisations working in the field under consideration, in the impact assessment procedure.¹²⁸ Indeed, the largely symbolic nature of such impact assessments was evident from the social impact assessment linked with the third Greek bail-out.¹²⁹

The Council Conclusions on the Charter of Fundamental Rights after 10 Years: State of Play and Future Work,¹³⁰ 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. As shown above, 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. There are of course, some housing measures which are entirely based on national law, but there are many more areas involving shared competences between EU Member States and the EU, as well as many areas where Member States are implementing EU law and acting within the scope of EU law. Indeed, a great many issues which affect 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).¹³¹ This has a powerful effect on national housing systems and policies. EU institutional approaches must embrace the wider objectives of the EU Charter of Fundamental Rights.

¹²⁶ 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.

¹²⁷ Of the 35 Impact Assessments examined between 2011 and 2014, fundamental rights were taken into account in only 19 - De Schutter, O. (2016) p. 20.

¹²⁸ Indeed, the EU has a much more developed approach in relation to its activities outside the EU. See http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf

¹²⁹ Commission Staff Working Document - Assessment of the Social Impact of the new Stability Support Programme for Greece, Brussels, 19.8.2015 SWD(2015) 162 final.

https://ec.europa.eu/info/sites/info/files/ecfin_assessment_social_impact_en.pdf. See critique from FEANTSA at https://www.feantsa.org/download/greece_sia-35137668843822528050.pdf

¹³⁰ Council 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 Council Conclusion 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).

¹³¹ For instance, the levels of State expenditure on housing are subject to the EU institutional macroeconomic 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.

10. Obligations on EU institutions to promote the Charter

The Charter of Fundamental Rights has its own mainstreaming clause in Article 51(1), which states that the Union's institutions, and the Member States when implementing Union law, shall "promote the application" of Charter rights "in accordance with their respective powers." As the Charter itself does not create new competences for the Union, this means that in the exercise of its competences, each EU institutions must promote the application of the fundamental rights of the Charter. The Charter must be integrated in all domains of EU law,¹³² and it is crystal clear that EU institutions, agencies, offices and bodies must not only respect the rights, observe the principles, but **promote the application of the Charter** within their respective competences and mandates.¹³³ This entails some positive action.

Olivier De Schutter suggests that there are positive duties on EU institutions whereby fundamental rights would inform proactively the legislative and policy agenda-setting. He points out that human rights law imposes not only duties of abstention (negative duties not to adopt measures that could infringe on human rights, unless certain conditions are complied with), but also duties of action (positive duties to take measures that protect and fulfil human rights).

A commitment to human rights goes beyond accepting a prohibition: it also involves a duty to contribute the realization of human rights, by exercising certain powers so as to maximize the enjoyment of human rights by the rights-holders.

The Charter of Fundamental Rights is not merely a set of prohibitions. It also should serve as a tool to guide action, ensuring that the institutions of the Union exercise their competences with a view to fulfilling the provisions of the Charter.... Of course, para. 2 of Article 51 adds that "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties". That does not imply, however, that no positive obligations (duties to take action) can follow from the Charter. The Explanations accompanying the Charter clarify that "an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers". But that is not to say no such obligation exists...¹³⁴

¹³² Kilpatrick, C & De Witte, B (2019) 'A Tangible Human Face for Social Europe', European University Institute, RSCAS Policy paper 2019/02. p. 1.
https://cadmus.eui.eu/bitstream/handle/1814/61585/RSCAS%20PP%202019_02.pdf?sequence=1&isAllowed=y

¹³³ 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. Kilpatrick, C & De Witte, B (2019) 'A Tangible Human Face for Social Europe', European University Institute, RSCAS Policy Paper 2019/0 points out that the policy-activating potential of the Charter has remained unused so far.

¹³⁴ This dual function of human rights is fully compatible with the principle of conferral in EU law, whereby the EU institutions are attributed certain limited powers by the EU Member States, the "masters" of the treaties (Article 5(1) and (2) TEU). It is also fully compatible with the principle of subsidiarity, according to which, in areas of shared competences, the EU should only take action if and in so far as the action envisaged cannot be sufficiently achieved by the Member States, either at central or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Article 5(3) TEU).

While FRA developed guidance for Member States on how to proactively promote the Charter,¹³⁵ no such guidance has been prepared for the EU economic governance and financial supervision institutions. This may point to a major weakness in EU policy making, and support for EU human rights.

It is crystal clear that EU institutions, agencies, offices and bodies must not only respect the rights, observe the principles, but **promote the application of the Charter** within their respective competences and mandates. This entails some positive action.

“A commitment to human rights goes beyond accepting a prohibition: it also involves a duty to contribute the realization of human rights, by exercising certain powers so as to maximize the enjoyment of human rights by the rights-holders.”

¹³⁵ Fundamental Rights Agency of the European Union, (2018) *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level Guidance*, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf

11. Conclusion

Ensuring adequate and affordable housing for all in Europe, the prevention of homelessness and the provision of independent living for persons with disabilities are in line with EU human rights objectives and housing rights. Indeed, housing rights are an integral part of international human rights adopted by all EU Member States. These are drawn from UN, Council of Europe and national housing policies, legislation, and in a few cases, constitutional articles. The nature and content of these rights is now well established, covering State obligations and normative standards. Since 2009 most of these rights have been codified in the Charter.¹³⁶ The Charter must be respected and promoted by EU institutions, offices, bodies and agencies, as well as Member States when they implement EU law. This can provide an avenue for advancing housing rights within the EU multi-level institutional governance architecture.

¹³⁶ Charter of Fundamental Rights of the European Union, Art 34(3) OJ 2010/C 83/02.

