

Enforcement of Security Rights in Residential Immovable Property and Consumer Protection: An Assessment of Estonian and Norwegian Law

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Abstract

This article concentrates on certain consumer protection issues in Estonian and Norwegian law in proceedings for the enforcement of security rights in residential immovable property. These issues are discussed in the context of European Union (EU) law as the recent *Aziz* case of the Court of Justice of the European Union (CJEU) and the new Mortgage Credit Directive (MCD) have begun to set new standards for enforcement proceedings which Member States must follow. The authors conclude that no legislative amendments are currently required in either of the two countries: the Estonian and Norwegian rules on acceleration and default interest clauses, as well as on enforcement proceedings, seem to be well in line with the requirements set by *Aziz* and by the MCD. Some of the national provisions allow for rather wide discretion, however, and it is possible that the future case law of the CJEU regarding the Unfair Terms Directive, the MCD and the Charter of Fundamental Rights will continue to create new standards for the effective protection of consumers in the enforcement of security rights. The current wave of developments seems to include a growing fundamental rights aspect as the individual's right to housing is being increasingly promoted through consumer protection norms.

Keywords: Consumer credit; consumer protection; enforcement of security rights in residential immovable property; Unfair Terms Directive; Mortgage Credit Directive

1. Introduction

The purpose of this article is to discuss some issues of Estonian and Norwegian law regarding consumer protection in proceedings for the enforcement of security rights in residential immovable property. These issues are topical both because of recent developments in the case law of the Court of Justice of the European Union (CJEU), first and foremost the *Aziz* case,¹ in which Spanish legislation on enforcement proceedings was found not to comply with the Unfair Terms Directive,² and because of the new so-

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¹ Case C-415/11 *Mohamed Aziz v Caixad'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (14 March 2013), ECR report forthcoming (*Aziz*). In the very recent case, *Sánchez Morcillo*, the CJEU again had to decide on the conformity of Spanish enforcement procedure rules with EU consumer law: Case C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA* (17 July 2014), ECR report forthcoming.

² Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L 95/29 (Unfair Terms Directive).

called Mortgage Credit Directive (MCD),³ which must be implemented by Member States before 21 March 2016.

It is impossible to discuss all aspects of consumer protection and enforcement of security rights here. Regarding the contractual relationship between debtor and creditor, we concentrate on acceleration clauses (clauses entitling the creditor to reimbursement of the total loan upon certain events) and the closely related default interest clauses. Both types of clause were discussed in *Aziz* and they are also to some extent regulated by the MCD. In addition, we look at global securing agreements ('all money' clauses), in particular where the security right covers claims against a party other than the owner of the property. Such clauses have caused some problems under national law. As for enforcement proceedings, we discuss the consumer's option to have his objections to the underlying claim tried during the enforcement process; this was an important issue in *Aziz*. Further, we discuss the extent to which the rules are suited to obtain the best efforts price in a forced sale, as required under the MCD. Finally, some remarks are made about the consumer's possible right to housing where the enforcement process leads to eviction of the consumer from his or her home. This is not regulated by EU law, but may nevertheless be seen as the crux of the problem in terms of consumer protection and enforcement of security rights.

The solutions under Estonian and Norwegian law are in turn assessed on the basis of the requirements laid down in the CJEU case law and in the MCD. The comparative approach – juxtaposing Estonian and Norwegian law in the same article – serves both to illustrate how these issues are dealt with in two different States and to gain a better understanding of the national solutions in light of both EU law and the law of another State. The EU law in question is relevant to Norway as a member of the European Economic Area.

Some remarks on terminology are required. The law concerning security rights in assets has not been harmonised across Europe. Several models of security rights exist, and terminology and categories vary quite a lot. The English version of the MCD uses the formula 'credit agreements relating to residential immovable property' in its title and, according to Article 1, the Directive deals with 'agreements covering credit for consumers secured by a mortgage or otherwise relating to residential immovable property'. The established short form is 'the Mortgage Credit Directive'. The German version uses *Wohnimmobilienkreditverträge* in its title and a more comprehensive formula in Article 1:

Kreditverträge, die entweder durch eine Hypothek oder eine vergleichbare Sicherheit, die in einem Mitgliedstaat gewöhnlich für Wohnimmobilien genutzt wird, oder durch ein Recht an Wohnimmobilien besichert sind ...

³ Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L 60/34 (Mortgage Credit Directive).

The Directive has no definition of a security right. As the Directive refers to national security rights only, it is natural that national terminology be used in the different language versions. Using national terms would be less appropriate when describing Estonian and Norwegian law. In this article, we prefer to use 'security right' (in an asset) as the general term, inspired by Book IX of the Draft Common Frame of Reference (although the Book deals with security rights in movable property only). We refer, however, to the 'Mortgage Credit Directive' and where 'mortgage' is used in English versions of case law, this term is kept.

The term 'foreclosure' is also strongly related to the Common Law mortgage model, describing the termination of the mortgagor's equitable right to redemption. The term 'foreclosure' is used in the English version of the Mortgage Credit Directive Article 28, while the German version uses *Zwangsvollstreckungsverfahren*, the French version *procédure de saisie*, the Danish *tvangsauktion* and so on. This article uses the more descriptive term 'enforcement of a security right'.

2. Recent Developments in EU Law

2.1. The *Aziz* case

Traditionally, enforcement procedure rules, including regulation of the enforcement of security rights, have been the exclusive competence of Member States, reflecting the principle of so-called procedural autonomy.⁴ Recently, however, EU law has begun to assert itself in this area. This was first evident in the CJEU ruling in the *Aziz* case in early 2013.⁵ In *Aziz*, the CJEU had to answer questions referred to it by a Spanish court on the unfairness of the terms of a secured credit agreement and the compatibility of Spanish enforcement rules with the purposes of the Unfair Terms Directive. Under Spanish rules, a debtor who defaults on a home loan is not entitled to contest the fairness of a standard term of the credit agreement in the proceedings for enforcement of the security right; he may only do so in subsequent declaratory hearings. However, when the consumer initiates the subsequent declaratory proceedings, the court was – at the time – not entitled to terminate the enforcement proceedings. Therefore, even if a non-negotiated term in an agreement on secured credit is later declared to be unfair, there were no

⁴ On procedural autonomy, see Hannes Rösler, *Europäische Gerichtsbarkeit auf dem Gebiet des Zivilrechts: Strukturen, Entwicklungen und Reformperspektiven des Justiz- und Verfahrensrechts der Europäischen Union* (Mohr Siebeck 2012) 236, 243; Christian Heinze, 'Zivilrecht unter europäischem Einfluss' (2011) *Juristenzeitung* 709; Hans-W Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 CMLR 771, 784–85.

⁵ See Hans Micklitz, 'Case C-415/11, Mohamed Aziz v Caixa D'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), NYR' in Evelyne Terry, Gert Straetmans and Veerle Colaert (eds), *Landmark Cases of EU Consumer Law In Honour of Jules Stuyck* (Intersentia 2013); Micklitz and Reich (n 4) 798–801; Sara Iglesias Sánchez, 'Unfair terms in mortgage loans and protection of housing in times of economic crisis: *Aziz v. Catalunyacaixa*' (2014) 51 CMLR 955.

means in Spanish procedural law for the consumer to prevent the forced sale of his or her home. The only remedy for the consumer in this case was a claim for damages.⁶

The CJEU first acknowledged that national enforcement rules are not harmonised at the European level and thus fall within the procedural autonomy of Member States. However, the Court stressed that national enforcement rules must not conflict with the long-established EU law principles of equivalence and effectiveness.⁷ While the Court found no violation of the equivalence principle in the case at hand, the compatibility of the Spanish rules with the principle of effectiveness was denied on the basis that the Spanish rules did not constitute ‘an adequate or effective means of preventing the continued use of that term, contrary to Article 7(1) of Directive 93/13’.⁸ Consequently, the CJEU held Spanish law on the enforcement of security rights to be contrary to EU consumer protection rules and thus once more showed that in the area of the Unfair Terms Directive the procedural autonomy of Member States is subject to considerable restrictions.⁹ The position of the CJEU in *Aziz* was later confirmed in the joined cases *Banco Popular Español SA and Banco de Valencia SA*¹⁰ where similar questions about the compatibility of the Spanish enforcement rules with the Unfair Terms Directive were referred to the CJEU.

