



This project has received funding from the European Union's Seventh Framework Programme for research, technological development and demonstration under grant agreement no. 290694.

TENLAW: Tenancy Law and Housing Policy in Multi-level Europe

Lead Beneficiary: Technische Universiteit Delft

Deliverable No. 4.3
Analysis of EUs role

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Towards a European Role in Tenancy Law and Housing Policy?

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Abstract

Given the growing importance of tenancy law and housing policy for the Single Market in times of crisis and migration and the significant collateral effects of EU law and policies in other areas, this contribution advocates a stronger European coordinative role in this field. As legal harmonization, both maximum and minimum harmonization, is regarded as little realistic and desirable, the open method of coordination (OMC), which has been carried out in other branches of social policy with acceptable results, is regarded as the best institutional tool currently available. In an OMC process, comparative socio-legal analysis may show the existence of bad, good and ambivalent national practices, with black markets, social rental agencies and energy refurbishment regulation serving as examples. In a positive perspective, an OMC-inspired analysis advocates neutrality of tenure as “mega principle” for regulation in the field. From this may be derived general principles which national tenancy regulation should respect and balance adequately: profitability and respect of property rights for the landlord, and affordability, stability and flexibility of the tenancy for the tenant. These general principles may in turn guide the development of more detailed European principles and rules of tenancy law, which will be exemplified in the areas of duration and termination of tenancy agreement as well as rent control. These could also inspire the draft of European tenancies, i.e., model agreements to be implemented and concretized at national level. In sum, it is submitted that European principles on tenancy law developed on this basis could be effective means of “persuasive guidance” for national regulation in the field.

Introduction

It is a major social and economic consequence of the financial crisis since 2007 that rental tenancies have become more important as an alternative to home ownership in many European countries. The crisis has famously accelerated intra-European labour mobility, especially from Southern to Northern Europe. Moreover, it

has triggered the “credit crunch”, which entails the more difficult availability of loans, including housing loans, and a growing number of mortgage defaults and repossessions, particularly in Southern European States.¹ But even in Northern European States hit less by the crisis such as Germany, the price of houses and rents in metropolitan areas has increased considerably as a result of very low interest rates.² As a result of such developments, the number of tenant households has grown in many European states: Whereas the proportion has already been more than 50% in Switzerland³ and Germany,⁴ considerable increases have occurred in England,⁵ Italy⁶ and most Eastern European States.

Almost everywhere, the biggest increase has taken place in private market tenancies as opposed to subsidised public or “private social” tenancies. This is mostly due to budgetary cuts for public and social housing, privatisation measures and the ensuing decrease of available dwellings in these sectors, which lead to insufficient supply and long waiting lists. For this reason, private tenancies are often the only available resort, particularly for migrants within a country and immigrants from abroad. Notably, the number of private tenancies is increased by “black market tenancies”, *i.e.*, tenancies with illegal elements (*e.g.*, the violation of registration duties for reasons of tax evasion) which remain in an extra-legal sphere. Despite the lack of statistical data, black market tenancies seem to make up the largest share of private tenancies in Central and Eastern European⁷ countries but may be found elsewhere as well.⁸

As a result, the social and political pressure on tenancy law has grown, and many European states have reformed their legislation in recent years. In Spain and Portugal⁹, the protection of tenants has been decreased sharply, creating an additional incentive for owners to rent out their property. In several Eastern European countries, specific tenancy regulation has been introduced for the first time, thereby

¹ See *e.g.* *Tenlaw*, ITALY Report, 2014, 32-34; *Tenlaw*, PORTUGAL Report, 2014, 49-50; *Tenlaw*, SPAIN Report, 2014, 38-40. All reports are available at www.Tenlaw.uni-bremen.de/reports.html.

² *Tenlaw*, IRELAND Report 2014, 51-52.

³ *Tenlaw*, SWITZERLAND Report, 2014, 8.

⁴ *Tenlaw*, GERMANY Report 2014, 8.

⁵ *Tenlaw*, ENGLAND & WALES Report 2014, 11: increase in private rentals from 11% (2001) to 18% (2011).

⁶ *Tenlaw*, ITALY Report, citing increase in rental tenancies from 21% in 2010 to 23% in 2012.

⁷ See *e.g.* *Tenlaw*, HUNGARY Report 2014, 19-20; *Tenlaw*, LITHUANIA Report 2014, 16; *Tenlaw*, SERBIA Report 2014, 27.

