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Visser, Irene; Bredeveld, Jamie; Hasnaoui, Yassine

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Different Models of Forbearance and Mortgage Enforcement Proceedings

Comparing Default Resolution Approaches in Europe

Irene Visser | ORCID: 0000-0003-2182-9742

Assistant Professor, Department of Private and Notarial Law, Faculty of Law,
University of Groningen, Groningen, the Netherlands
irene.Visser@rug.nl

Jamie A. Bredeveld; Yassine Hasnaoui

students of the Research Master at the Faculty of Law, University
of Groningen, Groningen, the Netherlands
j.a.bredeveld@student.rugl.nl; y.hasnaoui@student.rug.nl

Abstract

The international credit crisis of 2008–2013 changed the legal landscape of mortgage enforcement proceedings in Europe dramatically. The growing influence of the international right to housing, the increasing attention towards homeowner protection, the renewed policies towards mortgage financing and the changes in national legislation, make the study of these proceedings relevant and interesting. Moreover, the phase between default of the mortgage debtor and the actual start of these proceedings is becoming more and more relevant because of these developments. Nonetheless, this phase is quite underresearched, especially from a comparative legal research point of view. Our comparative study therefore takes a different approach than classical comparative studies on mortgage enforcement procedures. With this project, we investigate the approaches of mortgage lenders after the mortgage debtor is in default with his mortgage obligations. These approaches can be based on legislation, self-regulation or agreements with the mortgagor. The aim of this project is to discover how these regulations function in practice. This paper provides an introduction to this emerging legal comparative research project on, what we call, default resolution approaches in Europe. We explain the main interests involved in default resolution

approaches and the dimensions that should be taken into account in our study. We then sketch our comparative framework for further research.

Keywords

mortgage enforcement – forbearance – default resolution – enforcement proceedings – foreclosure – homeowner protection

1 Introduction

What happens when a mortgage debtor fails to comply with his mortgage obligations and is in default? The answer to this question seems simple if it requires an answer from a national legal perspective. In most civil law countries, the answer can be found in the Civil Code or the Code of Civil Procedure Law. The mortgage lender can start an enforcement procedure, resulting in the mortgage debtor abandoning their home and the mortgage lender recovering his claim. However, if the solution needs to include every possible way to cure the default, things start to get more complex. In practice, it is more common not to immediately start enforcement proceedings in case of default given that legal proceedings are costly. Further, such proceedings may affect the reputation of the lender and more often than not liquidation does not lead to the highest possible price, proving unsatisfactory for the lender (and the debtor). Particularly since the ending of the last credit crisis, it has become increasingly common to search for alternative solutions before starting enforcement proceedings. Some legal systems require these solutions by law, while others leave room for self-regulation by professional mortgage institutions or other forms of regulations to prevent foreclosure. These default resolution approaches form the core of our emerging comparative research project carried out within the research programme 'Rethinking Public Interests in Private Relationships'.¹

Thus far, comparative legal literature in this field mainly focuses on the mortgage enforcement proceedings only with little attention being paid to what happens in practice. Moreover, other present day legal literature in this area tends to study the proceedings from a different perspective than ours; for

¹ More information on this research programme can be found here: <https://www.rug.nl/rechten/onderzoek/expertisecentra/repp/?lang=en>.

instance, the *Pilot project Promoting protection of the right to housing*,² which primarily focuses on homelessness in the context of evictions. Conversely, the phase after default but before mortgage enforcement proceedings is quite underresearched. However, our hypothesis is that this phase is becoming increasingly important in curing default. As such, we will study this significant pre-phase along with the mortgage enforcement procedure itself from a comparative perspective. The aim of this project is to discover how regulation concerning both phases functions in practice. Consequently, we do not only focus on black letter law. The self-regulatory practice is equally important for this research and consists of rules made by financial institutions themselves (including terms and conditions accompanying the mortgage loan contract), customary law or an agreement between the mortgagee and mortgagor.

Therefore, our research project is focused on what we call default resolution approaches; a general term to indicate that all resolutions for default are included in the research. In our project, we focus on all solutions that are used to solve the problem of non-payment by the mortgage debtor. Thus, we not only focus on the mortgage enforcement proceedings that are prescribed by law which generally start with an official notice of the foreclosure and end with an eviction.³ We are also honing in on the approaches used *before* these official proceedings take place; the pre-enforcement phase. This phase does not always end in an official mortgage enforcement procedure and/or eviction of the homeowner; it is also possible that the mortgagee and mortgagor find an alternative resolution for the default. In fact, there is little knowledge about what actually happens in this stage, which makes this research even more relevant. With this research project, we aim to identify the functioning of default resolution approaches across Europe.

In this perspective, the terms 'soft approach' and 'hard approach' are also relevant. The issue of default could be solved by two means. Firstly, the mortgagor and mortgagee can amend the mortgage agreement terms so the contract can be maintained; the so-called soft approach. This soft approach is characterized by a consensual agreement on how to solve the issue of non-payment. Examples of this approach are a payment reduction or a pause of the payments, a loan modification, a repayment scheme, or a private sale (with or without a power of attorney for the mortgagee). This particular approach

2 P. Kenna *et al*, *Pilot project. Promoting protection of the right to housing. Homelessness prevention in the context of evictions. Full report – final version* (VT/2013/056), Luxembourg: Publications Office of the European Union 2016, doi: 10.2767/463280.

3 See also the phases of the eviction process described by Kenna *et al*, *ibid.*, p. 21–22.

also includes self-regulation of financial institutions to prevent enforcement in case of default. In this research, the term forbearance is used for this approach. Secondly, the mortgagee initiates a procedure to force the sale of the mortgaged property, a mortgage enforcement procedure or foreclosure; the so-called hard approach. This approach is defined by a one-sided, non-consensual right of the mortgagee.

This paper is the first step in this project and provides an introduction to our emerging comparative research project on these soft and hard approaches of default resolution. This introduction is based on an analysis of existing literature and case law. We have used not only doctrinal legal sources such as literature and case law, but have chosen also to rely on documents that focus more on economic and financial aspects of default resolution approaches. For instance, the publications of the International Monetary Fund, the European Banking Association and other financial or monetary institutions often contain comparative analysis on foreclosure proceedings in European countries. We have primarily focused on comparative literature keeping in tune with the fact that this research takes a comparative approach. The documents found in this type of literature tend to take a broader perspective than sources that primarily focus on national law, and are therefore more useful for our framework. For the same research we also studied literature that described (parts of) default resolution approaches with a more general view. Examples of the latter are the interesting article of Beka on embedding the ‘basic needs’ principle in mortgage repossession proceedings,⁴ and the equally interesting article of Kenna on mortgage law developments in the European Union.⁵ We will use these sources to build a framework that enables us to compare the different default resolution approaches across Europe. Therefore, we explain the main interests involved in default resolution approaches, the dimensions that should be taken into account in our study and sketch our comparative framework for further research.

We explain that to understand the functioning of these default resolutions, it is insufficient to only analyse the existing legal framework of certain jurisdictions. In order to properly compare the functioning of these systems, we need to understand the interests involved and the dimensions that influence the

4 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. 247–272.

5 P. Kenna, ‘Mortgage Law Developments in the European Union’, 4 *Journal of Law, Property and Society*, 45 (2019), https://static.wixstatic.com/ugd/d91411_6743920d872d4ecc900e4a3044a75f0b.pdf.

functioning of the different approaches to default resolution in practice. We describe the interests involved in default resolutions and the dimensions that should be taken into account when studying the different approaches, based on existing literature. These dimensions are the national and international legal framework and non-legal circumstances that are of direct influence to the functioning of the default resolution approaches. Then, we describe the comparative framework for the research. This framework contains the elements to analyse the regulation and the functioning of this regulation in the jurisdictions involved in the research. The aim of the framework is to make a suitable comparison of different default resolution approaches throughout Europe. This goal is best reached if all relevant circumstances can be taken into account. For the actual comparison itself, our methodology is inspired by the *Common Core Project* of Bussani & Mattei.⁶ That project aims to analyse the present legal systems in Europe to see what is already common among these systems.⁷ 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.”⁸ Bussani & Mattei therefore not only analyse the legal provision, but – to understand the law in a given system – also the application of these provisions in practice. Since our project is also interested in more than the regulation itself, the method of questionnaires is also used here. Additionally, we are also interested in the empirical data to provide information about the functioning of the regulation. Likewise, this project combines the qualitative approach of the *Common Core Project* with quantitative data to complete the picture.

Before elaborating further on the substantive aspects, we first point out the limitations of the research and some terminology issues. To start with the limitations, describing all possible default resolution approaches in case of mortgage non-payment would be an almost impossible task. Therefore, we have made some necessary limitations in the scope of our research. We only focus on default resolution approaches regarding professional mortgagees in situations of owner-occupied residencies. In our study, we assume that the homeowner is also the mortgage debtor. In this way, the case of security granted by

6 M. Bussani & U. Mattei, ‘The Common Core Approach to European Private Law’, 3 *Colombia Journal of European Law*, 339 (1997), https://repository.uchastings.edu/faculty_scholarship/519/, p. 343–346; 351–354.