In *Aziz*, the Spanish court which referred the case asked the CJEU to clarify the constituent elements of the concept of ‘unfair term’ (such as ‘significant imbalance’ and ‘contrary to the requirement of good faith’) in order to assess the possible unfairness of an acceleration clause in a long-term credit agreement for events of default occurring within a very limited, specific time period.¹¹

In its analysis the Court first recalled that the decision on the unfairness of a term in a given case must be made by the national court, which takes into account ‘the nature of the goods or services for which the contract was concluded and referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of it’.¹²

The Court then listed some more specific circumstances to take into account when carrying out the unfairness assessment. As for the notion of ‘significant imbalance to the detriment of the consumer’, the Court stated that a national court should assess in particular whether the contract places the consumer in a legal situation less favourable than that provided for by national default rules.¹³ Somewhat surprisingly though, the CJEU continued to state that the assessment should also consider which legal means the

⁶ *Aziz* (n 1) paras 37, 43, 56–57, 60.

⁷ *Aziz* (n 1) para 50.

⁸ *Aziz* (n 1) para 60.

⁹ Martin Ebers, ‘EuGH: Hypothekenvollstreckungsverfahren und Inhaltskontrolle’ (2013) *Lindenmaier-Möhrling* 345483.

¹⁰ Joined cases C-537/12 and C-116/13 *Banco Popular Español SA v Maria Teodolinda Rivas Quichimbo, Wilmar Edgar Cun Pérez and Banco de Valencia SA v Joaquín Valldeperas Tortosa, María Ángeles Miret Jaume* (14 November 2013), ECR report forthcoming.

¹¹ *Aziz* (n 1) para 31.

¹² *Aziz* (n 1) paras 71–72, referring to the principles laid down in earlier CJEU case law.

¹³ *Aziz* (n 1) paras 68, 76.

consumer has under national law to prevent the continued use of such unfair terms.¹⁴ Thus the Court required national judges to pay attention to both material and procedural law when evaluating the possible unfairness of a standard contract term. This reasoning was again emphasised in assessing the possible unfairness of acceleration clauses. The CJEU stated that the Spanish court should assess whether the creditor's right to invoke an acceleration clause depends on non-performance by the consumer of:

an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the relevant applicable rules and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.¹⁵

The CJEU's reasoning seems to suggest that an acceleration clause in a long-term credit contract is subject to a proportionality test under the Directive – a balancing of interests. Additionally, it must be considered whether the right to accelerate payment derogates from national law in situations where no agreement has been reached and whether national law contains adequate measures for the consumer to remedy the acceleration of the loan. Under the proportionality test, it must be borne in mind that a potential consequence of accelerated payment and subsequent enforcement is the loss of the consumer's home.¹⁶

Proportionality is also referred to in the Court's discussion of the default interest clause. The stipulated rate of interest should be compared with the statutory interest rate, 'in order to determine whether it is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them'. In addition, the national law which applies in the absence of an agreement should be assessed.¹⁷

2.2. Mortgage Credit Directive

In the recently adopted Mortgage Credit Directive (MCD), an EU law instrument for the first time sets specific requirements for national enforcement law. In addition to many other consumer protection measures – such as the information duties of the creditor, the principle of responsible lending and the consumer's right to withdrawal – Article 28 of the MCD also sets out some aims and standards concerning the national rules on default charges and on the enforcement of security rights. The norms in Article 28 are relatively vague, laying down general principles for default charges and enforcement proceedings

¹⁴ Ibid. Critical on this point: Ebers (n 9) 345483.

¹⁵ *Aziz* (n 1) para 73.

¹⁶ Micklitz (n 5) 646.

¹⁷ *Aziz* (n 1) para 74.

while leaving considerable legislative discretion to the Member States. Article 28(1) of the MCD, for example, provides that Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before enforcement proceedings are initiated.

This regulatory vagueness, however, does not necessarily mean that the CJEU will be unable to assess whether Member States' transposed rules are compatible with the purposes of the Directive. Member States must therefore bear in mind that the compatibility of their enforcement rules with EU law will – at least in some aspects – be subject to the control of the CJEU in the future. This was evident in the recent *Crédit Lyonnais* case,¹⁸ where the Court of Justice had to decide whether French rules conformed with Articles 8 and 23 of the Consumer Credit Directive (CCD).¹⁹ In *Crédit Lyonnais*, the referring court questioned whether a French sanction for breaching the duty to assess a consumer's creditworthiness could be considered an effective penalty in discouraging creditors from concluding loan agreements without carefully examining a borrower's financial situation. Under Article 23 of the CCD, Member States must ensure that effective, proportionate and dissuasive sanctions exist for breach of its provisions. Although Article 8 of the CCD, which obliges Member States to ensure that the creditor examines the borrower's creditworthiness, leaves a considerable amount of discretion to the Member States as to how exactly this should be done,²⁰ the CJEU considered the French penalty to be non-compliant with the Directive's purpose.²¹

Similarly, Article 38(1) of the MCD demands that Member States provide for effective, proportionate and dissuasive sanctions for infringement of national provisions adopted on the basis of the Directive. And while the rules in Article 28 of the MCD also leave considerable discretion to Member States – as does Article 8 of the CCD – it is evident that national Directive-relevant enforcement rules can and will be tested against EU standards.

Probably the most important principle concerning enforcement proceedings is set out in Article 28 paragraph 5 of the MCD. It obliges Member States to adopt procedural rules enabling the best efforts price to be obtained for the property, if the price obtained affects the amount owed by the consumer.²² The existing Estonian and Norwegian rules on best price regulation in enforcement proceedings will therefore analysed with the

¹⁸ Case C-565/12, *LCL Le Crédit Lyonnais SA v Fesih Kalhan* (27 March 2014), ECR report forthcoming (*Crédit Lyonnais*).

¹⁹ Directive 2008/48/EC on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L 133/66 (Consumer Credit Directive).

²⁰ Karin Sein, 'Transposition of the New Consumer Credit Directive in Estonia' (2012) 20 *European Review of Private Law* 435, 439–440.

²¹ *Crédit Lyonnais* (n 18) para 52. The CJEU stressed that the purpose of the CCD is to protect consumers against the risks of over-indebtedness and bankruptcy and that the French rules in the given case did not meet the standards set by the Directive.

²² Recital 27 of the Directive states that Member States should also encourage creditors to take reasonable steps to obtain the best efforts price for the immovable property in the context of market conditions.

aim of assessing whether they comply with the purposes and standards of the Mortgage Credit Directive.

2.3. Fundamental rights aspects, including case law of the European Court of Human Rights

The enforcement of security rights in residential immovable property, apartments, etc. will regularly result in the debtor and the debtor's family losing their home. Protection of the home is regarded as a fundamental right. This is stated in several instruments, for example Article 7 of the Charter of Fundamental Rights of the European Union ('Everyone has the right to respect for his or her private and family life, home and communications.') and Article 8 of the European Human Rights Convention ('Everyone has the right to respect for his private and family life, his home and his correspondence.').²³ Enforcement may also raise issues concerning the right to a fair trial and the protection of property.²⁴

The European Court of Human Rights found in its 25 July 2013 judgment in the case *Rousk v Sweden* (Application No. 27183/04) that Sweden had violated Article 8 of the Convention as well as Article 1 of Protocol 1 to the Convention (protection of property). The applicant's house had been sold by forced sale in relation to a tax debt amounting to EUR 800 at the time of the sale, subsequent to a rather nightmarish bureaucratic procedure, and the applicant was evicted from the house. The Court made the following general remarks on Article 8 and enforcement:

137. In this respect, the Court has held that the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention (ibid. [*Zehentner v. Austria* (no. 20082/02), § 54, 16 July 2009] § 59, and *McCann v. the United Kingdom*, no. 19009/04, § 50, ECHR 2008). The decision-making process leading to the measures of interference must also have been fair. The Court will therefore attach particular weight to the existence of procedural safeguards.

138. Thus, while the Court accepts that it will sometimes be necessary for the State to attach and sell property, including an individual's home, in

²³ Charter of Fundamental Rights of the European Union [2007] OJ C 303/1, Art 7; Convention for the Protection of Human Rights and Fundamental Freedoms Art 8. See Kåre Lilleholt, 'The Right to Housing and its Impact on Contract Law' in Kirsten Ketscher and others (eds), *Velferd og rettferd Festskrift til Asbjørn Kjønstad 70 år* (Gyldendal Juridisk 2013) 363.

²⁴ Articles 47 and 17 of the Charter; Article 6 of the Convention and Article 1 of Protocol 1 to the Convention. Indeed, in *Sánchez Morcillo* the CJEU held that Spanish enforcement procedure rules, taken as a whole, were incompatible with Article 47 of the Charter, claiming that the Spanish system leads to the inequality of arms between creditors and consumers and therefore violates the right to an effective remedy and to a fair trial: *Sánchez Morcillo* (n 1) paras 48–50.

order to secure the payment of taxes due to the State through enforceable debts, it emphasises that these measures must be enforced in a manner which ensures that the individual's right to his or her home is properly considered and protected.