Appendix 1.

Fighting homelessness and housing exclusion in Europe – study of national policies. ESPN – DG, Employment, Social Affairs & Inclusion

Table 15: Main housing-related systemic causes

	Description of main housing-related causes
AT	Rising housing costs; lack of affordable housing; mismatch between demand and supply; lack of available dwellings within the public housing stock; entry costs restraining access to Limited Profit Housing Association (LPHA) dwellings
BE	Rising housing costs; limited availability of social housing stock; mismatch between demand and supply; low quality of social housing
BG	Very low quality of social housing; illegal temporary housing settlements
CY	Lack of affordable housing
CZ	Rising housing costs; lack of affordable social/public housing
DE	Lack of affordable housing; mismatch between demand and supply; discrimination in the rental housing market
DK	Lack of affordable housing; insufficient housing supply; mismatch between demand and supply
EE	Lack of available dwellings within the public housing stock
EL	Lack of social housing; rising housing costs; lack of affordable housing
ES	Lack of affordable housing; insufficient housing supply; mismatch between demand and supply
FI	Lack of affordable housing in the rental market; uneven access to affordable housing in different municipalities
FR	Lack of affordable housing in the rental market; mismatch between demand and supply of social housing; low quality of social housing

Housing Rights Must be Respected and Promoted by EU Institutions for EU Citizens

HR	Lack of affordable social or rented housing
HU	Lack of social housing; lack of affordable housing
IE	Financialisation of the social housing sector; subsidisation of the private rental housing market; rising housing costs; lack of affordable and secure rented housing
IT	Lack of affordable social and public housing; consistent decline of the public housing system
LT	Lack of affordable social housing; increasing evictions from social housing; inadequate funding of social housing; mismatch between demand and supply
LU	Lack of affordable housing; lack of social housing; rising housing costs
LV	Insufficient municipal housing stock; lack of affordable housing; poor quality of housing; insufficient funding; insufficient temporary housing solutions to address crisis situations
MT	Lack of new investments in social housing; mismatch between demand and supply of social housing; rising housing costs; liberalisation of the rental market
NL	Lack of social housing; mismatch between demand and supply of social housing
PL	Insufficient supply of municipal housing; insufficient funding for expanding the supply of municipal housing
PT	Lack of social housing; mismatch between demand and supply of social housing; lack of affordable housing; rising housing costs; failure of specific programmes for increasing social rental market solutions
RO	Lack of social housing; mass evictions due to property restitution; emergence of collective and segregated forms of homelessness
SE	Lack of affordable housing; mismatch between demand and supply of rented accommodation; rising housing costs in the rental market; redefined role of municipal housing companies
SI	Lack of social housing; lack of affordable rented housing; impact of the tourism industry on the availability of the rental housing stock
SK	Lack of affordable rented housing; lack of social housing; discrimination in access to social housing and access barriers to social housing for homeless people
UK	Low rates of building; lack of social housing; lack of affordable and secure rented housing; falling rates of home ownership; short private rented tenancies
AL	Insufficient supply of social housing; insufficient funding; insufficient human capacities at both central and local level in the social housing sector
BA	Problems with property law implementation; unregulated housing market and rising housing costs; very limited availability of social housing stock
ME	Lack of affordable social housing
MK	Lack of social housing for homeless persons; high housing costs; housing insecurity, i.e. living in illegally built buildings
RS	Poor quality of housing conditions among the Roma population
TR	Poor quality of housing conditions among the Roma population and Syrian refugees
XK	Lack of social housing (mismatch between demand and supply of social housing units), procedural obstacles and inappropriate distribution of social housing units

Source: ESPN national reports.

Baptista, I. and Marlier, E. (2019) Fighting homelessness and housing exclusion in Europe – study of national policies. ESPN – DG, Employment, Social Affairs & Inclusion, Table 15. <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8243&furtherPubs=yes>

Appendix 2.

Distribution of population by tenure status, 2017 (source Eurostat) (% share of total population)

	Owner, with mortgage or loan	Owner, with no outstanding mortgage or housing loan	Tenant, renting at market price	Tenant, renting at reduced price or free
EU-28	26.5	42.8	20.0	10.7
EA-19	27.3	38.8	23.6	10.3
Netherlands	60.7	8.7	29.8	0.8
Sweden	52.2	13.0	34.0	0.8
Denmark	47.8	14.4	37.7	0.1
Belgium	42.9	29.8	18.7	8.6
Luxembourg	42.7	32.0	20.8	4.5
Finland	42.3	29.1	13.4	15.2
United Kingdom	38.0	27.1	17.0	17.9
Portugal	37.3	37.5	12.8	12.5
Ireland	31.8	37.8	12.5	18.0
France	30.9	33.5	19.2	16.4
Spain	29.5	47.6	14.4	8.5
Germany	25.7	25.7	40.0	8.6
Austria	24.3	30.7	30.1	14.9
Malta	22.1	59.2	5.0	13.7
Czechia	20.7	57.8	15.5	6.0
Estonia	20.0	61.8	4.0	14.2
Cyprus	19.8	50.9	14.4	14.9
Slovakia	16.1	74.0	8.5	1.5
Hungary	16.0	69.3	5.4	9.3
Greece	15.7	57.6	21.0	5.8
Italy	13.6	58.8	18.0	9.5
Slovenia	12.0	63.6	5.4	19.0
Lithuania	11.1	78.6	1.5	8.7
Poland	11.1	73.1	4.3	11.5
Latvia	10.8	70.7	7.9	10.5
Croatia	6.9	83.6	1.5	8.0
Bulgaria	2.9	80.0	3.0	14.1
Romania	1.1	95.7	1.0	2.2