7 Bussani & Mattei, *ibid.*, p 343–344.

8 Bussani & Mattei, *ibid.*, p. 344.

a third party ('a third party mortgage') is ignored. Furthermore, we primarily focus on regulation in European countries in the post-crisis era (after 2013). Existing comparative research in this field mainly dates from before or during this crisis. Since then, many European countries have changed (parts of) their regulation on default resolution approaches (including mortgage enforcement proceedings). Also, the first EU regulation that affects mortgage enforcement procedures was introduced and implemented in 2016.

Considering the fact that this is a comparative study, explaining the various terms and definitions used throughout is essential. We have chosen to use English-law terms given that English can be considered the *lingua franca* of comparative legal studies. These terms however, need to be interpreted in light of their comparative aim and are therefore not to be automatically understood in their traditional, common-law sense. This point was neatly explained by Schmid & Hertel in their report on Real Property Law and Procedure in the European Union when they stressed that, "if you are an English lawyer reading this study, please first forget everything you know about English land law terminology".⁹

The main terms used in this article are the following. The general term 'foreclosure' is used to indicate all mortgage enforcement proceedings, referring to both the judicially supervised and non-judicially supervised procedures,¹⁰ and including all legally prescribed mortgage recovery procedures such as, for example, the public auction, the sale out of court, and possession. This term is therefore meant in the broad sense and includes all different types of mortgage enforcement. Since the term 'foreclosure' is also used in the European Mortgage Credit Directive, that applies to all mortgage enforcement proceedings in European Member States, the use of this term seems a logical choice. The term 'mortgagee' is used to refer to the mortgage lender. The simplified term 'financial institutions' is used to describe all professional mortgage institutions, including insurance companies and mortgage servicers. The term 'mortgagor' is used in reference to the mortgage debtor. Finally, since this research only focuses on owner-occupied residencies the term 'homeowner' is frequently used interchangeably with 'mortgage debtor'.

Typically, the term 'mortgage' refers to the accessory type of mortgage, that is the mortgage that requires the existence of a secured claim for money payment (*hypothec*). The type of mortgage we describe is the result of an agreement

9 C.U. Schmid & C. Hertel (eds), *Real Property Law and Procedure in the European Union. General Report. Final Version*, Florence/Würzburg: European University Institute/Deutsches Notarinstitut (DNotI) 2005, p. 9.

10 See for this distinction: Kenna *et al*, *ibid.*, p. 21–22, and paragraphs 4 and 5.2 below.

between the homeowner and the financial institution. In this context, statutory and forced mortgages are left out of the picture.¹¹ Practically, the accessoriness of mortgages is loosened by financial institutions, like the ‘all moneys claim’ in England and Scotland or the *Bankhypotheek* in the Netherlands.¹² Therefore, the distinction between accessory and non-accessory is of less importance for this research than the distinction between consensual mortgages and statutory or forced mortgages.

2 Public and Private Interests Involved in Default Resolution Approaches

The primary purpose of default resolution approaches is to allow the lender to recover the outstanding mortgage claim. In said approaches, various different public and private interests can be identified. Private interests relate to the parties whose rights are influenced by the mortgage enforcement procedure. These parties include not only the mortgage lender and the debtor and their family (and other residents), but also third parties like tenants and other creditors.¹³ These third parties could be influenced by the enforcement procedures, losing their rights as a result of the foreclosure. As such, some of these third parties often have an interest in the revenues of the foreclosure, given that they are entitled to a portion of the proceeds.

On the other hand, public interests involve the interests of homeownership and mortgage lending as a way to finance homeownership. Put differently, the mortgage loan provides the mortgagor “with a relatively economic and efficient way of turning an immovable asset into a liquid one”.¹⁴ Since World War II, housing affordability has been an important part of the political discourse in Europe.¹⁵ Mortgage loans have been the main source of financing the purchasing of houses and therefore, in order to simulate homeownership, mortgage lenders are equipped with powerful rights in case of default. Public interests also encapsulate the idea of financial stability. As revealed by the last

11 For more information on this distinction, we refer to Schmid & Hertel (eds), *ibid.*, p. 86.

12 See also Schmid & Hertel, *ibid.*, p. 89–91.

13 In this research we focus only on owner-occupied homes. The interests of other occupiers therefore only play a secondary role.

14 M. Dixon, *Modern Land Law*, Oxford: Routledge 2021, p. 414.

15 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.

16 See for further information Chemlar, *ibid.*, p. 19–21.

credit crisis, a rapid growth in mortgage enforcement proceedings can have a devastating macroeconomic impact.¹⁶

Another public interest is illustrated by Kenna, where he describes the consequences of the unprecedented levels of mortgage cases courts were facing during the credit crisis:

“The curial *David v. Goliath* encounters between distressed home loan borrowers and globalized corporate mortgage lenders (often offshore registered and controlled private equity funds) seeking to repossess and sell the mortgaged homes, have become public issues.”¹⁷

These private and public interests form the starting point for our comparative analysis. At first glance, the interests of the mortgage lender and the interests of the homeowners seem to be contradictory here. While the mortgage lender aims to recover their claim against the lowest possible costs and as soon as possible, the homeowner’s key interest is to remain in his home, at least as long as possible. However, these interests are more aligned than they seem. Especially since the last credit crisis, the insight that preventing the foreclosure as much as possible is in the interest of both the mortgagor and the mortgagee became more and more common. While the mortgagee can potentially benefit from a considerable broad power based on the law, it is not always in his best interest to use that power. This insight forms the basis of the first aspect of the comparative framework, where we analyse the ways in which enforcement proceedings are prevented in various jurisdictions. We call this the pre-enforcement phase. This aspect is also relevant from the perspective of the international right to housing and homeowner protection, as will be elaborated on at a later stage in this article.

But, as Chmelar explains, preventing foreclosures is also in the interest of society as a whole:

“Huge losses are generated from the fact that foreclosures and evictions divest otherwise long-term solvent individuals of their homes, which are then liquidated at a lower price, leading to the fall of the asset prices and further exacerbating the mortgage crisis, or become vacant, which generates costs for the whole of society and does not improve the situation of lenders. Although most of the responsibility lies clearly with borrowers and lenders, absolving

17 Kenna, *ibid.*, p. 60.

18 Chmelar, *ibid.*, p. 20. See also: European Commission, *National measures and practices to avoid foreclosure procedures for residential mortgage loans*, SEC(2011) 357 final, Brussels, March 31, 2011, p. 3.

both groups would generate moral hazard, there is a case for them not being completely left behind during exceptional economic problems.”¹⁸

From this perspective, preventing foreclosures does not only benefit the homeowner (and their family) but also works in the interest of the mortgage creditor as well as society as a whole. A well-functioning default resolution system is also relevant for the economy and banking stability. Since the global financial crisis, the influence of a well-functioning system of dealing with default on the economy and banking stability became more and more clear. One important consequence was the enhanced role of the European Central Bank (ECB) since the global financial crisis. As Zilioli explains, the EU realised that the shortcomings of the financial framework for prudential supervision and financial stability needed to be addressed.¹⁹ This led, *inter alia*, to the establishment of a single supervisory mechanism for the euro area and gave the ECB a specific task relating to the prudential supervision of credit institutions (single supervisory mechanism (SSM)).²⁰ One of the supervisory tasks of the ECB is to direct banks to address their non-performing loans (NPLs). In this role, the ECB has identified a number of best practices which are collected in the *Guidance to banks on non-performing loans*.²¹ Forbearance measures are mentioned as a “key tool available to banks to resolve or limit the impact of NPLs”.²² Kenna describes that, through the *Guidance to banks on non-performing loans*, the ECB “suggests the type of forbearance measures mortgage regulated mortgage lenders should adopt in their enforcement of the security on home loan mortgages”.²³ Although the ECB guidance is “currently non-binding in nature”, it is stated in the guidance that these guidelines are “taken into consideration in the SSM regular Supervisory Review and Evaluation Process and non-compliance may trigger supervisory measures”.²⁴ Kenna concludes that the measures can change the private law relationship between mortgagee and mortgagor, since the powers of the mortgagee to enforce the mortgage can be

19 C. Zilioli, ‘the Independence of the European Central Bank and Its New Banking Supervisory Competences’, in: D. Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union*, Oxford: Oxford University Press 2016, p. 126.

20 Council Regulation (EU) 1024/2013 of 15 October 2013, OJ 2013 L 287/63.

21 European Central Bank, *Guidance to banks on non-performing loans*, March 2017, https://www.bankingsupervision.europa.eu/ecb/pub/pdf/guidance_on_npl_en.pdf?b2b48eefag972f0ca983c8b164b859ac.

22 European Central Bank, *ibid.*, p. 31.

23 Kenna, *ibid.*, p. 65.

24 European Central Bank, *ibid.*, p. 6.

25 Kenna, *ibid.*, p. 66.

altered.²⁵ This illustrates that the public interest involved in default resolution mechanisms could directly affect the private interests involved.