The case of *Zehentner v Austria* (referred to in the quote) dealt with a forced sale of an apartment and the outcome was the same. The case of *McCann v the United Kingdom* dealt with eviction following termination of a tenancy.²⁵ The essence of these and some similar judgments, as far as Article 8 is concerned, is that eviction from a home 'must be enforced in a manner which ensures that the individual's right to his or her home is properly considered and protected' (see quote above). It is a procedural safeguard. In addition, the disproportionate interference with property in *Rousk* illustrates that there is a certain protection of substantive rights as well.

The case law of the European Court of Human Rights thus supplements the protection established in *Aziz* and in subsequent cases of the CJEU. *Aziz* ensures that review of contract terms falling under the scope of Directive 93/13 must be available in the enforcement proceedings. Provisions of national legislation concerning enforcement, on the other hand, do not fall under the scope of the Directive.²⁶ Member States of the EU are all bound by the European Convention of Human Rights, notwithstanding some loose ends concerning the accession of the EU to the Convention.²⁷ Prior to such accession, the CJEU cannot, in principle, rule on the conformity of national law with the Convention or interpret the Charter unless the implementation of EU law is involved.²⁸ It remains to be seen whether the rather vague provisions of the Mortgage Credit Directive on 'encouraging' creditors to exercise reasonable forbearance (Article 28) will be sufficient to bring the Charter into play. In any case, the Court's approach in *Aziz* and several other cases may be regarded as a sort of 'hidden constitutionalisation of private law', as fundamental rights are involved even if the Charter is not explicitly referred to.²⁹ This 'constitutionalisation' becomes understandable when one bears in mind the historical background of the *Aziz* case that had its roots in a constitutional dispute: in 1981, the Spanish Constitutional Court declared that the Spanish enforcement rules were in conformity with the Spanish Constitution and that no fundamental rights argument could therefore be raised. However, the Spanish courts found a way to overcome the

²⁵ See also *Kay and Others v the United Kingdom* (Application No. 37341/06) and *Brežec v Croatia* (Application No. 7177/10).

²⁶ Case C-280/13 *Barclays Bank SA v Sara Sánchez García, Alejandro Chacón Barrera* (30 April 2014), ECR report forthcoming.

²⁷ See, for an update, Paul Gragl, 'A giant leap for European Human Rights? The Final Agreement on the European Union's accession to the European Convention on Human Rights' (2014) 51 CMLR 13.

²⁸ See, most recently, Case C-483/12 *Pelckmans Turnhout NV v Walter Van Gestel Balen NV and Others* (8 May 2014) ECR report forthcoming (and case-law cited therein).

²⁹ Micklitz (n 5) 648–50. Furthermore, in *Sánchez Morcillo* the CJEU made explicit reference to the Charter and the fundamental right to a fair trial and an effective remedy guaranteed by Article 47. *Sánchez Morcillo* (n 1) paras 35, 48 and 50. See further the more recent judgment in Case C-34/13 *Monika Kušionová v SMART Capital a.s.* (10 September 2014), ECR report forthcoming.

shortcomings of domestic enforcement regulation via European consumer protection rules.³⁰

The fundamental rights aspect of the *Aziz* case has also been recognised by O. Cherednychenko who states that the case reflects the balancing of the creditor's right to conduct a business (Article 16 EUCHR) and the consumer's right to a home (Article 7 EUCHR). She argues that the Unfair Terms Directive could also have the effect of promoting a fundamental right to a home despite this originally being outside the purposes of the Directive.³¹

Thus, this fundamental rights aspect is part and parcel of any discussion of enforcement rules. This reminder aside, we do not discuss in this article the complex subject of the current role of fundamental rights in EU law.

2.4. Estonian law

2.4.1. Statistical overview of non-performing loans and forced sales

Estonia experienced a housing boom between 2004 and 2007 with the result that the number of loans secured by a security right in immovable property increased particularly rapidly during these years. This boom, along with skyrocketing housing prices, can be described as a housing bubble and it backfired at the onset of the financial crisis in 2008. By the end of 2007, Estonia had one of the highest levels of private sector debt among the European emerging market economies.³² As a result of economic recession and the rise in unemployment, many households were unable to pay back their secured loans. This led to enforcement proceedings being initiated by creditors and the forced sale of many debtors' homes.

The percentage of non-performing housing loans (those overdue by more than 60 days) peaked at 4.5% in the third quarter of 2010. Since then, the percentage has been decreasing, but still amounted to 3% in mid-2012.³³ As the pre-crisis level in 2007 stood at only 0.5%, the increase has been considerable.³⁴ According to the statistics of the European Commission, Estonia was one of the countries with the highest increase in default rates at that time and the number of new enforcement proceedings in immovable

³⁰ Iglesias Sánchez (n 5) 970–971.

³¹ Olha O. Cherednychenko, 'Fundamental Rights, European Private Law, and Financial Services' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 199. See also Iglesias Sánchez (n 5) 956.

³² Zuzana Brixiova, Laura Vartia and Andreas Worgotter, 'Capital Inflows, Household Debt and the Boom-Bust Cycle in Estonia' (2009) William Davidson Institute Working Paper No 965, July, 8–9; <<http://deepblue.lib.umich.edu/bitstream/handle/2027.42/64378/wp965.pdf?sequence=1>>.

³³ Merike Kukk and Karsten Staehr, 'The over-indebtedness of European households: updated mapping of the situation, nature and causes, effects and initiatives for alleviating its impact' (2012) Country report Estonia, Civic Consulting of the Consumer Policy Evaluation Consortium, 19 January, 25.

³⁴ *Ibid.*

property also peaked, jumping from 843 in 2008 to 1329 in 2009.³⁵ Thus the total number of enforcement cases increased by almost 40% in the space of one year during the financial crisis. By 2011, the situation had somewhat improved with about 1,100 new enforcement proceedings initiated.³⁶

2.4.2. Global securing agreements and security rights for third party debt

The problems with rapidly increasing mortgage debt were also reflected in Estonian case law. As most of the enforcement proceedings in Estonia are initiated not on the basis of a court decision but rather on the basis of a notarised deed on submission to immediate enforcement³⁷ (known in German law as *Unterwerfung unter die sofortige Zwangsvollstreckung*), the Supreme Court tried to intervene for consumer protection purposes by subjecting the terms of these notarised deeds to unfair terms control. The Estonian case law mostly concerns situations where the security right lies not in the immovable property of the debtor but rather in that of a third person who, as a rule, is a parent, child or other relative of the debtor. Often, the third person is also acting as a personal security provider for the debtor and the clause in the notarised deed provides that the security right in his immovable property also covers claims of the creditor arising out of personal security contract(s). The personal security contract, in turn, is drafted so as to secure the creditor's claims based on future credit agreements of the debtor. Alternatively, the third person may not be acting as a personal security provider for the debtor; rather, the securing agreement between the third party and the creditor may provide that the security right secures all the debts of the borrower, including those arising out of credit agreements the borrower might conclude in the future. In the media, a number of cases were reported where the third person lost his or her home in enforcement proceedings without ever having understood that this might be the outcome when signing the notarised deed on submission to immediate enforcement.³⁸

Under Estonian law, notarised agreements that make the owner of immovable property subject to immediate enforcement for the satisfaction of a claim secured by a security right in immovable property are considered enforcement instruments (subsection 2(1) p. 19 of the Code of Enforcement Procedure (CEP))³⁹. This means that if the debtor defaults, the creditor is entitled to submit an application directly to the enforcement officer to commence enforcement proceedings, including the forced sale of the

³⁵ National measures and practices to avoid foreclosure procedures for residential mortgage loans. Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property. SEC(2011) 357 final, 12–15.

³⁶ Kukk and Staehr (n 33) 25.

³⁷ By 2010, there were a total of 2621 enforcement proceedings initiated on the basis of such enforcement instruments pending in Estonia. See Anneli Alekand, 'Quo vadis, notariaalne leping täitedokumendina?' (2011) VI *Juridica* 458, 463.

³⁸ Kadri Ibrus, '70-ndates vanaproua kaotas käendajaks hakates oma kodu', *Eesti Päevaleht* (Tallinn, 29 October 2012); Kadri Ibrus, 'Tarbijakaitseamet asub laenuvõtjate kaitseks tegutsema', *Eesti Päevaleht* (Tallinn, 3 December 2012).

