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In this book, the results of a comparative study of the systems of forbearance and mortgage enforcement after the global financial crisis of 2008 to 2013 are presented. This chapter provides a brief overview of the background, methodology and content of the book. For a more exhaustive overview, I refer to my article ‘Different Models of Forbearance and Mortgage Enforcement Proceedings’.<sup>1</sup> This article explains the theoretical background thoroughly, as well as the comparative framework used in this research.

## 1.1 BACKGROUND

On 14 March 2013, the First Chamber of the EU Court of Justice decided on the case between Mohamed Aziz, a Moroccan national working and living in Spain, and the Spanish bank *Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*.<sup>2</sup> The family home of Mr. Aziz was subject to a mortgage held by this bank, to secure the repayment of a loan (principal sum: 138,000). When Mr. Aziz stopped payments from June 2008, the bank started enforcement proceedings against him in March 2009. Although this enforcement procedure can be viewed as a logical result of non-payment, the case of Mr. Aziz is mentioned here because it became famous for giving a new perspective on mortgage enforcement proceedings.

While mortgage enforcement proceedings traditionally belong to the field of property law and mortgage rights have long been viewed as security rights that can be used in case of default, the *Aziz* case shows a broader perspective, where the EU Court of Justice states that Mr. Aziz was insufficiently protected in the light of the Unfair Credit Terms Directive by the procedural rules at the time and that

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- 1 I. Visser, J.A. Bredevelde, & Y. Hasnaoui, ‘Different Models of Forbearance and Mortgage Enforcement Proceedings. Comparing Default Resolution Approaches in Europe’, *European Journal of Comparative Law and Governance*, Vol. 9, 2022, pp. 152-186, <https://doi.org/10.1163/22134514-BJA10032>.
  - 2 CJEU 14 March 2013, C-415/11, ECLI:EU:C:2013:164 (*Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*).

[t] hat applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling.<sup>3</sup>

Combined with other developments that took place around the first decade of the twenty-first century, the case is a sign of – what Kenna calls – ‘a nascent European standard, linking mortgage law, consumer law, and human rights law, with the UCTD [Unfair Contract Terms Directive, IV] providing the nexus among all three areas’.<sup>4</sup> The other developments worth mentioning in this perspective are the *Mc Cann v. The United Kingdom* case, where the European Court of Human Rights found that the loss of one’s home is the most extreme form of interference with the right to respect for the home (Art. 8 European Convention of Human Rights),<sup>5</sup> which was also referred to by the CJEU in the *Kušionová* case;<sup>6</sup> the *Vaskrsić v. Slovenia* case, where the European Court on Human Rights emphasised the need for alternatives in enforcement proceedings in the light of Article 1 of Protocol 1 of the European Convention of Human Rights (“given the paramount importance of the enforcement measure taken against the applicant’s property, which was also his home, and the manifest disproportion between this measure and the amount of debt it aimed to enforce, the authorities were obliged to take careful and explicit account of other suitable but less intrusive alternatives”);<sup>7</sup> cases of the European Committee of Social Rights, where it was stated, for example, ‘that State Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of persons concerned and that alternative accommodation is available’;<sup>8</sup> a European Directive dedicated to mortgage loans concerning residential property, of which Recital 27 and Article 28 explicitly deal with mortgage arrears and foreclosure;<sup>9</sup> and the establishment of a single supervisory mechanism (SSM) for the euro zone, giving the European Central Bank a specific task relating to the prudential supervision of credit institutions.

Most of these developments point towards a more consumer-friendly approach of mortgage enforcement proceedings, and – as a result – more attention for forbearance

3 *Ibid.*, para. 27.

4 P. Kenna, ‘Mortgage Law Developments in the European Union’, *Journal of Law, Property, and Society*, Vol. 4, 2019, p. 73.

5 ECtHR 27 September 1995, App. No. 18984/91 (*McCann and others v. the United Kingdom*).

6 CJEU 10 September 2018, Case C-34/13 (*Kušionová v. SMART Capital a.s.*).

7 ECtHR 25 July 2017, App. No. 31371/12 (*Vaskrsić v. Slovenia*).

8 *European Roma Rights Centre (ERRC) v. Italy*, Complaint No. 27/204, decision on the merits of 7 December 2005, § 41.