However, despite all efforts in the pre-enforcement phase, debt recovery procedures cannot always be avoided. This insight is also reflected in the working paper of the European Commission that accompanies the proposal for the Mortgage Credit Directive; on which we will elaborate later in this article.²⁶ Although the Commission states at first that foreclosures “should constitute a measure of last resort for a lender” and that measures to avoid foreclosures should be taken, they also acknowledge that foreclosure cannot be completely ruled out and advise that “common sense and humanity should always prevail at all levels (lender, authorities, courts, etc.) and throughout the whole procedure”.²⁷ Therefore, the enforcement stage is the second stage to investigate through our comparative framework.

During the enforcement proceedings, we can also identify a common interest of the mortgagor and the mortgagee. If enforcement is inevitable, the proceeds of the enforcement procedures are crucial to both the mortgagee and the mortgagor. The mortgagee will receive these proceeds to recover his claim, while the mortgagor will mostly benefit from the remaining proceeds. Equally important are the enforcement costs in case they need to be paid before the proceeds are distributed among the stakeholders. We will therefore use the term ‘net proceeds’ here.

The net proceeds of preventive measures are also important in case these measures contain the sale of the home. An element that needs to be taken into account when studying default resolution approaches as well is the length of the procedure. The length of the procedure can have an effect on the net proceeds, since a longer procedure will increase the payment arrears and in most cases also the enforcement costs. The length of the procedure could also affect the choice for a consensual or non-consensual approach. In the pre-enforcement phase, the mortgagee wants the mortgagor to rectify the possible defaults within a short timeframe. If this is not possible, an enforcement procedure might be a more efficient tool to protect the mortgagee’s financial interests, especially if these procedures take significantly less time. Evidently, the reverse is true as well: when the enforcement process is long-winded, prevention of enforcement might be an enticing option for the mortgagee. At the same time, the duration of the process could also have an effect on the welfare of society,

26 European Commission, *ibid.*, p. 11.

27 European Commission, *ibid.*, p. 11.

28 L. Chiquier, O. Hassler & S. Butler, ‘Enforcement of Mortgage Rights’, in: L. Chiquier & M. Lea (eds), *Housing Finance Policy in Emerging Markets*, The International Bank for Reconstruction and Development/The World Bank 2009, doi: 10.1596/0978-0-8213-7750-5.

because it affects the willingness of lenders to give out mortgage loans and the risk premium of credit rates.²⁸

3 Dimensions

In order to carry out a proper analysis of the functioning of the different default resolution approaches, we have chosen to take a three-dimensional approach. The dimensions form the glasses through which we analyse the different default resolutions approaches. As we will explain, comparing only the national regulations does not provide a complete picture. Analysis of comparative literature and (national and international) case law learns that, in order to properly understand the functioning of the different systems, the international legal framework and socio-economic and financial perspectives should be taken into account as well. With these three dimensions – *i.e.* the national legal framework, the international legal framework and the socio-economic and financial aspects, we want to identify what Bussani & Mattei call ‘legal formants’ of default resolution approaches.²⁹ As explained earlier, legal formants are “all those formative elements that make any given rule of law amidst statutes, general propositions, particular definitions, reasons, holdings, etc.”³⁰ They can be used not only to analyse the regulation regarding default resolution approaches, but – to understand the law in a given system – also the functioning of these approaches in practice. In this paragraph, we elaborate on these dimensions and outline their relevance for this particular framework. We also point to some existing research in this field and explain what we will add to the current literature.

3.1 *National Legal Framework*

From a traditional property law perspective a mortgage can be seen as a security right. The mortgagor (the debtor) uses his ownership to give the mortgagee (the creditor) a security right. This security right can be used in case of default. As Thompson puts it, “[t]he concept of security for a loan is not a complex one to grasp. If the borrower cannot repay the loan, then the creditor may sell the property in question in order to recover what he is owed.”³¹ Similarly, Grotius

²⁹ Bussani & Mattei, *ibid.*, p. 343–346; 351–354.

³⁰ Bussani & Mattei, *ibid.*, p. 344.

³¹ M.P. Thompson, *Modern Land Law*, Oxford: Oxford University Press 2012, p. 460.

³² Grotius 2.4.8.1., as translated by R.W. Lee, *An Introduction to Roman Dutch Law*, Oxford: Clarendon Press 1953, p. 183.

defines a mortgage as a “right over another’s property which serves to secure an obligation”.³² Hence, as soon as the debtor is in default with his obligations, the mortgagee can use his security right and foreclose the mortgaged object. In many countries, the Civil Procedure Law prescribes the mortgage enforcement procedure. Most commonly, the mortgagee has the power to transfer the property in case of default. In most countries with a Roman law tradition, the law prohibits the mortgagee from acquiring the property in case of default (*lex commissoria*).³³ In common law countries however, this form of recovery seems possible, based on a different approach of the mortgage concept.

This perspective – mortgage law as a part of national property law, with procedural law to describe the enforcement proceeding – is the starting point of most existing comparative research in the field of mortgage enforcement. The aim of such research is often to clarify the complex regulation used in this field, like the 2009 research of Stöcker & Stürmer.³⁴ The research may also be used to identify similarities and differences of mortgage legislation in order to show common structures in different jurisdictions, like the research of Schmid & Hertel of 2005.³⁵ These studies mainly describe the concrete outcome of the weighing of interests by the legislator and have less attention for the practical functioning of the procedures. Such studies have a broader perspective than that of our research as they also include the process of creating and registering a mortgage. Conversely, these studies tend to focus more on ‘the hard approach’ instead of on those agreements between the mortgage debtor and lender which seek to prevent foreclosure. Also worth mentioning here is that both of the aforementioned studies focus on real property law in general. Contrarily, our research takes a narrower approach and only includes owner-occupied residencies. The last remark on these studies is that they were executed before or during the last credit crisis. Since this period many jurisdictions have changed their legislation in this field. This same critique also applies to the comparative research of the European Commission on *National*

33 J.M. Milo, ‘Comparative Remarks on the Impact of Mortgage Credit Directive 2014/17/EU. Operating Credit Agreements and Powers of the Mortgagee’, in: M. Anderson & E. Arroyo Amayuelas (eds), *The Impact of the Mortgage Credit Directive in Europe: Contrasting Views From Member States*, Zutphen: Europa Law Publishing 2017, p. 453. See also: Schmid & Hertel, *ibid.*, p. 93–94.

34 O.M. Stöcker & R. Stürmer, *Flexibility, Security and Efficiency of Security Rights over Real Property in Europe Volume III. Results of the workshops of the round table “Security Rights over Real Property” held in Berlin 2009*, Berlin: Verband Deutscher Pfandbriefbanken 2009.

35 Schmid & Hertel (eds), *ibid.*

36 European Commission, *ibid.*

37 European Commission, *ibid.*, p. 3.

measures and practices to avoid foreclosure procedures for residential mortgage loans which was published in 2011.³⁶ This document aims to offer examples and guidance to national authorities and mortgage creditors of measures to avoid foreclosure proceedings.³⁷

Examples of national legislative developments created afterwards include the 2015 Dutch legislation introduced to attract a wider variety of bidders (especially private persons) and to gain higher net proceeds. This law was implemented as a reaction to research that showed the high discounts on public auctions,³⁸ and research that points at collusion by auction bidders.³⁹ Another example can be found in Spanish legislation. In a reaction to the cases of the ECJ on the Unfair Terms Directive (see paragraph 3.2.3), Spain introduced a new objective for mortgage debtors to oppose a mortgage enforcement procedure based on unfair terms in the loan agreement.⁴⁰

Other comparative research worth mentioning here, are the studies that take a more economic approach and focus on the outcomes of foreclosure procedures, in terms of length, cost and revenue. The reports published within the EU project *The Integration of EU Mortgage Credit Markets* are worth mentioning here. To be more specific, the study of the European Mortgage Federation (EMF) is rather interesting, detailing the concrete length and costs of forced sale procedures in 16 of 25 EU Member States.⁴¹ The research carried out here partly overlaps the study of Schmid & Hertel mentioned before, as it also maps the different procedures in the mortgaging process by using country reports. Nonetheless, the EMF study is more focused on the efficiency of the procedure. Where it describes the foreclosure procedure, it takes into account other aspects than the previously mentioned research and is therefore of particular interest to our study, like common practices in Member States.

38 D. Brounen & M. de Jong-Tennekes 'Executieveilingen: verbeteren of voorkomen?', 2012, https://www.mejudice.nl/docs/default-source/download/executieveilingen_2012.pdf?5idd36_o. This research shows an average discount of 34% of houses sold by public auctions in the Netherlands between 2006 and 2011.

39 H. Ferwerda *et al*, *Malafide activiteiten in de vastgoedsector. Een exploratief onderzoek naar aard, actoren en aanpak* (WODC research), Den Haag: WODC, Ministry of Justice, 2007, p. 100–107.

40 S. Nazarre-Aznar & R.M. Garcia-Teruel, 'Evictions and homelessness in Spain 2010–2017', in: Kenna *et al* (eds), *Loss of Homes and Evictions across Europe. A Comparative Legal and Policy Examination*, Cheltenham UK/Northampton, MA, USA: Edward Elgar Publishing, 2018, p. 304.

41 European Mortgage Federation, *Study on the Efficiency of the Mortgage Collateral in the European Union*, 2007, via https://www.law.berkeley.edu/files/bclbe/EU_Efficiency_Mortgage_Collateral_2007.pdf.