³⁹ Code of Enforcement Procedure (täitemenetluse seadustik) RT I 2005, 27, 198, RT I, 13.03.2014, 3. On the history and nature of this enforcement instrument in Estonian law, see Alekand (n 37) 458–64.

immovable property.⁴⁰ The claims of the creditor that are secured by the security right are agreed upon in the so-called securing agreement (*tagatiskokkulepe*), which is also notarised. The prerequisites for commencing enforcement proceedings under Estonian law are a valid notarised agreement on submission to immediate enforcement as well as a valid notarised securing agreement (and, of course, the default of the debtor).⁴¹

Thus, one of the preconditions for enforcement proceedings is a valid securing agreement between the security right creditor and the owner of the immovable property. In principle, the parties are free to agree on which of the creditor's claims should be secured by the security right in immovable property. However, according to the Supreme Court, this freedom is limited in the case of securing agreements. Restrictions on the parties' autonomy concern above all so-called global securing agreements, where all existing and future claims of the creditor are to be secured by the security right. As early as 2008, the Supreme Court found that a securing agreement could violate good morals, and could thus be void in cases where secured future claims were inadequately identified or where all possible claims of the creditor were secured and the economic liberty or future subsistence of the debtor thereby unreasonably restricted.⁴² In 2013, the Supreme Court added that such a violation is especially evident if the securing agreement involves all claims against a third person.⁴³

As the violation of good morals is hard to prove in practice and thus its protective effect remains relatively low, the Supreme Court went further and subjected the securing agreement to unfairness control. Of course, the first question raised was whether the fact that the securing agreements are notarised precludes them from being considered 'terms not individually negotiated'. The Supreme Court took a firm position by declaring that at least as far as residential credit agreements and their securing agreements are concerned, they should, as a general rule, be viewed as standard terms, and it is up to the creditor to prove the contrary.⁴⁴ The court based this conclusion partly on the explanations of the representative of the creditor in the proceedings, who admitted that such security agreements are common practice in the credit sector and serve the purpose of avoiding the need to amend the notarised agreement in case the debtor wishes to take out a new loan.⁴⁵ The initial purpose had, however, backfired in this case to the detriment of the consumer.

⁴⁰ As confirmed by Riigikohus (Supreme Court), RKTko3-2-1-64-12 para 17. The Estonian Supreme Court decisions are available on the Court's website: <<http://www.nc.ee/>>.

⁴¹ RKTko3-2-1-60-11 paras 17, 18.

⁴² RKTko3-2-1-104-08 para 19.

⁴³ RKTko3-2-1-64-12 para 27.

⁴⁴ *Ibid*, para 35.

⁴⁵ *Ibid*, para 34. In his article in *Juridica*, the Supreme Court judge V. Kõve points out that in many cases the notaries failed to fulfill their obligation to explain to borrowers the meaning and risks of the notarised enforcement instruments and thus to guarantee the lawfulness of their terms. He even suggests that the role of notaries has in some cases been more or less reduced to putting their 'stamp' on the deed prepared by the creditors. V. Kõve, 'Tsiiviilkohtumenetluse kiirendamise võimalused ja nendega seotud ohud' (2012) IX *Juridica* 659, 674.

After making clear that security agreements are, as a rule, concluded on standard terms prepared by the creditor and thus subject to unfairness control, the Supreme Court went on to determine which terms should be considered unfair. First, the Supreme Court stated that global securing agreements can restrict the economic independence of the debtor, create vagueness about the scope of collateral security and uncertainty as to when the creditor is entitled to start enforcement proceedings.⁴⁶ It further stressed that including all possible future claims of the creditor in the securing agreement (other than those arising out of the residential credit agreement itself) and setting this as a precondition for obtaining residential credit was unacceptable. The legal basis for declaring such security agreement terms unfair was, according to the Supreme Court, either subsection 42(3) p. 22 or the general clause of subsection 42(1) of LOA.⁴⁷ Under subsection 42(3) p. 22 of LOA, a standard term of a consumer contract is considered unfair if the term provides the party supplying the term with the right to require security of unreasonably high value. By invoking this provision, the Supreme Court tried to prevent the over-securing effect of such security agreements.

Another goal of the Supreme Court was to protect the interests of consumers who, without being the borrowers themselves, are securing the loan with their immovable property. It was made clear that if the creditor wishes to include in the securing agreement claims arising out of future personal security contracts to be concluded with those persons, this may, as a rule, only be done in an individual agreement and not in standard terms.⁴⁸

Following this Supreme Court judgment, the Estonian Consumer Protection Agency agreed with credit institutions and notaries that global securing agreements of this sort would no longer be used. Since then, banks have changed their relevant standard terms.⁴⁹ It is interesting to note that, contrary to the situation in Norway (and more generally, in the Nordic countries), it was not the Estonian Consumer Protection Agency who pushed for creditors to stop using unfair terms in notarised deeds. Although the Estonian Consumer Protection Agency is entitled to file a lawsuit to stop the use of unfair contract terms (subsection 45(1) of the Law of Obligations Act (LOA),⁵⁰ subsection 41¹(2) of Consumer Protection Act (CPA)⁵¹), the Agency began using this power only very recently.⁵² Instead, the Agency has tried to negotiate with creditors, with varying degrees of success. The Consumer Protection Agency remained until recently relatively passive in the control of unfair terms, and the Supreme Court has

⁴⁶ RKTko3-2-1-64-12 para 28.

⁴⁷ Ibid.

⁴⁸ RKTko no 3-2-1-64-12 para 29.

⁴⁹ Kadri Ibrus, "Tarbijakaitse sundis pankasid röövellikke laenutingimusi muutma" *Eesti Päevaleht* (Tallinn 1 September 2013).

⁵⁰ Law of Obligations Act (võlaõigusseadus) RT I, 29.11.2013, 4.

⁵¹ Consumer Protection Act (tarbijakaitse seadus) RT I, 31.12.2013, 7.

⁵² And even in the couple of cases at issue, there has not yet been a final court decision.

instead taken the lead, declaring certain terms to be unfair and thus void.⁵³ The Consumer Protection Agency has followed the Supreme Court's conclusions, ensuring that such terms are no longer used in practice. The Estonian experience is thus somewhat different to that of Norway and many Member States where consumer protection institutions have played a leading role in the 'battle' against unfair standard terms. In Estonia, in contrast, this task has, at least in part, been assumed by the Supreme Court.

2.5. Acceleration clauses

In *Aziz*, the CJEU ruled that when deciding upon the possible unfairness of an acceleration clause, domestic court should assess, *inter alia*, whether the creditor's right to invoke such a clause derogates from the applicable non-mandatory rules. In Estonian law, the default rules for accelerating a long-term loan contract for failure to pay are set forth in subsection 399(1) of the LOA.⁵⁴ According to this provision, the creditor is entitled to terminate a loan agreement and demand immediate repayment of the loan if 1) the debtor is in default with more than two payments overdue or with one payment overdue for more than three months, or 2) if the debtor fails to perform the obligation to pay interest. In addition, the creditor must grant the debtor an additional term of reasonable length (subsection 196(2) of LOA) and only if the debtor does not perform within this term is the creditor entitled to accelerate the loan.⁵⁵

It seems that the Estonian security rules against which acceleration clauses are judged already contain, at least in part, the assessment criteria set out in *Aziz*: the requirement of subsection 399(1) p 1 ensures that an acceleration clause cannot be invoked without payments being significantly overdue (i.e. that the debtor's 'non-compliance is sufficiently serious' as demanded by the CJEU) and the requirement to set an additional term gives the debtor the possibility to 'remedy the effects of the loan being called in'.⁵⁶ However, Estonian law also allows for a secured loan to be called in 'if the debtor fails to perform the obligation to pay interest' (subsection 399(1) p 2 of LOA). While it is true that the creditor is also obliged in this case to grant a reasonable additional term for performance and acceleration of the loan is possible where the debtor fails to pay within this term,⁵⁷ in some cases additional application of the *Aziz* proportionality test seems

⁵³ See further Karin Sein, 'Protection of Consumers in Consumer-Credit Contracts: Expectations and Reality in Estonia' (2013) XX *Juridica International* 38, 38–39.

⁵⁴ Subsections 416(1) and 417(1) of LOA that provide for specific restrictions for acceleration of a consumer credit are not applicable to credit agreements that are secured by a security right in immovable property (subsection 403(4) of LOA). Those provisions stipulate that acceleration is only possible if the consumer has been in default with three consecutive repayments and if the creditor has, without success, granted an additional term of at least two weeks to the consumer for the payment of the remaining amount together with notification that the creditor will cancel the contract upon failure to pay the tranches within the term and will claim for payment of the whole debt.

⁵⁵ Paul Varul, Irene Kull, Villu Kõve and Martin Käerdi, *Võlaõigusseadus II. Kommenteeritud väljaanne* (Tallinn: Juura 2007) 398.

⁵⁶ *Aziz* (n 1) para 73.