9 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

measures. The term forbearance can be linked to Article 28 of the Mortgage Credit Directive, which prescribes that member states shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated. In Recital 27, these measures are described as ‘reasonable attempts to resolve the situation through other means before foreclosure proceedings are initiated’.

These developments must also be viewed against the background of the global financial crisis of (roughly) 2007 to 2013.<sup>10</sup> With the bankruptcy of Lehman Brothers as the catalyst,<sup>11</sup> the crisis also revealed ‘the broader economic and societal implications of the repossession of the primary residence’, as Beka puts it.<sup>12</sup> These implications emphasised the need for more procedural protection of homeowners in many EU member states and shed new light on the security rights of mortgage lenders. Furthermore, the implications were described by many scholars. This has led to a lively debate in literature on the way to protect the consumer losing their home as a result of the enforcement began.<sup>13</sup>

This book takes these developments as the starting point, by describing to what extent the growing attention for the consumer losing its home are currently visible in regulations and legislation on mortgage enforcement proceedings. Special attention is paid to the regulation, legislation and practices regarding forbearances measures, since preventing mortgage enforcement proceedings has gained more attention as a result of the more consumer-friendly approach. All chapters were last

<sup>10</sup> See also Kenna, 2019, pp. 58-63.

<sup>11</sup> C. Hopkins, ‘Unraveling the Lehman Brothers: Catalyst of the 2008 Financial Crisis and Global Ramifications’, *Michigan Journal of Economics*, <https://sites.lsa.umich.edu/mje/2024/01/29/unraveling-the-lehman-brothers-catalyst-of-the-2008-financial-crisis-and-global-ramifications/>.

<sup>12</sup> A. Beka, ‘The Protection of the Primary Residence of Mortgage Debtors: Embedding the “Basic Needs” Principle in Mortgage Repossession Proceedings’, in: L. Ratti (Ed), *Embedding the Principles of Life Time Contracts*, Den Haag: Eleven Law Publishing, 2018, p. 267.

<sup>13</sup> See, *inter alia*, S. Nield & N. Hopkins, ‘Human Rights and Mortgage Repossession: Beyond Property Law Using Article 8’, *Legal Studies*, Vol. 33, No. 3, 2013, pp. 431-454, <https://doi.org/10.1111/j.1748-121X.2012.00257.x>; S. Nield, ‘Article 8 Respect for the Home: A Human Property Right?’, *King’s Law Journal*, Vol. 23, No. 2, 2013, pp. 147-171, <https://doi.org/10.5235/09165768.24.2.147>; A. Chemlar, ‘Household Debt and the European Crisis’, paper presented at the European Credit Research Institute (ECRI) Conference, *ECRI Research Report* No. 13, June 2013, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2307854](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307854); I. Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts*, Oxford: Hart Publishing, 2017; Beka, 2018, pp. 247-272; Kenna, 2019, pp. 45-80; P. Kenna & H. Simón-Moreno, ‘Towards a Common Standard of Protection of the Right to Housing in Europe Through the Charter of Fundamental Rights’, *European Law Journal*, Vol. 25, 2019, pp. 608-622, <https://doi.org/10.1111/eujl.12348>; J.M.L. van Duin, *Justice for both: Effective judicial protection under Article 47 of the EU Charter of Fundamental Rights and the Unfair Contract Terms Directive* (diss. Amsterdam), 2020, available on: <https://dare.uva.nl/search?identifier=8f36d07e-603e-42e8-883a-e2a01f9a46eb>; I. Domurath & C. Mak, ‘Private Law and Housing Justice in Europe’, *Modern Law Review*, Vol. 83, No. 6, 2022, pp. 1188-1220, <https://doi.org/10.1111/1468-2230.12557>.

updated in the course of 2024, and so developments since then could not be included by the authors.