When studying the national legal framework on default resolution approaches, it is important to look further than the traditional property law and civil procedure law legislation as has been stressed prior. For example, The *Aziz* case, further elaborated on in paragraph 3.2.3, shows us that consumer protection law also plays a role here. Another example highlighting the influence of consumer protection legislation on default resolution approaches is the Mortgage Credit Directive which also serves to indicate the growing influence of international regulation in the area of resolution approaches.

3.2 *International Legal Framework*

As Kenna describes, while property and land law are primarily national institutions, their application and content are heavily influenced by international dimensions.⁴² This also applies to mortgage enforcement proceedings, especially since the last credit crisis. This crisis caused a rise in mortgage enforcement proceedings and exposed “gaps in the procedural protection of mortgage debtors and unearthed the imbalances in the respective positions of the parties in the contractual and post-signing contractual processes, deeply rooted in the unlimited right of the mortgagee to repossess.”⁴³ Particularly in Europe, the absence of sufficient national procedural protection led to an interesting development in mortgage enforcement as debtors turned to the Court of Justice of the European Union to seek protection based on the Unfair Terms Directive. Furthermore, the enhanced role of the ECB as described in paragraph 2, and its supervisory role regarding NPLs can affect the private law relationship based on the mortgage contract. Lastly, in many international legal sources, we find a right to housing or at least some kind of protection for homeowners in default facing a mortgage enforcement procedure or eviction as a result of this procedure. We can find three levels of legal protection here: the UN level, the European Human Rights level (including case law from the European Court of Human Rights) and the level of EU regulation.

3.2.1 UN Treaties

In the first place, the right to housing is codified in Article 11 of the International Covenant on Economic, Social and Cultural Rights, ratified by all (former) EU Member States (so including the United Kingdom). This article obliges States to recognize the right to an adequate standard of living for himself and his family, including *inter alia* adequate housing. In 2014, the UN Committee on

42 Kenna, *ibid.*, p. 46.

43 Beka, *ibid.*, p. 271.

44 UN CESCR, *Communication No. 2/2014, Views adopted by the Committee at its fifty-fifth session (1–19 June 2015)*, October 13, 2015, E/C.12/55/D/2/2014.

Economic, Social and Cultural Rights (UN CESCR) emphasised the importance of this Covenant in mortgage enforcement proceedings.⁴⁴ In accordance with General Comment No.7 of the UN CESCR, the Committee held that States are obliged to take “appropriate legislative measures to ensure that the mortgage enforcement procedure and the procedural rules contain appropriate requirements.” Such measures include the provision of “adequate and reasonable notice” to all persons affected by the eviction. Although the General Comment No. 7 is intended to apply to so-called illegal evictions, the Committee has found that this protection is also applicable in similar situations including mortgage enforcement proceedings given that such proceedings “can seriously affect the right to housing”. In this sense, States are obliged to ensure the accessible legal remedies for those that face a mortgage enforcement procedure.

Another important UN Treaty, which has also been ratified by all (former) EU Member States, important in our discussion is the Convention on the Rights of the Child. According to Article 3 of this Convention, in all actions concerning children, the best interests of the child should be a primary consideration. The exact implications of this Article on mortgage enforcement proceedings are still unclear, although Kenna mentions Spanish case law in which the court stressed the need to consider the Convention and Article 8 of the European Convention on Human Rights, if minors are affected by an eviction.⁴⁵ Despite the fact that these cases concerned tenants facing eviction, the broad phrasing of Article 3 should logically apply to mortgage enforcement proceedings.

3.2.2 European Convention on Human Rights

The European Convention on Human Rights (ECHR) contains a strong protection for homeowners to be found in Article 1 of Protocol 1 (right to peaceful possession of property). Article 8 (right to respect for the home) also grants further protection. Here, we only point to the most important implications of these articles for mortgage enforcement proceedings. This is done primarily by referring to relevant case law of the European Court of Human Rights (ECtHR). Important here is *McCann v. The United Kingdom* in which the ECtHR found that the loss of one’s home is the most extreme form of interference with the right to respect for the home.⁴⁶ As such, any person at risk of an eviction should be able to have the proportionality of this measure determined by a national tribunal. Although the Court emphasises that a so-called proportionality defence will only be successful in very exceptional cases, even the possibility of a court examining the specific details of a case in the light of Article 8, seems to offer a major protection to homeowners facing an eviction.

45 Kenna *et al*, p. 46.

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

Nield & Hopkins argue that the right to respect for the home should be considered in all creditor enforcement proceedings and therefore that the national courts must assess the proportionality of the creditor's right to enforcement.⁴⁷ This also seems to follow from the *Zehentner v. Austria* judgment.⁴⁸ In this case, the Court held that "the judicial sale of an applicant's home and his or her eviction were to be seen as an interference with the right to respect for his or her home".⁴⁹ Therefore, the homeowner that faces a foreclosure, could be protected through Article 8 as well. In this light, the Court stated that the judicial sale and the eviction need to be seen as a whole.⁵⁰

However, later judgments have shed light on the so-called horizontal application of Article 8 in cases where only private parties are involved. In mortgage enforcement, often there are only private parties involved, namely a financial institution (the mortgagee) and a private homeowner. This is especially true when we look at non-judicially supervised mortgage enforcement proceedings. Therefore, it is interesting to study whether this farfetched protection of Article 8 also applies to these proceedings.

According to the view taken by Strasbourg Court in the *Vrzić v. Croatia* case, an important aspect of finding a violation of Article 8 in the *McCann* case and subsequent similar judgments afterwards, was "the fact that there was no other private interest at stake".⁵¹ In cases like *Vrzić v. Croatia* however, the homeowner was a private person and the creditors were private enterprises. Here, the approach "is somewhat different and [...] a measure prescribed by law with the purpose of protecting the rights of others may be seen as necessary in a democratic society", the Court ruled.⁵² Furthermore, the applicants entered voluntarily into a contract, and specifically agreed that the creditor was entitled to sell the house to seek enforcement.⁵³ Therefore, there had not been a violation of Article 8 despite the argument of the debtors that the enforcement procedure in Croatia did not allow the courts to carry out a proportionality test in enforcement proceedings. This decision was repeated in the *F.J.M. v. the*

47 S. Nield & N. Hopkins, 'Human Rights and mortgage repossession: beyond property law using Article 8', *Legal Studies*, Vol. 33 No. 3, doi: 10.1111/j.1748-121X.2012.00257.x, p. 431-454. The authors use the term 'mortgage repossession' here, referring to the English procedure, but we interpret this as a statement for all mortgage enforcement proceedings, since their thesis is that the right to respect for the home "should fall for consideration in all enforcement proceedings against the home by a creditor, regardless of the legal route through which the application reaches the court."

48 ECtHR 16 July 2009, App. No. 20082/02 (*Zehentner v. Austria*).

49 ECtHR 16 July 2009, App. No. 20082/02 (*Zehentner v. Austria*), para. 54.

50 ECtHR 16 July 2009, App. No. 20082/02 (*Zehentner v. Austria*), para. 54.

51 ECtHR 12 July 2016, App. No. 43777/13 (*Vrzić v. Croatia*).

52 ECtHR 12 July 2016, App. No. 43777/13 (*Vrzić v. Croatia*), para. 67.

53 ECtHR 12 July 2016, App. No. 43777/13 (*Vrzić v. Croatia*), para. 68-72.

United Kingdom judgment.⁵⁴ From this trend it can be said that the ECtHR limits the applicability of Article 8 in mortgage enforcement proceedings.

Keeping on the subject of the horizontal application of Article 8, it is interesting to note that the Court in the *Vrzić v. Croatia* case *did* however apply Article 1 of Protocol 1; the Court emphasised that even in cases with only private parties involved, States should afford judicial procedures that offer the necessary procedural guarantees.⁵⁵ This means that enforcement proceedings “must afford the individual a reasonable opportunity of putting his or her case to the relevant authorities” in order to effectively exercise the right to peaceful possession.⁵⁶ This judgment seems remarkable as it leaves room for a proportionality defence of the homeowner by applying Article 1 of Protocol 1 instead of Article 8.

Also, the *Vaskrsić v. Slovenia* case is important. In this case, 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 ECHR:

“While acknowledging that the Contracting States have a wide margin of appreciation in this area [...] and that the aims pursued by the relevant legislation might concern also issues exceeding the mere payment of a particular debt, such as the improvement of repayment discipline in the country concerned, the Court is nevertheless of the view that, 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 [...].”

A similar judgment was made in the *Rousk v. Sweden* case, where the Court deemed the enforcement of the home and the eviction following the sale to be “excessive and disproportionate”, especially given the fact that the applicant had other assets that could have been seized instead to recover the debt.⁵⁷ In these cases the foreclosure proceedings were initiated by public authorities. Therefore, it is uncertain whether these judgments apply to proceedings with only private parties involved, although we have discussed before that the Strasbourg Court leaves more room for the application of Article 1 of Protocol 1 in horizontal relationships. Unfortunately, the breadth of this paper does not allow for a further elaboration on this interesting discussion. Therefore,

54 ECtHR 29 November 2018, App. No. 76202/16 (*F.J.M. v. the United Kingdom*).

55 ECtHR 12 July 2016, App. No. 43777/13 (*Vrzić v. Croatia*), para. 101.

56 ECtHR 12 July 2016, App. No. 43777/13 (*Vrzić v. Croatia*), para. 110.

57 ECtHR 25 July 2013, App. No. 27183/04 (*Rousk v. Sweden*), para.125.

we have highlighted some interesting literature which further delves into this topic should you wish to learn more.⁵⁸ In the research project, we will however identify how the different States protect the rights of Article 1 of Protocol 1 and Article 8 in mortgage enforcement proceedings and how homeowners can protect their rights through court proceedings.