⁸ See *e.g.* *Tenlaw*, ITALY Report, 17-18; SPAIN Report, 25-26; SWEDEN Report 2014, 20.

⁹ *Tenlaw*, SPAIN Report, 193; PORTUGAL Report, 85-87.

consolidating the legal position of both parties and counteracting black market agreements.¹⁰ In Germany, massive increases in house prices and rents have recently prompted the legislator to introduce a cap for rent increases (“Mietpreisbremse”).¹¹

Often, these reforms have been rather hasty reactions to urgent social and economic problems. Just as what has been characteristic for special tenancy legislation in Europe since its beginnings during World War I, these reforms have been initiated by political parties influenced by lobby groups of home owners, investors, banks and tenant associations. Rarely have expert knowledge and foreign experiences been integrated to a meaningful extent. Consequently, standing tenancy legislation is often of poor technical quality and unbalanced, with barely justified advantages for landlords or tenants. In some countries including Austria and Spain, there is even a sequence of different pro-tenant or pro-landlord regimes whose applicability depends on the starting date of the individual tenancy (intertemporal conflicts).¹² As a result, more comparative law expertise would be very helpful in most European countries to enhance the quality and social fit of new legislation; in particular, it could act as a powerful antidote to political pressures in national legislative processes.

But beyond this comparative dimension, there is also a European dimension of tenancy law and housing policy. Indeed, despite its national character, its European importance and the European influences on it are widely ignored but nevertheless considerable. This is true, most obviously, for the Single Market, for which tenancy legislation is increasingly important due to the growing mobility of citizens and the transnational expansion of job markets. Beyond the free circulation of tenants, also the freedom of capital is affected by tenancy law when it comes to housing property as an investment object e.g. in relatively new asset classes such as Real Estate Investment Trusts (REITS). However, the European impact on tenancy law derives even more from the manifold collateral effects of EU regulation and policy in other fields. Thus, EU social policy against poverty and social exclusion extends to selected issues of housing, in particular the amelioration of housing conditions.¹³

¹⁰ See e.g. *Tenlaw*, CROATIA Report 2014, 111; HUNGARY Report, 76; SLOVENIA Report 2014, 85.

¹¹ *Tenlaw*, GERMANY Report, 85.

¹² *Tenlaw*, AUSTRIA Report 2014, 60; *Tenlaw*, SPAIN Report, 66.

¹³ *Ch. Schmid/ J. Dinse*, European Dimensions of Residential Tenancy Law, *European Review of Contract Law* 9 (2013), 201 (207-209).

Housing policy has also been affected by European competition and state aid rules to a certain degree, in particular as regards State-subsidised social housing for the poor.¹⁴ Further aspects of tenancy law are dealt with by European consumer law.¹⁵ Thus, the unfair terms directive extends to clauses contained in tenancy contracts, provided that the tenant is a consumer and the landlord is a commercial party. Moreover, the tenant is also protected against misleading advertising and similar practices by the 2005 unfair commercial practices directive (Art. 2 lit. c). In a different legal area, tenancy law is affected by European provisions on energy saving¹⁶ according to which, *inter alia*, the landlord is bound to inform the tenant about the building's energy consumption at the conclusion of the contract. Further European influences derive from tax law, private international law and anti-discrimination law. Yet, probably the most important and still increasing influences stem from the European Convention on Human Rights, with the number of judgements affecting landlord and tenant amounting close to 70.¹⁷ Communication rights, non-discrimination rights, the protection of the private sphere and family life, due process rights and the landlord's property rights have so far been applied to tenancy law cases by the Strasbourg court.

As a result, if European institutions interfere selectively into the field, the continuation of the current status quo of inaction seems to be hardly plausible on account of the responsibility of the EU for the effects of its policies. Instead, the EU should be aware of the consequences of its policies for the functioning of tenancy law as a whole and develop an effective procedural framework for an adequate role in tenancy law. In sum, both a comparative reconstruction of tenancy law *and* a European perspective on this field are desirable. This contribution is first devoted on how this could be realised in the European institutional context (II). This analysis will advocate the initiation of an open method of coordination process as in other fields of social law and policy. In substance, such a process will give rise to the discovery and analysis of good and bad practices in current national systems and (III) and, in a positive perspective, the elaboration of principles of good tenancy regulation (IV).