⁵⁷ Varul et al (n 55) 398.

necessary as failure to pay interest even after an additional term might not always qualify as a 'sufficiently serious' breach.⁵⁸ Alternatively, a solution similar to the proportionality test can be achieved by a certain interpretation of Estonian, non-mandatory law against which the clause must be tested. Under Estonian general rules, namely, termination of long-term contracts is possible only for a 'good reason', in particular if the party cancelling the contract cannot reasonably be expected to continue performing the contract until the end of the agreed term or until the end of the notice period, taking into account all the circumstances and the mutual interests of the parties (subsection 196(1) of LOA). The content of this norm is very similar to the *Aziz* proportionality test as it requires that the interests of the parties be balanced. Although the commentary to the Law of Obligations Act states that subsections 399(1) and (2) of LOA constitute as such 'good reasons' within the meaning of subsection 196(1) of LOA,⁵⁹ an alternative interpretation is also possible. In our view, these two rules can be applied cumulatively with the result that the balancing of interests (required in subsection 196(1) of LOA) will also come into play.

The need for additional application of either the *Aziz* proportionality test or the principle of balancing of interests (subsection 196(1) of LOA) should not occur too often as the standard terms of Estonian credit institutions seem even more consumer-friendly than the default rules of the Law of Obligations Act. For example, the standard terms of Swedbank (the biggest credit institution in Estonia) entitle the creditor to acceleration only if the debtor has defaulted on three consecutive payments (including interest payments) and a two-week additional period has elapsed in vain.⁶⁰ The same applies to Nordea bank.⁶¹ However, the need to apply either the proportionality test or the principle of balancing of interests may emerge for such clauses where the creditor's right to accelerate is triggered by breaches other than the consumer's failure to pay.

In order to decide upon the fairness of a default interest clause, the CJEU requires that the clause be compared with the national non-mandatory law and with the statutory default interest rate.⁶² Under Estonian law, the creditor is entitled to claim interest for late payment under subsection 113(1) of the LOA from the moment the consumer defaults on payment. The default interest rate is usually stipulated in the credit contract. However, according to subsection 415(1) of LOA, the contractual default interest rate may not exceed the statutory default interest rate provided for in subsection 113(1) of

⁵⁸ It is rightly pointed out that, according to the *Aziz* ruling, the national default rules constitute only one important reference point in assessing unfairness. Other elements, such as the seriousness of the non-performance, must also be taken into account however. Thus the fact that an acceleration clause complies with the national non-mandatory norms does not rule out the possibility that it might still be declared unfair: Iglesias Sánchez (n 5) 969.

⁵⁹ Varul et al (n 55) 397.

⁶⁰ See p. 10.1.2 of the standard terms of Swedbank, <https://www.swedbank.ee/static/pdf/private/credit/loans/tyypting_est_2013_05_01.pdf>.

⁶¹ See <http://www.nordea.ee/sitemod/upload/root/content/nordea_ee_ee/eeee_private/eeee_pr_laenuud_liisimg_pr/eluasemelaenuud/Laenusaja_meelespea.pdf>.

⁶² *Aziz* (n 1) para 74.

LOA. The statutory default interest rate is calculated on a half-year basis by adding 8 percentage points to the statutory interest rate specified in section 94 of the LOA. For credit agreements, an alternative calculation method is provided for in the third sentence of subsection 113(1) of the LOA: if a contractual interest rate exceeds the statutory default interest rate, then the contractual interest rate can be claimed in the case of late payment. These rules are mandatory (and thus not subject to unfairness control) and the parties cannot validly agree to additional penalties for late payment (subsection 415(1) of LOA).

As far as the consumer's interest in saving his or her dwelling is concerned, the legal conditions for acceleration and default interest do not weigh heavily under Estonian law. If the debtor defaults, the creditor can start enforcement proceedings even if the loan has not been accelerated.⁶³ It is therefore critical that the debtor has efficient legal means to suspend the enforcement proceedings in cases where he has objections to the underlying claim (such as the unfairness of a credit contract term).

2.6. Enforcement proceedings

2.6.1. Objections to the underlying claim

As explained above, most of the Estonian enforcement proceedings of a security right in immovable property are initiated on the basis of a notarised deed on submission to immediate enforcement, without a prior court decision. It is therefore crucial for the debtor to have a remedy to stop enforcement and avoid losing his or her home if objections to the underlying claim exist. Such a remedy does indeed exist in Estonian procedural rules: in cases where enforcement proceedings are initiated on the basis of a notarised deed on submission to immediate enforcement, subsection 221(1¹) of the CEP entitles the debtor to submit an action to the court for a declaration of enforcement as inadmissible and to raise all objections to the existence and validity of the claim arising from the enforcement instrument. Such an action (the so-called revocation of the enforcement action) may be filed at any time prior to the end of enforcement proceedings. The purpose of the enforcement action's revocation is to contest the enforceability of the enforcement instrument and is characterised by a material law dispute about the claim documented in it.⁶⁴ In this action, the debtor is entitled to raise all material law objections against the alleged debt,⁶⁵ including the unfairness of the term on which the claim is based.

After filing a revocation of the enforcement action, normal court proceedings take place: the debtor is only obliged to show reasonable doubt as to the existence or validity of the claim; if he manages to do so, then the burden of proof is on the creditor to show a valid

⁶³ RKTKo 3-2-1-190-13 (Supreme Court) paras 16 and 20.

⁶⁴ RKTKo 3-2-1-60-11 (Supreme Court) para 15.

⁶⁵ RKTKo 3-2-1-190-13 (Supreme Court) para 16.

claim against the debtor exists and has fallen due.⁶⁶ In addition, the debtor is entitled to request preliminary measures (measures securing the action) under section 378 of the Estonian Code of Civil Procedure (CCP),⁶⁷ including the suspension of the enforcement proceedings (subsection 378(2) p 6 of CCP). The court secures an action if there is reason to believe that failure to secure the action may render enforcement of a court judgment difficult or impossible (subsection 377(1) of CCP). In practice, debtors often request the suspension of enforcement proceedings and the courts are rather willing to grant a suspension in the case of enforcement of security rights in residential immovable property.

Thus the legal situation in Estonia is different from that in Spain as Estonian law allows the consumer to request that the court suspend the enforcement procedure, if the creditor has initiated the procedure based on an unfair non-negotiated contract term. Estonian law may therefore be considered compatible with EU consumer law as interpreted by the CJEU in the *Aziz* case.

2.6.2. *Best efforts price*

In Estonia, enforcement proceedings are carried out by enforcement officers who have to follow the rules of the Code of Enforcement Procedure. Enforcement in immovable property is, in principle, subject to the same rules which apply to enforcement in the case of movables,⁶⁸ but is further regulated by a number of special provisions in sections 138-161 of the CEP. As a rule, the immovable property is sold at auction (section 150 of CEP). As an alternative to auction, the law also allows for the immovable property to be sold under the supervision of an enforcement officer (sections 157 and 102 of CEP), an option which has gained popularity in recent years. It has in some cases proved to be a better option for the debtor as he is then entitled to negotiate the sales price himself and the enforcement costs may also turn out to be lower than in the case of an auction. However, this sales option is only available to the debtor if the creditor consents or if an auction has already failed (subsections 102(1) and 2 of CEP).

In the case of an auction, the immovable property is valued by the enforcement officer based on an agreement between the creditor and the debtor. If they fail to reach an agreement, the property is valued by the enforcement officer on the basis of its usual value (subsections 74(4) and (5) of CEP) and the rights entered in the land register are taken into account (subsection 144(1) of CEP). If one of the parties does not agree with the price determined by the enforcement officer, he may file a complaint (subsections 74(7) and 217(1) of CEP) and the enforcement officer can then ask the court to designate an expert for a new evaluation (subsection 74(8) of CEP). This ability to challenge the price determined by the enforcement officer affords a measure of control

⁶⁶ Ibid, para 17.

⁶⁷ Code of Civil Procedure (tsiviilkohtumenetluse seadustik) RT I, 13.03.2014, 105.

⁶⁸ This is stipulated in CEP s 137.

over the officer's activities and thus contributes to the achievement of the best price in the enforcement proceedings.

The procedure and especially the requirement to publicise the auction also act as guarantees in achieving the best price for the property. Since the beginning of 2013, the enforcement officer is obliged to announce the auction not only in the Official Publications (*Ametlikud Teadaanded*) but also on the Internet via at least one of the most commonly used portals for the sale of immovable property (subsection 153(2) of CEP). On the Internet announcement, the enforcement officer must also publish photographs of the immovable property. More importantly, since 2013, an Internet auction has become a possibility via the electronic auction environment for enforcement officers and bankruptcy trustees (<https://www.oksjonikeskus.ee/>). These announcement requirements, as well as the use of a modern Internet environment, should guarantee that information about the auction and the condition of the property will be most widely available to persons looking for a house or apartment.⁶⁹ This, in turn, is a vital precondition for achieving the best price at auction.