3.2.3 EU Regulation

Also important for mortgage proceedings are Article 16 and 31 of the European Social Charter. Article 16 contains an obligation to provide family housing, while Article 31 obliges States to ensure the effective exercise of the right to housing. As the case law of the European Committee of Social Rights shows, these articles are of special importance when it comes to an eviction. For example, in the *European Roma Rights Centre (ERRC) v. Italy*, the Committee notes “that States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned and that alternative accommodation is available.” Furthermore, the “law must also establish eviction procedures, specifying when they may not be carried out (for example, at night or during winter), provide legal remedies and offer legal aid to those who need it to seek redress from the courts.”⁵⁹ In another decision, the Committee emphasises the need for evictions to take place in accordance with the applicable procedural rules and stresses that these rules should sufficiently protect the rights of the persons concerned.⁶⁰

The EU Charter of Fundamental Rights contains the rights and freedoms of every individual in the European Union. Article 7 of this Charter contains the right to respect for the home. In the discussion on the horizontal application of Article 8 and the proportionality test in particular, a 2014 CJEU case is of special importance. Here, the CJEU stated that “that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed [...]. Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of

58 See (besides the literature mentioned before), for example: M. Vols, ‘European law and private evictions: property, proportionality and vulnerable people’, *European Review of Private Law* 2019, Volume 27, Issue 4, p. 719–752; Sarah Nield, ‘Article 8 Respect for the Home: A Human Property Right?’, *King’s Law Journal*, 2013, Volume 24, Issue 2, p.147–171, doi:10.5235/09615768.24.2.147.

59 *European Roma Rights Centre (ERRC) v. Italy*, Complaint No. 27/2004, decision on the merits of 7 December 2005, § 41.

60 *European Roma Rights Centre (ERRC) v. Greece*, Complaint No. 15/2003, decision on the merits of 8 December 2004, § 51.

the Charter that the referring court must take into consideration when implementing Directive 93/13”.⁶¹

Simón-Moreno & Kenna defend the importance of this Charter of Fundamental Rights for the functioning of EU regulatory law, particularly given the limitations of other human rights instruments like the ECHR.⁶² In their vision, European regulatory law should be interpreted through the EU Charter of Fundamental Rights; this, they argue, would add a human rights dimension to EU regulatory law “thus ensuring the physical, social and psychological considerations of consumers”. They plead for a broad application of the Charter by the European Commission, the European Central Bank and the European Banking Authority. Furthermore, they emphasise that national legislators should pass legislation in a Charter-compliant way and that the application of said Charter should be extended to judicial interpretations. They point out that the Charter is not applied uniformly in the EU “as it depends on a more active role being played by national judges, and the legal foundation and the ambit of the ex officio principle in consumer law seems to be unclear in many countries”.

At the level of EU regulation, we also point at the interesting judgments of the Court of Justice of the European Union based on the Unfair Terms Directive. The famous *Aziz* case was the first to show the CJEU repairing “gaps in the procedural protection of mortgage debtors”⁶³ when many homeowners in Spain faced the devastating effects of the credit crunch.⁶⁴ Here, the Court decided that the Unfair Terms Directive “must be interpreted as precluding legislation of a Member State [...], which, while not providing in mortgage enforcement proceedings for ground of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court before which proceedings have been brought [...], to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee full effectiveness of its final decision.”

As Kenna & Simón-Moreno point out, the novelty of the *Aziz* case was the recognition by the CJEU that consumer contract law applies to mortgaged homes.⁶⁵ This issue is therefore not limited to property law, but also a matter of

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

62 H. Simón-Moreno & P. Kenna, ‘Towards a new EU regulatory law on residential mortgage lending’, *Journal of Property, Planning and Environmental Law*, 2019, doi: <https://doi.org/10.1108/JPEL-06-2018-0017>.

63 Simón-Moreno & Kenna, *ibid.*

64 CJEU, 14 March 2013, Case c-415/11 (*Aziz v. Caixa d'Estalvis de Catalunya*).

65 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*, 2019, doi: <https://doi-org.proxy-ub.rug.nl/10.1111/eulj.12348>.

consumer protection. This is also stressed by Advocate General Kokott, where she states that “where the mortgaged property is the debtor’s own home, a mere claim for damages is not conducive to guaranteeing effectively the rights conferred on the consumer [since it] does not constitute effective protection against unfair terms if, in connection with such terms, a consumer is defenceless in accepting the realisation of a mortgage and thus the judicial auction of his home, the associated loss of ownership and eviction, and can only make claims for damages by way of subsequent legal protection”.⁶⁶ This line of reasoning is followed by the Court, where it reasons that it “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.”⁶⁷ The *Aziz* case was therefore the first to create a new paradigm for property law at a national level. Together with the *Kušionová v. SMART Capital a.s.* case cited before, these developments led to what Kenna calls “a nascent European standard, linking mortgage law, consumer law, and human rights law, with the UCTD providing the nexus among all three areas.”⁶⁸

The integration of EU consumer law with national mortgage law was further promoted by Directive 2014/17/EU of the European Parliament and of the Council 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, known as the Mortgage Credit Directive. Recital 27 of this Directive encourages professional mortgage lenders to consider a forced sale as the last resort and to act with forbearance instead.⁶⁹ Beka states that the Mortgage Credit Directive is the first European legislation to establish a link between credit default, indebtedness and the family home.⁷⁰ This Directive could be seen as a result of increased attention at a European level for consumer protection in the field of mortgage loans. For this research project, Recital 27 and Article 28 of the Directive are of particular interest. Article 28 entails provisions for arrears and foreclosure, and because of its close relationship to this research project is cited here explicitly:

66 Opinion of AG Kokott delivered on 8 November 2012, See CJEU, 14 March 2013, Case c-415/11 (*Aziz v. Caixa d'Estalvis de Catalunya*).

67 CJEU, 14 March 2013, Case c-415/11 (*Aziz v. Caixa d'Estalvis de Catalunya*), para 61.

68 Kenna, *ibid.*, p. 73.

69 See also: European Banking Authority, *Final Report. Guidelines on arrears and foreclosures*, EBA/GL/2015/12, June 1, 2015, <https://www.eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation/guidelines-on-arrears-and-foreclosure>.

70 Beka, *ibid.*, p. 259.

“1. Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated.

2. Member States may require that, where the creditor is permitted to define and impose charges on the consumer arising from the default, those charges are no greater than is necessary to compensate the creditor for costs it has incurred as a result of the default.

3. Member States may allow creditors to impose additional charges on the consumer in the event of default. In that case Member States shall place a cap on those charges.

4. Member States shall not prevent the parties to a credit agreement from expressly agreeing that return or transfer to the creditor of the security or proceeds from the sale of the security is sufficient to repay the credit.

5. Where the price obtained for the immovable property affects the amount owed by the consumer Member States shall have procedures or measures to enable the best efforts price for the foreclosed immovable property to be obtained.

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.”

Article 28 prescribes reasonable forbearance before foreclosure proceedings. Interestingly, the importance of forbearance is also emphasised in the ECB's *Guidance to banks on non-performing loans* as described earlier. Since this article explicitly prescribes reasonable forbearance before foreclosure proceedings, there is a direct link with this research subject. The relationship of this Article 28 with our research will be further elaborated in paragraph 5.

Where the described developments seem to point in the direction of more consumer protection, Domurath makes an important remark where she shows that the EU mortgage law takes a formalistic approach of contracts.⁷¹ This approach respects the initial choice of the parties and leaves the performance of the contract according to the rules established at the time the contract was concluded, with some exceptions in the Mortgage Credit Directive and CJEU cases. She states the EU mortgage law is therefore “ill-equipped to protect the welfare of the consumer by dealing with unforeseen circumstances that negatively affect the consumer's ability to repay the loan”.⁷² She therefore argues

71 I. Domurath, 'Mortgage Debt and the Social Function of Contract', *European Law Journal* (22) 2016, p. 764–767.

72 Domurath, *ibid.*, p. 767.

to make “use of the doctrine of change in circumstances under a more cooperative understanding of contracts and their social function”.⁷³ Interestingly, many Member States have an existing concept that deal with a change of circumstances. Incorporating the concept of a cooperative contract law approach could “help to avoid the social repercussions following eviction, homelessness and social exclusion, and thus to fulfil the social function of contracts”.⁷⁴

3.3 *Socio-Economic and Financial Dimension*

This research is, in the first place, legal research which aims to compare the different systems of mortgage enforcement proceedings in Europe. Nevertheless, as has been noted prior, there are important socio-economic and financial aspects that should be taken into account in order to have a clear understanding of the functioning of default resolution approaches in practice.