¹⁴ Ibid, 209-212.

¹⁵ Ibid, 212-213

¹⁶ Ibid, 213.

¹⁷ See generally *Ch. Schmid/ J. Dinse*, Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court of Human Rights on Tenancy Law, in *L. Nogler & U. Reifner* (Eds.), *Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*, 2014, 605.

Generally, all proposals are assessed against the background assumption that a balanced European contribution to an established field of social law and policy such as tenancy law and housing policy - which would need to abstain from unification, but deal with national divergences constructively - bears a huge potential of enhancing the legitimacy of the EU in the eyes of its citizens. And here this notion does not only mean members of the political, economic and intellectual elite who are empowered by the EU anyway, but less well-off citizens who have otherwise little to gain from European integration.

II. Institutional and Procedural Options for a European Role

Considering European action in a new field of law and policy, the first option might be the classic “**community method**”, i.e. **that of legal harmonisation**. However, full harmonisation under the prominent legal basis of Art. 114 TFEU would presuppose tenancy law to be regarded as necessary for the establishment of the Single Market. This might perhaps be discussed for commercial tenancies, but is not an option for residential tenancies. Given the widely different social and economic conditions and diverging political preferences in the Member States in general, and the different interrelationships of private tenancy law with public housing policies at national and sub-national level in particular, full harmonisation of private law rules would by no means lead to uniform conditions but might rather have a disintegrative effect on national housing policies and legislation.

Therefore, **minimum harmonisation** as practised in many fields European contract law might be a more subtle and better option. In practical terms, as residential tenancies involve the tenant as a consumer and, often, the landlord as a business operator (leaving aside, however the important group of private landlords), a minimum harmonisation directive under European consumer law (Art. 169 para. 3 TFEU) might be conceivable. Of course, resort to this legal basis might not be uncontroversial in the first place, in particular as the European measure would deal with property law from the Common Law perspective and the national rules governing property ownership shall not be prejudiced by the Treaties according to Article 345 TFEU (ex Article 295 EC).¹⁸ More importantly, minimum harmonisation would also presuppose that a common denominator of minimum protection for tenants is possible without

¹⁸ However, the ECJ has up until now given a rather restrictive interpretation of this provision with the result that the enactment of EU measures in the field of property law might not be excluded. See in detail *B. Akkermans/ E. Ramaekers*, Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations, *European Law Journal* 16 (2010), 292.

disintegrating national tenancy and housing systems. If one considers the extreme differences in tenancy legislation of EU member States, this issue is far from settled. The ensuing probable lack of political consensus on any European measure and the current priority of other policies and actions at EU level also militate against minimum harmonisation.

Next, drawing on an analogy between labour and tenancy law and given the existence of landlord and tenants organisations in nearly all EU Member States, one might as a second option think of **extending the social dialogue** (Art. 154f. TFEU) to our field. This might be possible even *de lege lata* if such dialogue were based on the task of “fighting against social exclusion” within the meaning of Art. 153 para. 1 lit. j) TFEU, to which tenancy law could undoubtedly make an important contribution. However, as the trade unions and employer associations currently involved in this dialogue could not sensibly deal with tenancy issues, this interpretation would require regarding national (and possibly future European) landlord and tenant organisations as social partners within the meaning of Art. 152 TFEU – which was probably not intended by the drafters of European social policy. It would also need to be considered that landlord and tenant organisations do not in most Member States have similar statutory roles and a similarly high social standing and representativeness as the industrial partners.

Given all these obstacles, a more modest and realistic option would therefore be the initiation of an **open method of coordination** (OMC) process as in other fields of social policy, in particular employment, pension and health policies and systems. Following this approach, the established OMC techniques - benchmarking, sharing and spreading of best practices, target-setting and peer review – could be applied to the field. As regards its location within EU policies, tenancy law could even be added *de lege lata* to the existing OMC in social protection and social inclusion,¹⁹ as its significance for these matters is obvious. Contrary to the current practice of initiating OMC processes only in fields in which the EU does not have legislative competence, such a process might perhaps also be envisioned in European consumer law. As mentioned, residential tenancy law could also be classified as consumer law, and the possible availability of a legal basis for (minimum) harmonisation (Art. 169 para. 3 TFEU) could give additional impetus to OMC co-ordination efforts “in the shadow of the law” – *i.e.*, with harmonisation being available as an alternative if OMC were to fail.