The procedural rules for the auction in the Code of Enforcement Procedure also provide numerous and fairly detailed requirements and restrictions concerning determination of the final price of the property, participation in the auction, the bidding procedure and the possibility to reduce the price if the initial auction fails. Enforcement officers have even reported cases where the initial auction failed but the final price at the repeated auction nevertheless exceeded the initial price. The new method of electronic auction also fosters higher transparency of the auction proceedings as it reduces the likelihood of pre-auction deals between bidders. This was one of the reasons why the electronic auction for enforcement officers was proposed in Estonian legal literature as early as 2002: it was argued that electronic bidding would enable a fair price to be obtained for the debtor's property.⁷⁰

All in all, the rules of the Estonian Code of Enforcement Procedure create a legal environment that in our opinion enables the best price for the mortgaged property to be obtained as required in Article 28(5) of MCD. Since 2013, this legal environment is supported by the availability of a modern electronic auction environment that fosters transparency of the auction procedure. Therefore, Estonian enforcement law should be considered already compatible with the purpose of the Mortgage Credit Directive to achieve the best price for the mortgaged property. Additional legal amendments for transposition of the Directive are thus not necessary in this respect.

2.6.3. Possible measures for protection of the debtor's home

⁶⁹ The requirement that the auction announcement be published on Internet portals in order to make the information more accessible was suggested as early as 2002. At the same time, the plea for the use of electronic auctions for mortgage enforcement was made: see Anneli Alekand, 'Elektroonline enampakkumine täitemenetluses' (2002) IX *Juridica* 619, 619–620.

⁷⁰ *Ibid*, 624.

There are no specific enforcement-related measures for the protection of the debtor's home in Estonian law. Enforcement cannot be made subject to the existence of alternative housing for the debtor. If persons are evicted from their home in the case of enforcement of a security right, they are entitled to apply for municipal housing under subsection 14(1) of the Social Welfare Act.⁷¹ Under this provision, the municipality is obliged to provide housing for individuals or families who are unable or incapable of housing themselves or their families and to create, if necessary, the opportunity to lease social housing. Very recently the Supreme Court stressed that this provision also obliges municipalities to guarantee that there are enough dwellings available for those who are entitled to social housing.⁷²

3. Norwegian Law

3.1. Statistics concerning non-performing loans and forced sales

Norway has so far been spared the serious effects of the financial crisis that developed from 2007. The rate of non-performing personal loans (those overdue by more than 30 days) was 0.9% at the end of 2013, a rate largely unchanged since 2006.⁷³ There was a certain rise in the number of forced sales of immovable property (and shares in housing co-operatives) around 2009, but the total number of completed forced sales is still quite low (for Oslo, 193 in 2012 and 161 in 2013).⁷⁴

3.2. Global securing agreements and security rights for third party debt

Global securing agreements ('all money' clauses) seem to be common in Norway for business-related debts secured by a security right in an owner's or a shareholder's home.⁷⁵ Today, the predominant model for security rights in immovable property is the 'abstract' security right, similar to the German *Grundschuld*: no claim is specified in the security document, nor is it specified in the Land Registry; the claims covered by the security right are listed in a separate agreement between the security grantor and the creditor, and this agreement often states that all outstanding claims, present and future, are secured under the right. Global securing agreements are probably less common when the security right is granted for a home loan (i.e. a loan for the purpose of acquiring the residential immovable property).

There is no legislation concerning securing agreements in connection with security rights. Limitations of the scope of such agreements may follow from interpretation of

⁷¹ Social Welfare Act (Sotsiaalhoolekande seadus) RT I, 21.03.2014, 5.

⁷² RKHKo3-3-1-91-13 (Supreme Court) para 22.

⁷³ Finanstilsynet, *Finansielt utsyn 2014* (2014) 18–19.

⁷⁴ See statistics for the relevant Oslo court: <<http://www.domstol.no/no/Enkelt-domstol/Oslo-byfogdembete/Aktuelt/Arsstatistikk-for-Oslo-byfogdembete-2013/>>.

⁷⁵ Some examples from case law: Norsk Retstidende (Rt) 1994, 775 (Supreme Court), LA-1992-506 (appeal court), LB-2001-2810 (appeal court), BKN-1996-41 (complaints board).

the agreement or from general rules on unfair terms. Assessment of unfair terms is mainly done under the so-called general clause in section 36 of the Formation of Contracts Act, with some additional rules in section 37 regarding non-negotiated terms in consumer contracts.⁷⁶ These two provisions also represent the transposition of Directive 93/13 EEC on unfair terms in consumer contracts.⁷⁷

The unfairness is relevant mainly in cases where the security right secures a third party's debt – and not the grantor's debt – as when a shareholder grants a security right in his home in order to secure the company's debt to the bank. If the agreement covers only the grantor's debt, the inclusion of new credit under the agreement will often be less detrimental to the grantor, as the grantor already owes the money. However, if the consequence of securing a new claim under the security right is a potential acceleration of the total debt, leading to a forced sale of the grantor's home, the grantor may be worse off than if the new credit had not been secured.

In a judgment from 1994, the Supreme Court discussed the interpretation of a general securing agreement⁷⁸ in which a person was granted a security right in his apartment in a housing cooperative. The occasion was a bank loan connected to the grantor's business activities and, according to the securing agreement, the security right covered 'all present and future outstanding claims' which the bank had against the grantor. About one year later, the same bank provided two additional loans, without a new securing agreement. In a conflict with another bank which had obtained a security right in the apartment in the meantime, it was disputed whether the two additional loans provided by the first bank were covered by the original security right. The Supreme Court made the remark that a securing agreement with such general and broad wording could be interpreted restrictively if there was no 'reasonable and natural connection' between the credit giving rise to the security right and the new credit. In the present case, the Supreme Court found there was no such lack of connection and deemed that the additional loans were covered by the securing agreement.

This case dealt with a conflict between two creditors, not with the protection of the grantor's interests. The Court's remarks on a 'reasonable and natural connection' with the original credit have general relevance, though they are particularly pertinent in conflicts between parties to the securing agreement.

⁷⁶ Formation of Contracts Act (lov 31. mai 1918 nr. 2 om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer).

⁷⁷ In addition, the Consumer Ombudsman and the Market Council have been given power to ban the use of certain terms in contracts between businesses and consumers if the term is deemed unreasonable: see Marketing Act (lov 2/2009 om kontroll med markedsføring og avtalevilkår mv.) s 22.

⁷⁸ Norsk Retstidende (Rt) 1994, 775. For some older cases, arguably with a stricter interpretation, see Rt 1928, 940, Rt 1929, 257, Rt 1929, 326, Rt 1930, 272 and Rt 1931, 343. See also the discussion in Sjur Brækhus, *Pant og annen realsikkerhet. Omsetning og kreditt 2* (3 edn, Universitetsforlaget 2005) 297–98 and Jens Edvin Andreassen [Skoghøy], *Factoringpant* (Universitetsforlaget 1990) 289–93. Also of interest is Rt 1998, 204 (a securing agreement did not cover claims from a new bank connection).

There are no Supreme Court cases assessing the fairness – under section 36 of the Formation of Contracts Act – of a general securing agreement. Cases from other courts and instances are few and far between and do not provide clear instruction.⁷⁹

The conclusion is that the unfair results of a global securing agreement may be adjusted, either by restrictive interpretation of the agreement or on the basis of the general clause on unfair contract terms (section 36 of the Formation of Contracts Act). The general clause must be applied in conformity with the EU case law concerning Directive 93/13. There are few cases on global securing agreements, and the interpretation and fairness of such agreements have not been tried by the Supreme Court for the last twenty years. On this point there is a notable difference when compared with the developments in Estonia.

Personal security contracts under which the creditor is a bank or other financial institution are regulated by the Financial Contracts Act Chapter 4. The Chapter includes special rules on contracts under which a consumer acts as personal security provider.⁸⁰ Under these rules, a security right in an asset for a third party's debt is comparable to a contract for personal security.⁸¹ If a security right is granted in assets which are not mainly connected with the grantor's business activities, the rules on consumer personal security contracts apply.⁸² In descriptive terms, the lumping together of a security right in an asset for third parties' debt and a contract for personal security may seem confusing. The explanation is that both have a security function.⁸³ The need for consumer protection is clearly the same for both contracts.

For personal security contracts, the creditor has pre-contractual information duties and must even warn a consumer against concluding a personal security contract if the consumer's financial situation or other circumstances would recommend abstention. Breach of this duty to warn may lead to adjustment of the consumer's obligations under the contract.⁸⁴ This means, for example, that the bank may be obligated to warn a shareholder against granting a security right in the grantor's home if the purpose is to secure the company's debt. The same applies if a spouse grants a security right in his or her assets in order to secure debts connected to the other spouse's business activities.

These rules on pre-contractual information and on the duty to warn apply in addition to the general clause in section 36 of the Formation of Contracts Act. In one Supreme Court case, a security right granted by a mother in her apartment in a housing cooperative for her son's debt was set aside as unfair under the general clause, but the circumstances of

⁷⁹ Some examples: LA-1996-506 (appeal court, agreement deemed valid); LA-1992-506 (appeal court, agreement deemed valid); BKN-2000-14 (complaints panel, interpretation against creditor); BKN-1993-109 (complaints panel, new claims not included).