To exemplify the importance of these other non-legal aspects, an example from the Netherlands is of particular help. The Netherlands is often criticised for its high mortgage loans and tax deductions of mortgage rent.⁷⁵ Despite these risks, there is a relatively low chance for households to fall into arrears and of foreclosure. According to a recent report commissioned by the Dutch Banking Association, the reason why Dutch households are among the best performing in Europe is due to the risks which are mitigated by *inter alia*, the so-called *Nationale Hypotheekgarantie* and the Dutch social security system.⁷⁶ The *Nationale Hypotheekgarantie* (Dutch Mortgage Guarantee Scheme, NHG) is a collective insurance for mortgage loans regarding homes, possible for loans up to a maximum of € 355,000 in 2022 (or, for a loan to carry out energy-saving measures up to € 376,300). If a homeowner falls into arrears with his mortgage payments due to divorce, disability, death of the partner or unemployment, NHG can sometimes assist with, for example, job coaching or reskilling assistance to avoid foreclosure.⁷⁷ In instances where a foreclosure cannot be prevented and the revenues are not high enough to cover the debt, the NHG can step in and pay back the loss to the mortgage lender. The homeowner needs to meet certain criteria before NHG will write off this debt. For example, there must have been an attempt to avoid foreclosure and sell the house by a private

73 Domurath, *ibid.*, p. 771.

74 Domurath, *ibid.*, p. 769.

75 De Nederlandsche Bank, ‘Our high mortgage debt – risks and solutions’, <https://www.dnb.nl/en/current-economic-issues/mortgage-debt/>; IMF Country Report Kingdom of the Netherlands/the Netherlands, April 2017, No. 17/93.

76 Ecorys, *Risks on the Dutch housing market. Putting the Dutch housing market into European perspective*, Brussels March 26, 2021, p. 38.

77 Ecorys, *ibid.*, p. 32.

sale. If the mortgage loan is secured by NHG the interest rate that needs to be paid by the debtor is lower.

This example shows that the NHG directly influences the functioning of debt resolution approaches in various ways. First of all, by reducing the mortgage interest rates of mortgage loans backed by NHG security.⁷⁸ Secondly, by prescribing the ways of default resolution. And thirdly, by mitigating the outcomes of a foreclosure, since the remaining debt could be written off if the criteria are met.

In our comparative research project, we want to involve the socio-economic and financial aspects that *directly* affect the functioning of default resolution approaches in practice. As the Dutch example shows, these aspects need to be taken into account when studying the functioning of debt resolution approaches in practice. These factors help to see the whole picture of default resolution approaches and are therefore essential for this research. However, we do not want to blur the focus of this research and involve all possible factors for (the number of) foreclosures, real estate markets as such or the mortgage market in particular. By limiting the aspects to those that *directly* affect the functioning of default resolution approaches we attempt to clarify this focus. For example, as Chmelar describes, the expansion of mortgage markets in the last decades of the previous century was caused by factors such as the rise in the supply of mortgage products and the higher availability of housing credits.⁷⁹ Factors like these contributed to the impact of the last credit crisis and the number of foreclosures, but they do not *directly* affect default resolution approaches. Therefore, these indirect factors will not be a part of this research.

4 A Three-Stage Framework

Taking into account the interests and the dimensions described above, we propose a three-step framework for our comparative research on default resolution approaches. This framework is inspired by the model that is used in the pilot project *Promoting protection of the right to housing* by Kenna *et al* to analyse the process of eviction in EU Member States. Kenna *et al* divide the judicial eviction process into three phases to illustrate the process of eviction and its links to homelessness.⁸⁰

78 Home owners do need to pay a one-time fee of 0.6% of the total loan to NHG, called the suretyship fee.

79 Chmelar, *ibid.*, p. 13–14.

80 Kenna *et al.*, *ibid.*, p. 21–22.

The model of *Kenna et al* separates judicially supervised evictions from non-judicially supervised evictions and then further distinguishes three phases in the judicially supervised eviction process: the pre-court phase (from the moment of the issuance of the formal instruction to leave, like a notice to quit, a letter seeking repossession etc.); the court process (up to the decision to evict or the possession order); and the phase from court decision to the actual eviction. The non-judicially supervised evictions are distinguished into legal and illegal evictions by *Kenna et al*, without a further distinction in phases. This is possibly due to the wide variety in procedures within this category and maybe also not necessary for the aim of the model, which is to illustrate the process of eviction and the link to homelessness. For our framework, the distinction between judicial and non-judicially supervised procedures is also relevant, since mortgage enforcement proceedings could also be divided into these categories.⁸¹ Conversely to *Kenna et al* however, the distinction in phases is possible in both types of procedures. Therefore, the phases we describe below apply to both judicial and non-judicially supervised enforcement procedures.

The model of *Kenna et al* aims to analyse all eviction proceedings and distinguishes four types of occupiers; owner occupation with or without mortgage; private rented with or without assistance; social rented (including institutional types of accommodation); and unauthorised informal occupancies. Our framework will only be used for the analysis of one of these groups, namely, owner-occupiers. Moreover, in order to further refine this group, we only study proceedings by professional mortgage lenders. Put differently, we have further specified the model to fit our specific research topic.

The model of *Kenna et al* starts with the moment of the issuance of the formal instruction to leave, *i.e.* a notice to quit, a letter seeking repossession *et cetera*.⁸² In our research, we will also investigate the phase *before* the actual notice to leave. This is what we call the pre-enforcement phase. Our hypothesis is that there will be considerable differences at a regulatory level. We expect that there will be jurisdictions where there is already detailed legislation on these phases, like the Irish Code of Conduct on Mortgage Arrears that sets out the obligations for mortgage lenders in case of arrears of the homeowner. We also expect to find jurisdictions more like the Netherlands, in which the pre-enforcement phase is mostly left to self-regulation of financial institutions.⁸³

81 European Mortgage Federation, *ibid.*, p. 15; H. Gramckow, 'Court Auctions: Effective Processes and Enforcement Agents', *Justice & Development Working paper series* 18/2012, p. 5–9.

82 *Kenna et al.*, *ibid.*, p. 22.

83 European Commission, *ibid.*, p. 4.

Further research into the pre-enforcement stage is also interesting from another perspective. Although the developments described earlier emphasise the need to prevent foreclosures as much as possible, there is little empirical and legal data about the procedures that are followed at this stage. This point is outlined by Kenna *et al* where they describe the outcome of their data search for all three different stages of judicially supervised evictions:

Comparable data for those households who received a notice to quit but who were not evicted at the last stage of the eviction process is not available. Many people might have left 'voluntarily' and either found another home or became homeless. Some might have managed to stay in their homes, due to the efforts of preventive services, or through private arrangements with the landlord (for example reaching agreements to pay rent arrears in instalments).⁸⁴

The importance of preventing mortgage enforcement as much as possible in the light of homeowner protection and the right to housing also requires paying more attention to what actually happens at this stage. Therefore, we want to study the regulation that prescribes what steps should be taken and look into whether the parties involved comply with this regulation in practice. This implies an analysis of the regulation of countries regarding default and the stage before the actual enforcement proceedings is an important aspect of this research.

This results in a three-stage approach for our framework to compare default resolution approaches in Europe:

1. The pre-enforcement phase, starting with the mortgage debtor/homeowner being in default and aiming to prevent enforcement as much as possible. We divide this stage into 1A and 1B to gain more insight in the various aspects that play a role here.
 - 1A indicates the regulatory requirements of default and therefore specifies when we enter this stage;
 - 1B contains the so-called consensual alternatives. These are the alternatives resulting from any kind of agreement between the debtor and the lender. In this phase, the *soft approach* will be most prominent.

84 Kenna *et al.*, *ibid.*, p. 43.

2. The second stage is the enforcement phase that starts when the pre-enforcement phase does not lead to a default resolution. As an official starting point, we could take the moment of the instruction to leave as was taken by Kenna *et al.*⁸⁵ However, in practice, this instruction can already be part of the first phase. Therefore, we have chosen to take the less visible but practically more accurate realisation that a non-enforcement resolution was not possible. In this phase, the *hard approach* will be most prominent.
3. Thirdly, the eviction and distribution of the proceeds phase: the stage after the actual foreclosure, when the debtor (and their family) is evicted from the home (court order). This stage will not be part of our research for various reasons. First of all, our research is focused on default resolution approaches and this third stage takes place *after* the resolution phases. Secondly, we have found that there is already an abundance of research on this phase such as the impressive work by Kenna *et al* on *Loss of homes and Evictions across Europe*, which contains a prescription of regulation and policies in various countries.⁸⁶ Also, the *Evict project* by Vols must be mentioned in this perspective.⁸⁷ The distribution of the proceeds will only be part of our research if it influences the functioning of the default resolution approaches. An example of this is the study of rights that are extinguished after the forced sale and the question if they have a right on the proceeds instead.