¹⁹ See, as groundwork, *K. Armstrong*, Tackling Social Exclusion through OMC: Reshaping the Boundaries of EU Governance, in: T. Börzel/ R. Cichowski (eds.), *State of the Union: Law, Politics and Society*, vol. 6, chapt. 8, 2003.

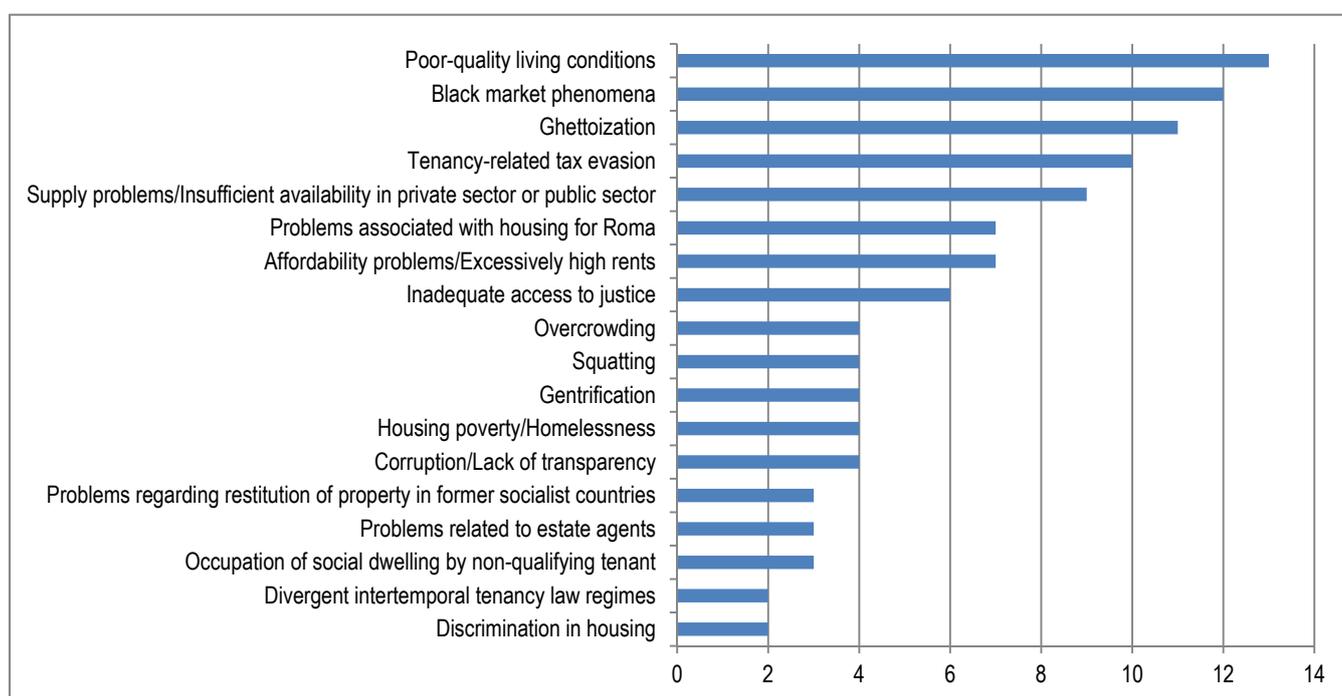
The remainder of this contribution therefore is on academically preparing and performing such an OMC process. This analysis may be undertaken in two ways: first, **by uncovering good (and) bad practices in current tenancy law systems (III)**; and second, **through the elaboration of European principles of good tenancy regulation (IV)**.

III. An Assessment of Good and Bad Practices in National Tenancy Laws and Housing Policies

Following the OMC approach just presented, the research undertaken in *Tenlaw* has uncovered important housing problems as listed in the various national reports. The table below, first presented at the 2013 Annual Conference of the European Housing Research Network held in Tarragona, presents failures which have been found in more than one country.