⁸⁰ Financial Contracts Act (lov 46/1999 om finansavtaler og finansoppdrag).

⁸¹ Financial Contracts Act s 57(2).

⁸² Financial Contracts Act s 57(3)(b).

⁸³ Compare the German Civil Code (BGB) § 232 on types of *Sicherheitsleistung*.

⁸⁴ Financial Contracts Act s 60(2).

the case were rather peculiar, e.g. concerns about the mother's state of mind.⁸⁵ Examples can also be found in cases from lower courts and complaint panels.⁸⁶ In most cases, however, the personal security provider's claim for contract revision was not successful. The personal security contract is, after all, binding as a rule.

3.3. Acceleration clauses and default interest clauses

Acceleration clauses typically entitle the creditor to immediate reimbursement of the entire loan upon certain events, such as delayed payment of one or more instalments. This means termination of the credit contract. The debtor will often have problems refinancing the debt on short notice and termination will regularly entail a higher interest rate than the original one – an interest rate fixed by the contract or in legislation on late payment. If the debt is secured by a security right, termination may lead to enforcement of this right. In particular, when the credit is secured by a security right in the debtor's home, enforcement will lead to further detrimental consequences for the debtor. Acceleration clauses thus call for an assessment of their fairness, especially if the clauses are inserted in consumer contracts.

Under the Finance Contracts Act, the creditor may terminate the credit contract and claim immediate reimbursement of the loan in specified situations, the most important of which is fundamental non-performance of the debtor's obligations. Additional grounds for termination are the death of the debtor and the opening of insolvency proceedings. The loss of an asset securing the debt, the forced sale of such an asset or non-performance of the debtor's obligation to take care of the asset, may also lead to termination of the credit contract.⁸⁷ If the debtor is a consumer, these rules may not be derogated from by the parties to the detriment of the consumer.⁸⁸ Open-ended credit agreements may be terminated by giving two months' notice if this has been agreed in the contract, regardless of non-performance.⁸⁹

Whether or not the non-performance of the debtor's obligations is fundamental must be decided in light of the circumstances of the case. The parties may not set out in their contract that, for example, delayed payment of one or two instalments automatically gives sufficient reason for immediate reimbursement of the loan. This legislation seems to provide clearer and more efficient protection of the consumer's interest in comparison to a more general assessment of unfair terms.

As the creditor's right to terminate the credit contract in cases of fundamental non-performance is the background rule under national law, a contract term corresponding

⁸⁵ Rt 1995, 1540.

⁸⁶ Examples: LB-1999-2707 (appeal court), RG-1991-1251 (first instance court), BKN-1993-54 (complaints panel), BKN-1995-17 (complaints panel).

⁸⁷ Financial Contracts Act s 52, also referring to Mortgage Act (lov 1980/2 om pant) s 1-9.

⁸⁸ Financial Contracts Act s 2.

⁸⁹ Financial Contracts Act s 51 a(2); cf Consumer Credit Directive Art 13(1)(2).

to this rule will probably not be deemed unfair under the Unfair Terms Directive.⁹⁰ Derogating to the detriment of the consumer is not allowed however; thus, an assessment of the term's compliance with the Directive is not necessary. From a fundamental rights perspective, the national rule is not necessarily acceptable, and some comments must be added concerning the proportionality test.

Arguably, the CJEU relies on a proportionality test when it requires that non-performance be 'sufficiently serious' for an acceleration clause to be applied, an implicit premise being that the consequences may be very grave for the consumer.⁹¹ Correspondingly, a proportionality test is crucial in the determination of possible infringements of fundamental rights. Fundamental non-performance as a ground for termination is based primarily on an assessment of the effects of non-performance on the creditor rather than a balancing of interests. For example, in the definition of 'fundamental' in DCFR III.-3:502(2), the essence is that the non-performance 'substantially deprives the creditor of what the creditor was entitled to expect under the contract'. It is required that the debtor foresees or could be expected to have foreseen the result, but the effects of termination on the debtor's interests are not considered. On the other hand, it is commonly held under Norwegian law that the consequences of termination for the debtor are also relevant in determining whether there is sufficient ground for termination. As such, the difference with a proportionality test may not be so important in practice.⁹²

A proportionality test in the assessment of a contract term is different from a proportionality test in a conflict between a State and an individual.⁹³ Private interests are involved on both sides: here, the creditor's interest in collecting his money is balanced against the debtor's interest in avoiding the potentially harsh consequences of debt collection. The difference should however not be overestimated. Issues of fundamental rights and proportionality often come up in connection with the State's efforts to protect the interests of one group of citizens over the interests of another group. What is formally a conflict between the State and the individual may in real terms be a conflict between private parties.

Under the Mortgage Credit Directive, Member States must 'adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated' (Article 28(1), see section 2.2 above). This is a rather vague guideline, but it seems to correspond well with the rule on fundamental non-performance as a

⁹⁰ See Unfair Terms Directive Art 1(2) and in particular Advocate General Kokott's opinion in *Aziz* (n 1) para 71. For more critical remarks, Micklitz (n 5) 644–45.

⁹¹ In the same vein: Micklitz (n 5) 646.

⁹² Viggo Hagstrøm, *Obligasjonsrett* (2nd edn, Universitetsforlaget 2011) 433–35. See also the Unidroit Principles of International Commercial Contracts 7.3.1(2)(e).

⁹³ On 'double proportionality', see in particular: Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W. Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 49–51.

requirement for termination of the credit contract, given one accepts an element of balancing of interests in the application of the fundamental non-performance criterion.

The Norwegian Late Payment Act fixes the interest rate in the case of late payment to eight percentage points above the Norwegian Central Bank's key policy rate, which is set every six months. Currently (May 2014), the late payment interest rate stands at 9.50% per year (no compound interest).⁹⁴ The rules are mandatory where the debtor is a consumer and the parties cannot validly agree to additional penalties etc.⁹⁵ However, the ordinary contractual interest rate may still be claimed by the creditor.⁹⁶ The Mortgage Credit Directive allows Member States to regulate charges on the consumer arising from a default, ensuring that the charges are 'no greater than is necessary to compensate the creditor for costs it has incurred as a result of the default' (Article 28(2)). The statutory late payment interest rate should arguably be regarded as acceptable under this guideline.

The Consumer Ombudsman has reached an agreement with the organisation of banks and other financial institutions on the standard terms of loans to consumers. In particular, it has stressed that the consumer should receive a concise and simple explanation of the terms of the loan agreement.⁹⁷

3.4. Enforcement proceedings

3.4.1. Objections to the underlying claim

The rules on the enforcement of security rights vary according to the kind of asset to which the security right relates. In this article, we concentrate on security rights in residential immovable property. Under Norwegian law, security rights in housing cooperative apartments etc., which are not formally immovable property, are to a great extent regulated by the same rules as security rights in residential immovable property.

Enforcement of a security right in immovable property (and in apartments) must always be decided by the district court (the general court of first instance).⁹⁸ The parties cannot validly agree beforehand on another procedure of enforcement.⁹⁹ The basis for enforcement may, *inter alia*, be a registered security right¹⁰⁰ and there must be non-performance of the secured claim.¹⁰¹ Which claims are secured by the security right will typically be found in the written securing agreement. This agreement requires no witnesses (and Norway has no notarial system). The outstanding amount under these

⁹⁴ Late Payment Act (lov 100/1976 om renter ved forsinket betaling m.m.) s 3(1).

⁹⁵ Late Payment Act s 4.

⁹⁶ Late Payment Act s 3(2).

⁹⁷ See information on the Consumer Ombudsman's website, <<http://forbrukerombudet.no/2012/10/11042463.0>>.

⁹⁸ Enforcement Act (lov 86/1992 om tvangsfullbyrdelse) s 11-3.

⁹⁹ Enforcement Act s 1-3(1).

¹⁰⁰ Enforcement Act s 11-2.

¹⁰¹ Enforcement Act s 4-4.

claims will normally be listed by the creditor. Unless enforcement is based on a judgment or a similar decision, the debtor can raise any objection on the basis for enforcement (for example concerning the validity of a security right) and on the information concerning the secured claims and the amounts. The creditor's claim for enforcement will be submitted to the debtor, who may for example object to the claim, typically contending that there is no fundamental non-performance of the debt, where the creditor claims enforcement of the total debt.¹⁰² The district court's decision may be appealed by either party.