## 1.2 METHODOLOGY AND TERMINOLOGY

Taking these developments into account, this research aims to identify the systems of forbearance and mortgage enforcement proceedings after the global financial crisis. As explained, there has been a lively debate about the protection of the consumer, and developments at the international and European/EU level have also drawn the attention to a consumer-friendly approach, but thus far no study has focused on the actual impact of these developments in different countries from a comparative perspective. This is therefore the approach of this research. Here, we focus on the homeowner/consumer, borrowing money from a professional mortgage lender, who has a mortgage right in the family home of the homeowner/consumer. Therefore, throughout this book, the words ‘mortgagor’, ‘homeowner’, and ‘debtor’ will be used alternately and will have the same meaning, unless stated otherwise. This terminology refers to the owner of the house, who is also the person obtaining the mortgage to the mortgagee, and the debtor borrowing money. The same is true, *mutatis mutandis*, for the mortgagee, who can also be referred to as the ‘mortgage lender’ or ‘creditor’.

For the actual comparison itself, the methodology of this research is inspired by the *Common Core Project* of Bussani & Mattei.<sup>14</sup> That project aims to analyse the present legal systems in Europe to see what is already common among these systems.<sup>15</sup> For this purpose, the project relies on questionnaires to determine the so-called legal formants – i.e. ‘all those formative elements that make any given rule of law amidst statutes, general propositions, particular definitions, reasons, holdings, etc.’<sup>16</sup> Bussani & Mattei therefore analyse not only the legal provisions, but – to understand the law in a given system – also the application of these provisions in practice.

Since this research is also interested in more than the regulation itself, the method of questionnaires is also used here. Additionally, this research is interested in the empirical data to provide information about the functioning of the regulation. Likewise, this research combines the qualitative approach of the *Common Core Project* with quantitative data to complete the picture.

14 M. Bussani & U. Mattei, ‘The Common Core Approach to European Private Law’, *Colombia Journal of European Law*, Vol. 3, 1997, pp. 339, 343-346, 351-354, [https://repository.uchastings.edu/faculty\\_scholarship/519/](https://repository.uchastings.edu/faculty_scholarship/519/).

15 *Ibid.*, pp. 343-344.

16 *Ibid.*, p. 345.

To develop the questionnaires, we searched for experts in the field of mortgage enforcement proceedings. This search resulted in a group of eleven experts, from Belgium, England, Greece, Ireland, Italy, Poland, Spain, South Africa, Turkey, and the United States (the Netherlands was represented by me). To kick off the research, we held two expert meetings, one online, due to COVID-19 measures on 13 and 14 January 2022, and one in Groningen on 9 and 10 May 2022. During the first meeting, each expert gave a brief overview of the systems of forbearance and mortgage enforcement proceedings in their jurisdiction. Based on these overviews, existing literature, case law and studies, the questionnaire was developed. This questionnaire was discussed during the second expert meeting, when we also launched the Expert Group on Forbearance and Mortgage Enforcement Proceedings.

The country reports in this book are based on the questionnaire (see appendix 2) and are therefore split into five different chapters. The first chapter gives an impression of the system of homeownership, mortgages and enforcement proceedings for each country. This chapter provides the necessary background for each report. It then elaborates on the three different stages of the enforcement procedure. The second chapter is dedicated to the so-called pre-enforcement phase, when the debtor is in default but no enforcement procedure is initiated yet. Here, both regulation and legislation and consensual alternatives are described. The third chapter contains the enforcement phase itself and shows the legislation regarding the enforcement procedure. The fourth chapter contains the phase of eviction and distribution of the proceeds. This phase is considered to be important for the central topic too, since it shows aspects of the functioning of mortgage enforcement proceedings as well. For example, if there is an obligation to provide alternative accommodation to the homeowner that is evicted, this also influences the impact of a mortgage enforcement procedure on the consumer. The fifth, and final, chapter describes the influence of bankruptcy and insolvency proceedings and the impact of the COVID-19 pandemic on the enforcement procedure. All chapters also ask for data and other information about the functioning in practice, next to describing the procedure itself based on legislation, parliamentary documents, literature and case law. Figures are used to illustrate developments and/or specific aspects of the system, such as securitisation in the USA.<sup>17</sup>

The book thus combines the legal doctrinal research method with insights from socio-economic and financial studies as well as data about the functioning in practice. It is the first to identify existing legal and regulatory frameworks that prescribe the procedure from the moment a mortgage debtor is in default until the distribution

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17 Some figures in this book are in in the original language. Most of them, however, are provided with an English translation at the bottom.