Frequency of Problem Occurrence by Type (source *Tenlaw*)

(indicated as total number of countries reporting problem type)



As is obvious from the table, the detected housing problems and failures are very diverse. Some attach predominantly to economic, social and urban realities such as poor housing conditions, supply problems, overcrowding or problems associated with housing for Roma, though they might of course be alleviated or even overcome by housing legislation or regulation. Many other problems have a closer connection to tenancy law and have therefore been examined with priority in this project, as its legal focus could prove most beneficial in these cases. This is true for example for divergent intertemporal tenancy legislation and black markets, which constitute a prominent problem in many states (1). However, this research is capable of uncovering not only bad but also good practices – i.e. models with a “regulatory potential” functioning well in some states, which might therefore be extended to other states.

As an example, social rental agencies will be briefly presented here (2). Finally, there are ambivalent phenomena and practices with good and adverse effects. Such a case is provided by EU-induced rules on energy refurbishment, which in a minority of States also allow for rent increases by the landlord investing in such measures. The effects of these rules may of course be good for the environment but may render dwellings much more expensive, thus ultimately excluding the poor from the market (3).

1. Black Market Tenancies

Black market tenancies may be defined as informal agreements with illegal elements, which induce the parties to keep them in a hidden, extra-legal sphere. Black market contracts seem to be present in a majority of EU states but are particularly frequent in Eastern European states where they constitute the largest component of the private sector. Generally, black market contracts are associated with a lack of legal protection of the tenant and a low quality of housing, as no formal obligations exist for the landlord. Significant differences exist with respect to the types of violated provisions:

A first group concerns the violation of tax and/or registration law duties of the landlord-owner, who does not conclude a written contract because he wants to keep the contract secret *e.g.* with the purpose of tax evasion. Another group of cases is about the violation of prohibitions on the transfer of contracts. For example in Austria or Sweden, existing rental contracts with fixed low rents are transferred illegally against high sums (*e.g.* by faking a ground which would allow the transfer of the contract, such as that the buyer has cohabitated with the tenant-seller for a certain period). Moreover, in several other EU states, the illegal subletting of public or private-social dwellings with huge gains is a problem. This is typically so because rents are generally low and waiting lists long in these cases. A final group of cases concerns the violation of public law framework regulation such as “inhabitability standards” in case of low quality dwellings or provisions completed unrelated to the tenancy, *e.g.* when the tenant is an illegal immigrant. In these cases, the problem is of course that a tenant who invokes these violations may be expelled from the house by public authorities.

Possible regulatory answers need to address these constellations separately. Thus, the absence of a written contract or the violation of registration duties should not affect the tenancy negatively as long as the tenant is able to prove the existence of a contract through regular rent payments. In these cases, the tenant should have the claim to receive a full (default) rental contract, i.e. normally a contract for a longer period of time or an open-ended contract. Any

sanctions or other negative legal consequences for disrespecting registration duties should only lie with the landlord. Such measures would reintroduce informal (oral) contracts into the legal sphere, and the blackmail potential of the landlord would be reduced. This “good practice” may already be found in several EU states including Austria and Germany. The illegal transfer of contracts could simply be counteracted by limiting the possibilities of such transfers altogether, as is has already been done in Austria, though perhaps with a still too limited focus. Finally, if in the case of illegal subletting or the lease of uninhabitable dwellings, the tenant risks expulsion, this danger might be addressed by making available public or social dwellings to the tenant and by shifting the costs of such dwellings from public authorities to “black landlords”. Of course, the implementation of such measures in practice is more complex.

4.3.2. Social Rental Agencies

Social Rental Agencies (SRA) might be regarded as an example for a good practice. These are a tool used in about 15 EU States to make private rental dwellings available to less well off tenants to compensate for the decreasing number of public dwellings due to budgetary cuts and privatisation. Such agencies are generally financed by public funds and act as intermediaries between private landlords and households in need of affordable housing. They source suitable properties within the housing market and negotiate medium term leases with a private landlord. SRA pay or at least guarantee the full rent (which is usually slightly less than market level) to the landlord even when the dwelling is temporarily not occupied. Moreover, they frequently also act as rental manager of the dwelling, carrying out maintenance works etc, so that the owner does not need to care about the dwelling himself. In this field, comparative research may further assess the effectiveness and social impact of different SRA schemes to be found in Europe.