The enforcement procedure is meant to be summary. A dispute concerning the debtor's objections to enforcement may be referred to ordinary civil litigation, where possible claims concerning the underlying contract may be decided on as well.¹⁰³ Further enforcement, for example a forced sale of the debtor's home, will regularly be postponed until the debtor's objections have been heard and decided upon.¹⁰⁴

The duty of a court to assess of its own motion whether a contractual term is invalid under Directive 93/13 has not been much discussed in Norway, and there is reason to believe that Norwegian Courts are reluctant to do this, as it has traditionally been up to the parties to invoke such rules. To the extent that the court's duty to raise this issue of its own motion is relevant under the EEA agreement, as a substantive rule under the Directive and not only viewed as a part of the EU civil procedure system, the fairness issue may be raised in the enforcement procedure and may lead to postponement of the enforcement.¹⁰⁵ If so, the requirements following from the *Aziz* judgment can be met.

3.4.2. *Best efforts price*

If the enforcement proceedings lead to a forced sale of the debtor's home, the execution of the sale is regularly left to an 'assistant' appointed by the court.¹⁰⁶ The assistant is normally a lawyer or a real estate agent. The idea is that, in order to obtain a good price, a forced sale should as far as possible be carried out in the same way as an ordinary voluntary sale. A sale by auction is possible, but this is rarely chosen in practice for residential property.

In Norway, there is nothing comparable to the Estonian online auction in a forced sale. Despite this, more or less all properties for sale are marketed through an Internet portal, in addition to other channels, and this portal is used for forced sales as well.

A forced sale must be confirmed by the district court to be final. The parties, the debtor included, may raise objections and the court's decision may be appealed. The court

¹⁰² Enforcement Act s 11-7.

¹⁰³ Enforcement Act s 6-6.

¹⁰⁴ Enforcement Act s 6-5.

¹⁰⁵ For information on the courts' duties in this regard under EEA law, see Halvard Haukeland Fredriksen, 'Tvisteloven og EØS-avtalen' (2008) *Tidsskrift for Rettsvitenskap* 289, 327-28; Johan Giertsen, *Avtaler* (3rd edn, Universitetsforlaget 2014) 216.

¹⁰⁶ Enforcement Act s 11-12 and 11-13.

cannot confirm the sale if it is likely that continued sale efforts would lead to a better price.¹⁰⁷ This requirement seems to be in conformity with the MCD Article 28(5). In addition, a security right's holder having bought an asset at a forced sale may have to reduce a remaining claim against the debtor if the asset has been bought at a disproportionately low price.¹⁰⁸ The latter rule does not seem to be invoked often.

3.4.3. Possible measures for protection of the debtor's home

In most cases, forced sale of the debtor's home will have serious consequences both for the debtor and the debtor's family. Under Norwegian law, the municipality has a duty to find temporary housing for those who are not able to do this themselves.¹⁰⁹ The municipality also has a duty to assist in finding permanent housing for those who fail to achieve this on their own.¹¹⁰ It is for this reason that the district court may provide the municipality with a notice of enforcement proceedings, if appropriate.¹¹¹

Where enforcement of a security right – or enforcement in the course of insolvency proceedings – leads to the loss of a home for the debtor or the debtor's family, the court may, under certain conditions, decide that the provision of suitable alternative housing is a prerequisite for enforcement.¹¹² The idea is that the debtor should be offered less expensive housing, for example a modest rental flat, instead of the house or apartment which is to be sold in a forced sale. This rule was more important some decades ago, when price regulation contributed to a rather inefficient market for housing. Today, the situation is such that the debtor will normally be able to find alternative housing himself at a price which is affordable, if such housing is available on the market at all. In Oslo, for example, it seems that alternative housing has not been made a prerequisite for enforcement at all since 2000.¹¹³

This kind of relief is not available if the enforcement is related to rent or remuneration of another kind for the house or the apartment, or to interest or ordinary instalments of a loan covered by a security right in the house or the apartment (as opposed to the entire loan after termination). Thus, enforcement cannot be precluded if the debtor is not able to pay the ordinary housing costs. Further, enforcement cannot be precluded if the loan contract is terminated due to fundamental non-performance of the debtor's obligations regarding maintenance and fire insurance of the home or apartment with which the loan is secured.

¹⁰⁷ Enforcement Act s 11-30.

¹⁰⁸ Mortgage Act s 1-15.

¹⁰⁹ Social Services Act (lov 18/2009 om sosiale tjenester i arbeids- og velferdsforvaltningen) s 27.

¹¹⁰ Act on municipal health and care (lov 30/2011 om kommunale helse- og omsorgstjenester m.m.) s 37 and Social Services Act s 15.

¹¹¹ Enforcement Act s 11-8(3).

¹¹² Satisfaction of Claims Act (lov 59/1984 om fordringshavernes dekningsrett) s 2-10.

¹¹³ Personal communication 9 May 2014, Oslo byfogdembete (a specialized district court for enforcement cases).

3.4.4. Assessment of consumer protection in enforcement proceedings

The debtor is entitled to make objections and to have his interests taken into consideration throughout the entire enforcement process. Objections concerning the underlying claim may lead to a halt in the enforcement proceedings. The court must of its own accord refuse to confirm a forced sale if continued efforts are likely to lead to a better price. In certain situations, a provision of alternative housing may be made a precondition for enforcement (a rule which is, however, rarely applied anymore).

The rules seem well-suited to ensure a process in which the debtor's procedural and substantive rights are protected. The rule on alternative housing may even encroach on the creditor's security right, in that enforcement may be precluded. On the other hand, if the debtor is unable to pay interest and ordinary instalments on the loan, enforcement related to such payments must be allowed without the condition that alternative housing be provided.

4. Some Concluding Remarks from a Comparative Perspective

Estonia has been affected by the international financial crisis to a much higher degree than Norway. Thus, national law on consumer protection and the enforcement of security rights has been put to the test in Estonia more so than in Norway. In relation to the requirements set out by the CJEU – in particular regarding compliance with the Unfair Terms Directive – and by the recent MCD, it seems fair to say that there is no need for essential legislative amendments in either of the two countries for the time being. However, some of the national provisions allow for rather wide discretion and the future case law of the CJEU regarding the Unfair Terms Directive, as well as the MCD and the Charter of Fundamental Rights, may end up creating new standards for the effective protection of consumers in the enforcement of security rights.

The Estonian Supreme Court has played an active role in shaping guidelines for the acceptability of global securing agreements, including agreements on providing security for claims against third persons. The tool has been legislation on unfair standard terms. In Norway, there has not been much litigation regarding global securing agreements for many years. Restrictive interpretation aside, assessment of such clauses in global securing agreements must be done using the general clause of the Formation of Contracts Act, a provision also covering individually negotiated terms. Contracts providing security rights in assets for claims against third persons are dealt with in much the same way as contracts for personal security under Norwegian law, and when the security provider is a consumer, restrictive rules on information duties and even a duty to warn follow from the Financial Contracts Act.

As for acceleration clauses, both countries have legislation on the conditions for terminating a credit agreement and in Norway these rules cannot be derogated from to the detriment of a consumer. Terms corresponding to the background national law will not normally be regarded as unfair under the Unfair Terms Directive. If the CJEU requires a specific proportionality test in each case (cf. *Aziz*), this is not explicitly foreseen in national legislation and the issue may need some clarification. The Estonian national default rules on loan acceleration partly contain the same assessment criteria used in *Aziz*, but in certain cases, additional application of the proportionality test may appear necessary. Alternatively, a solution similar to the *Aziz* proportionality test may also be achieved by a certain interpretation of Estonian default rules allowing the balancing of parties' interests.

The rules on enforcement proceedings in both countries are, in our opinion, well in line with the requirements set by *Aziz* and by the MCD. Private agreements (notarised in Estonia) are sufficient as a basis for enforcement, but all objections by the debtor to such agreements can be determined by the court in the enforcement proceedings. The crucial problem in *Aziz*, namely that the assessment of the underlying contract could not be carried out during the enforcement proceedings or would lead to procedural postponement, should not therefore arise under Estonian or Norwegian law.

Both countries have also laid down procedures and measures to obtain the best efforts price in the case of a forced sale. In Norway, auctions are seldom used in a forced sale of residential property; the idea has been to follow the procedures for voluntary sales as far as possible. In Estonia, auctions are common but today in the form of electronic auctions, a procedure which is far more favourable to the interests of both debtors and creditors than the traditional auction. In both countries, the court has the possibility to control the price obtained.

The underlying problem of the debtor's right to housing cannot be solved by rules on contract terms and on enforcement proceedings alone. The interests of debtors must be balanced against the interests of creditors. Strong protection of debtors may entail higher credit costs (as the creditor must calculate using a higher risk premium) or even reduced availability of loans for residential property. In the long run, debts must be paid, as a rule. Legislation may give protection against unfair terms and disproportionate enforcement, but lasting debt problems must be solved by way of welfare measures, consumer insolvency models, etc.