With this three-stage approach, we will be able to compare the different default resolution approaches. Keeping in mind the interests involved and the relevant dimensions, we are interested in the regulatory aspects of each phase, the influence of financial and socio-economic circumstances and the *functioning* of the default resolution approaches in practice. Based on the existing literature, we will describe the relevant regulatory, financial and socio-economic aspects that we want to study in each phase below. To study the *functioning* in practice, we are interested in empirical data on net proceeds (*i.e.* revenue minus costs) and the length of each phase, but we are also interested in more qualitative aspects such as the position of the homeowner (considering the growing attention in international (human rights) law), the position of other parties involved, how often and why procedures are just or not and possible pitfalls of procedures. With the latter we mean that there might be some legal or practical elements that go against the possibility of default resolution approaches.

85 Kenna *et al*, *ibid.*, p. 22.

86 Kenna *et al* (eds), *ibid.*

87 See for more information: <https://www.eviction.eu/>.

For example, mortgagors might intentionally frustrate the procedure by litigation, the costs of the procedure could be too high, hindering the initiation of enforcement procedures (which can have adverse effects). Moreover, the court system of a country may also be overwhelmed in general, constituting a pitfall for countries with a foreclosure procedure that takes place in courts.⁸⁸ Because these elements are relevant in every stage we describe below, we will not elaborate on them in the next paragraph.

5 The Detailed Framework for Comparing Default Resolution Approaches

Considering the three phases and the elements of interest discussed, the comparative framework will have the following structure. The elements will be further detailed in the following subparagraphs.

Phase 1A: Pre-enforcement; formalities

- a. Regulatory aspects of default
- b. Special provisions on initiation and prevention of mortgage enforcement proceedings
- c. How is the enforcement procedure initiated?
- d. Which parties are involved?
- e. Socio-economic and financial aspects to be considered
- f. Functioning in practice:
 - i. Position of the homeowner
 - ii. Length
- iii. How often are the aspects described under a and b applied?
- iv. Pitfalls

Phase 1B: Pre-enforcement; consensual alternatives

- a. What are the alternatives?
- b. Which parties are involved?
- c. Socio-economic and financial aspects to be considered
- d. Functioning in practice:
 - i. Position of the homeowner
 - ii. Net proceeds

⁸⁸ European Bank for Reconstruction and Development, 'Building an Effective Debt Enforcement Framework. Discussion Paper', *EBRD Conference Debt Enforcement in Europe and Beyond: The Road to Successful Reform*, December 6 2019, p. 35.

- iii. Length
- iv. How often are consensual alternatives applied?
- v. Pitfalls

Phase 2: Enforcement

- a. How is the enforcement procedure organised?
 - i. Judicially or non-judicially supervised procedure?
 - ii. Timeline of the procedure
 - iii. Role of mortgagor, mortgagee, and enforcement agents
 - iv. Regulatory requirements
- b. Alternatives to public auction/repossession
 - i. Forced private sale
 - ii. Transfer to the mortgagee
 - iii. Mortgagor remains owner of the property
- c. Which parties are involved?
- d. Who is the prospective buyer?
- e. Socio-economic and financial aspects to be considered
- f. Functioning in practice:
 - i. Position of the homeowner
 - ii. Net proceeds
 - iii. Length
 - iv. How often are the enforcement procedures and alternatives applied?
 - v. Pitfalls

5.1 *Pre-Enforcement Phase; Formalities*

In the pre-enforcement phase while the debtor is in default, the mortgage enforcement procedure is not yet initiated. At this stage, the mortgage enforcement procedure is prevented as much as possible. As mentioned prior, across the various jurisdictions there exists a multitude of regulations, both by legislation and by self-regulation of financial institutions on this topic. These measures could also be part of an agreement between mortgagee and mortgagor.

The very first element of comparison are the regulatory aspects of default. Default always encompasses non-payment of the loan and is a necessary component in all jurisdictions for the initiation of enforcement proceedings. The regulatory requirements however can vary across countries, depending on legislation. These requirements are further determined by the mortgage deed, mortgage loan contract or contractual provisions of the financial institutions, like the terms and conditions accompanying the mortgage loan contract. This way, these institutions can expand or deviate from the requirements for default. Also, an acceleration clause can be part of these contractual provisions. Under this clause, the whole loan is accelerated as a consequence of the default.

Secondly, we will study special provisions that exist, mainly to protect the homeowner, on prevention of the mortgage enforcement proceedings. Especially since the last credit crisis, many countries adopted measures to protect the mortgage debtor in default. For example, there can be legal requirements that specify the waiting period for the mortgagee to take legal action. In Spain under the *Ley 5/2019 reguladora de los contratos de crédito inmobiliario*, introduced in June 2019, the mortgagee can only start legal action after 12 months or 3% of the capital in arrears for the first half of the mortgage term and after 15 months or 7% of the capital in the second half of the mortgage term. These provisions also include those by which the mortgagor can (one-sidedly) prevent the (continuation of) mortgage enforcement proceedings themselves. An example of these types of measures is the extension of the waiting period provided by a judge to a mortgagor in default. In France for example, this extension can be up to 24 months.⁸⁹ Moreover, in some countries it is possible that the mortgagor unilaterally prevents any enforcement if they cure the default, by still paying the (entire) mortgage debt or just the missed instalments.⁹⁰ Here, we therefore also study the available defences mortgagors can use to postpone or cancel the enforcement, based on the regulation and case law of the various countries.

The third element consists of the formalities by which enforcement procedures can be initiated by law and/or regulation and the way by which they are initiated in practice by the mortgagee. This element contains the requirements for initiating the procedure, as prescribed by the law and regulation. For example, in some countries it is necessary to obtain a judgement before the enforcement proceedings can start, while in other countries the mortgage loan is directly enforceable in case of default. In this part of the research, it is important to keep in mind that the legal right to initiate a nonconsensual enforcement process by the mortgagee is not always immediately used, for reasons described earlier in this article. In many cases, the mortgagee will first contact the mortgagor and discuss the default to find a consensual solution. Therefore, we will study the first steps a mortgagee takes when they notice a mortgagor is in or is threatening to go into default. Relevant in this regard are also the individual implementations of the Mortgage Credit Directive in the EU Member States and the Guidelines of the European Banking Authority (EBA) on Article 28 of this Directive.⁹¹ The guidelines establish behavioural norms

89 M. Uhry, 'Evictions in France', in: P. Kenna *et al* (eds), *ibid.*, p. 101.

90 In the Netherlands the mortgagor can pay the remaining mortgage loan and execution costs to prevent enforcement, art. 3:269 BW/Dutch Civil Code.

91 European Banking Authority, *ibid.* This report is accompanied by a document in which the relevant authorities have stated if they will comply, intend to comply or do not comply with these Guidelines (last updated April 13, 2021).

for mortgagees in case of (impending) default. For example, Guideline 1.1 prescribes that financial institutions should establish and keep up-to-date procedures to detect potential payment difficulties as early as possible. Moreover, Guideline 2 obliges financial institutions to work with the mortgagor to find out why the difficulties have arisen and to take appropriate steps in this regard. In our research, we will identify how these and other regulations function in various Member States.

5.2 *Pre-Enforcement Phase; Consensual Alternatives*

In the pre-enforcement phase, the mortgagor and mortgagee can attempt to resolve the default situation consensually. We refer to this option as the consensual alternatives to mortgage enforcement, since these alternatives are characterised by their consensual or reciprocal nature. Both parties attempt to find an acceptable solution without any kind of legal force. It is possible for the mortgagee to be required by law or regulation to attempt to find a consensual solution before initiating an enforcement procedure. Here, Article 28 of the Mortgage Credit Directive is relevant as well. The aforementioned EBA Guidelines to arrears and foreclosure that accompany Article 28 of the MCD state that mortgagees should take forbearance measures when a consumer is experiencing payment difficulties. The guidelines provide for debt restructuring or refinancing as examples of such a measure.⁹² Debt restructuring can involve extending the term of the mortgage, changing the type of mortgage, deferring repayment, changing the interest rate or offering a payment holiday.

It is also possible for financial institutions to regulate themselves and create their own policies around consensual default resolution. An example of this from the Netherlands is the irrevocable power of attorney ('onherroepelijke volmacht tot onderhandse volmacht') that was a practical initiative created during the last credit crisis.⁹³ This power of attorney was used to avoid the suboptimal effects of auction in case of default, handling the mortgagee the right to sell the property after the mortgagor had fallen into arrears. While the sale itself is forced in the sense that the mortgagee can one-sidedly sell the house, both parties agreed to the terms of this sale when the mortgagor signed the power of attorney. Also, the Commission staff working paper on national measures and practices to avoid foreclosure procedures must be mentioned here.⁹⁴ This document also contains alternatives used in the various

⁹² European Banking Authority, *ibid.*, Guideline 4.

⁹³ S.E. Bartels & L.C.A. Verstappen, 'Verkoop krachtens volmacht/lastgeving of executoriale verkoop?', *WPNR* 2011/6882 (in Dutch).

⁹⁴ European Commission, *ibid.*

EU Member States. However, since it was published in 2011, we will investigate whether this is still up-to-date.

As noted prior in this article, both the mortgagor and mortgagee can benefit from choosing an alternative to mortgage enforcement. If, for example, parties choose to restructure the debt, the mortgagor can remain in their home while the mortgagee will receive payment on modified terms that are acceptable to them, while avoiding a potentially lengthy and costly mortgage enforcement procedure with suboptimal results. At the same time, working towards a consensual solution will take time and require both parties to want to work together. It might also lead to decreased returns on the mortgage if the interest rate is lower post-restructuring. We also point out that the aspect of homeowner protection and the right to housing, as discussed in paragraph 6.2, plays an important role in searching for an alternative to enforcement as much as possible.