4.3.3. Energy Refurbishment of Rental Dwellings

Reduction of carbon dioxide and energy consumption as well as the improvement of energy efficiency of the housing stock are central goals of EU energy policy. Various directives, in particular Directive 2010/31/EU on the energy performance of buildings, have a big impact on national rental markets and tenancy legislation, especially through the setting of minimum energy performance requirements for buildings or the introduction of standardised energy performance certificates, which have to be provided by the landlord upon conclusion of a new rental contract. In several European states including Germany and Austria, the landlord has a statutory right to increase the rent after energy refurbishment measures.

Whilst this kind of regulation certainly promotes the protection of environment and climate, it might lead to higher rents and a higher share of black market tenancies. In particular, it might be abused to “price out” tenants no longer desired by the landlord, a practice which may be observed in Germany. Thus, similar to “fuel poverty”, such measures may lead to “energy refurbishment poverty” or preclude access to housing markets for vulnerable tenants altogether. A solution to such problems might be to limit the landlord’s right to increase the rent following energy refurbishment measures to the corresponding savings of the tenant (reduced utility payments) plus some limited “investment margin”. The logic behind this proposal is that (public) subsidies should act as the principal incentive to encourage the landlord to carry out such measures.

After this exemplary presentation of good, bad and ambivalent national practises, we will turn to the positive side of the OMC analysis pursued here: the elaboration of principles of good tenancy regulation.

IV. The elaboration of principles of good tenancy regulation

It goes without saying that the principles of good tenancy regulation proposed here constitute in the first place an academic exercise. They represent soft law without any directly or indirectly binding character. However, as they are based on a detailed comparative analysis, they might, ideally, develop into some kind of persuasive evidence and inspiration for national legislators or judges who have to develop or apply national tenancy law.

The following elaboration will first draw on an overall “mega principle” named neutrality of tenure, which will then be concretised into the general principles of profitability and respect of property rights for the landlord, and affordability, stability and flexibility of the tenancy for the tenant. On this basis, we will propose some more detailed principles and rules in core fields of tenancy regulation as a last step.

1. Neutrality of tenure as mega principle and guiding criterion

National housing policies are complex policy fields pursued by many actors at various levels of government. They extend to various policy branches including national and/or regional planning, urban policies as well as tax and subsidisation policies. In the wake of the financial crisis, several States have adhered to “**neutrality of tenure**” as a new key principle of housing

policy. This concept, strongly backed by housing scientists from different disciplines,²⁰ means that rental tenures should not be treated in national policy and regulation less favourably than homeownership, which is the traditional “reference tenure”.

The Tenlaw project builds on the working hypothesis that an adequate treatment of rental tenures should also be reflected in private tenancy law. Indeed, private law has a close relationship with housing policy, by which it is influenced and which it itself influences in manifold ways. To start with, a functioning private law infrastructure and court system (“Rule of Law”) must be in place; otherwise, as shown in several Eastern European states, no effective private rental market will develop on account of unforeseeable risks for landlords. Furthermore, rent regulation should enable the landlord to make adequate profit. Otherwise, she will not be inclined to rent out her properties but will consider alternative uses or even leave them empty in certain cases, as it is currently happening in Spain and several Eastern European states. As a consequence, the reliance of a growing number of EU States on the private market for the supply of rental dwellings to large parts of the population may be illusory. Instead, the State will need to step in and take care of those tenants who cannot satisfy their housing needs on the market.

On the other hand, if the position of tenants is too weak or instable, *e.g.*, if only short guaranteed periods of tenure are available (as *e.g.* under the British default tenancy, the so-called assured shorthold, which covers 6 months security of tenure only), rental tenancies do not constitute a reliable alternative to tenants who want to have a stable living base for their families. As a result, tenants may be pushed into homeownership even at the risk of overstressing their financial abilities and ending up in over-indebtedness; as is well known, such a situation has given rise to the subprime mortgage crisis in the US.²¹ Similarly, though less dramatically, the far-reaching prohibition of subletting even without the landlord alleging good reasons, which is common in Southern European countries, provides another unjustified disadvantage of rental tenures as compared to ownership – as an owner could of course rent her house for example during a period of absence for working reasons.

²⁰ See, *e.g.*, *M. Baldini/ T. Poggio*, Housing Policy Towards the Rental Sector in Italy: A Distributive Assessment, *Housing Studies* 27 (2012), 563-581.