When examining alternatives to mortgage enforcement, it is important to first map the different kinds of alternatives both those required by regulation and those that have been created in practice. This category encompasses all default resolution approaches based on consent between the mortgagor and mortgagee.

5.3 *The Enforcement Phase*

In the enforcement phase, there are usually two options for the mortgagor and mortgagee. The mortgage could be enforced through the practically most used foreclosure procedure in a certain country, which is usually forced sale by public auction, or repossession in common law countries.⁹⁵ In many countries, alternatives exist as well. The enforcement phase, as noted before, is characterised by a non-consensual, hard approach.

The first aspect that needs to be studied is the organisation of the enforcement procedure. To compare procedures, the process needs to be described from the initiation until the distribution of the proceeds of the enforcement procedure (the timeline of the procedure), both by law and in practice. The distinction between judicially and non-judicially supervised enforcement proceedings is relevant here.⁹⁶ For judicially supervised enforcement procedures, it is also relevant if the procedure is an ordinary or a summary procedure. Furthermore, we will study the possibility and procedure of appeals. These elements influence various aspects of the functioning in practice, such

95 European Mortgage Federation, *ibid.*, p. 175 – 191; Schmid & Hertel (eds), *ibid.*, p. 93.

96 Kenna *et al*, *ibid.*, p. 22.

as the length and net revenue of the procedure, and are therefore interesting to study.⁹⁷

Relevant here is also the role of the parties that are directly involved in the procedure (the mortgagor, mortgagee, and the enforcement agencies). Henderson divides the existing basic court enforcement agency models: court-controlled, public sector specialist, private or quasi-private specialist and multiple-institution controlled enforcement.⁹⁸ An interesting paper by Gramckow shows that the type of enforcement agency influences the outcome of the procedure and this is therefore an interesting object of our comparative study.⁹⁹

Also, regulatory requirements play a role here. In many countries, law and/or regulation prescribes the bidding method, if there is a reserve price for the auction, if the auction is online and how the property must be valued. These elements also influence the length of the procedure and the net revenue.

The second element involves alternative enforcement procedures, which exist in three main categories. These categories are: forced private sale, transfer of property to the mortgagee, and enforcement without loss of ownership. These three options impact the mortgagor in profoundly different ways. The first category concerns forced sales, but in ways other than through a public auction. This usually is a private sale, as is the norm in the Netherlands and France. These private sales have the same legal consequences as foreclosure: extinguishing the mortgage right and using the proceeds that exceed the mortgage to clear debts to other creditors according to a ranking system prescribed by law. Private sales can either be swifter or have higher net proceeds than foreclosure. The second category involves the mortgagor transferring the mortgaged property to the mortgagee, which clears the debt and mortgage. This system is relatively new in continental Europe¹⁰⁰ and not always used for residential property.¹⁰¹ For instance in France this procedure is prohibited in cases

97 See, for example, the interesting results presented by T. Just *et al*, 'Foreclosure discounts for German housing markets', *International Journal of Housing Markets and Analysis*, (13) 2019, No. 2, p. 143–163, doi: <https://doi.org/10.1108/IJHMA-12-2018-0106>.

98 K. Henderson *et al*, *Regional Best Practices: Enforcement of Court Judgments. Lessons Learned from Latin America*, IFES Rule of Law White Paper Series, Washington DC: International Foundation for Electoral Systems, https://pdf.usaid.gov/pdf_docs/PBAAB593.pdf.

99 Gramckow, *ibid*.

100 This transfer was forbidden under Roman law (*lex commissoria*), which is why this is a relatively new and controversial development in Europe. For countries in which this is not possible or allowed (in 2010), see Stöcker & Stürner *ibid*, p. 75–76.

101 Common law countries (Ireland and the United Kingdom) know repossession, which is subtly different from the transfer of property as an alternative to foreclosure.

involving residential property. Interestingly enough however, in Spain this type of transfer is permitted.¹⁰² An important question to be raised within this category is what happens to the residential status of the debtor and the potential proceeds of the property exceeding the remaining mortgage debt. An interesting variant of this transfer of property is the Irish Mortgage to Rent Scheme, by which the property is given to the mortgagee and subsequently sold to an Approved Housing Body. The mortgagor can rent the residence after the sale and has the possibility to buy back their property in the future depending on their financial position. Scotland has a comparable Mortgage to Rent Scheme. However, the former homeowner is not entitled to buy back their property after a couple of years.¹⁰³ The third category of alternative enforcement procedures contains those procedures that do not fit in either the first or second category. For this category, even though enforcement takes place, the mortgagor remains the owner of the property. An example of such enforcement is the German *Zwangsverwaltung* (forced administration). *Zwangsverwaltung* means that the proceeds of a property (like rent) will be seized and used to pay the mortgagee. Normally, when *Zwangsverwaltung* takes place the debtor cannot use the property anymore but for residential property they can use those rooms in the house that are 'necessary for their household'.¹⁰⁴ Because of this provision, *Zwangsverwaltung* will likely not often be applied to a (normal sized) residential property. However, this shows that it is possible to have enforcement procedures where the debtor can remain the owner of the property. It is therefore interesting to study whether alternatives of this kind for residential property are possible in other countries.

These three categories differ significantly in their financial and residential consequences for the mortgagor and can therefore be compared and contrasted with each other while studying the various countries. It is important

Repossession does not clear the debt in common law countries but is used as means for the bank to sell the house. The proceeds of this sale (might) clear the debt. The transfer of property itself, not a sale afterwards, clears the debt in countries that recognize the transfer of property as an alternative to foreclosure. See for example in Spain: *Real Decreto-ley 6/2012, de 9 de marzo, de medidas urgentes de protección de deudores hipotecarios sin recursos, anexo 3b*.

¹⁰² For Spain: *Ley 6/2012, de 9 de marzo, anexo 3a*, for France see: Article 2458 and 2459 *Code Civil*. In Spain, the former homeowner can become a tenant of their former property, see *Ley 6/2012, anexo 3c*. In Spain this alternative has prevented many evictions, see S. Nasarre-Aznar & R.M. Garcia-Teruel, 'Evictions and Homelessness in Spain 2010–2017', in: Kenna *et al* (eds), *ibid.*, p. 302.

¹⁰³ https://scotland.shelter.org.uk/housing_advice/paying_for_a_home/mortgage_arrears/mortgage_to_rent_scheme.

¹⁰⁴ Article 148(2) and 149 Gesetz über die Zwangsversteigerung und die Zwangsverwaltung.

to keep in mind that main foreclosure methods and alternatives may or may not be applied. Further, even if the option for forced private sales is a legal possibility in a given country, this does not signify that the procedure occurs all that often in reality. Therefore it is crucial to know how frequently the main foreclosure methods and alternatives are applied in practice and why.

Another aspect to consider is the prospective buyer of the property. The more people who participate in the auction, the higher the selling price will (usually) be.¹⁰⁵ Sometimes a public auction is not (realistically) accessible to all people. In the Netherlands for example, bidding at a public auction with reservations of getting a mortgage loan is not allowed according to the public auction conditions. This means that bidders at Dutch auctions need to be affluent enough to buy the property without taking out a mortgage. The prospective buyers will therefore mainly be wealthy consumers, investors or businesses all of whom may have adverse effects on the selling price. This effect is reinforced by other terms of the sale, like the impossibility of liability in case of nonconformity. The (number of) potential buyers could also influence the net proceeds of the sale. Evidently, the possible prospective buyers need to be kept in mind when comparing the various enforcement procedures.

6 Conclusions

The credit crisis of 2008–2013 changed the landscape of mortgage enforcement proceedings in many ways. The growing influence of the international right to housing, the increasing attention towards homeowner protection, the renewed policies towards mortgage financing and the changes in national legislation make the study of default resolution approaches relevant. This paper is the first step of a research project that aims to identify the functioning of the different default resolution approaches in Europe. In this paper, we have proposed a framework to study these approaches from a comparative perspective. Bearing in mind the impact of the national legal framework, the international legal framework and the *direct* socio-economic and financial influences on default resolution approaches, we have suggested a three-stage approach. In our research, we will mainly focus on the first two stages: the pre-enforcement and the enforcement stage. Since we are particularly interested in the functioning in practice of these approaches, the actual research will involve more than just the law in the books. Instead, the influence of the socio-economic and financial dimension, best understood by experts in the field, will

¹⁰⁵ H. Gramckow, *ibid.*, p. 14.

prove essential to our research. In this context, the research methodology is inspired by the *Common Core Approach* of Bussani and Mattei. The framework suggested in this paper will be the basis for a questionnaire on default resolution approaches. With the questionnaire, we aim to map the most important issues in Europe regarding default resolution approaches in the pre-enforcement and the enforcement phase. The framework will be further discussed with the experts involved in this research to improve it and to adapt it as much as possible to the various default resolution approaches. Any experts in this field who have not already been invited are more than welcome to contact the authors for further information and possible cooperation.