²¹ Similarly, in a perspective of legal-economic efficiency, in the absence of assured tenancies, the landlord could threaten the tenant with an eviction at short notice and could thus benefit of an economically inefficient monopoly rent: For in order to avoid the transactions costs caused by moving, the tenant will mostly be ready to pay more than the market rent to avoid eviction. See *H.-B. Schäfer/ C. Ott*, Die ökonomische Analyse des Rechts - Irrweg oder Chance wissenschaftlicher Rechtserkenntnis?, *Juristenzeitung* 1988, 213, 222.

Against this background, the core policy hypothesis of Tenlaw is that private law needs to respect a sort of “**socio-economic equilibrium**” between the legal positions of landlord and tenant – a principle which is thus based not only on private law (commutative) justice but also on legal economic findings. This principle aims at accommodating both the tenant’s need to have access to housing at reasonable conditions as well as the landlord’s profit-orientation and property rights.

To render operational the principle of a “socio-economic equilibrium” in a comparative analysis, Tenlaw has tried to develop an overall assessment of national legislation. This is based on a balance of general principles, which constitute key functional criteria for each party which a good legal system should accommodate: profitability and respect of property rights for the landlord, and affordability, stability and flexibility of the tenancy for the tenant:²²

2. Concretisation I: Profitability, respect of property rights, affordability, stability and flexibility as key functional criteria

The criterion of the **profitability for the landlord** encompasses the key research question whether rent regulation allows, or impedes, a reasonable profit, especially when profit from renting is compared to alternative investments. In this context, also the taxation of rental income, in particular possible tax privileges, needs to be considered. Likewise, attention should be paid to additional expenses which a landlord might face, such as certain taxes or the costs of repairs and utilities (to the extent these are not capable of being shifted to the tenant).

The criterion of the **respect, *de iure* and *de facto*, of the landlord’s property rights** is rendered operational by an assessment of important “Rule of Law” features such as the available remedies in cases of default on rent payment and deterioration of the house by the tenant, in particular of the effectiveness of eviction procedures (or alternatively available conciliation or mediation procedures). In this context, also the effectiveness of protection and guarantee mechanisms such as deposits, liens and pledges on the tenant’s belongings, personal securities (e.g. sureties of relatives) or insurances needs to be scrutinised. Another important dimension of the owner’s property right is the possibility to terminate the contract when the house is needed for own use or close relatives or when it is intended for another, more lucrative economic use. Finally, the opportunities for construction and rehabilitation are also relevant in this context, in particular the availability of mortgage credit, public subsidies for construction/rehabilitation and occasionally also the availability of private arrangements

²² On these criteria, see the Spanish *Tenlaw* team leader *S. Nasarre Aznar*; Leases as an alternative to homeownership in Europe. Some key legal aspects, *European Review of Private Law*, 2014.

according to which the tenant rehabilitates the dwelling (performance in kind) in lieu of paying rent.

As regards the tenant, the key evaluative criteria for him are **affordability, stability and flexibility** of the tenancy. **Affordability** depends on the effective regulation of the rent (limitations on the setting of the initial rent and control of later increases) and of other fees and expenses the tenant may have to bear, including the deposit, utilities, repairs and other fees such as registration fees or taxes which may lawfully be passed on to the tenant. Finally, the availability of public rent subsidies (housing allowances) for poor tenants is also relevant in this context.²³

The **stability** of the position of the tenant first depends on the legal regulation of the “default tenancy”, *i.e.*, in particular whether insecure instruments such as licenses instead of leases are lawfully available, as is the case in UK; or whether the lack of a written agreement or of registration in a public register, which is mandatory in many European states but frequently denied by landlords for tax evasion purposes, constitutes a risk for the tenant.

The key issue related to stability is the **duration of the tenancy**, *i.e.*, the period for which tenants are entitled to stay as long as they respect the contract. In open ended tenancies, this issue depends on whether there is adequate protection against the unilateral termination of the tenancy by the landlord. In systems following the French tradition of fixed period agreements (*e.g.* 3+3 years), it is decisive whether the guaranteed rental periods are adequately long and whether effective prolongation rights exist (or whether the landlord may make the prolongation dependent on the tenant’s consent to potentially abusive rent increases). Other criteria are the availability of the *emptio non tollit locatum* rule and/or pre-emption rights of tenants in case of sale of the dwelling, and the tenant’s legal position in case of a public auction of the house. Finally, the fairness of the eviction procedure, especially the availability of social defences or prolongation rights, also contributes to the stability of the tenant’s position.

The last key criterion for the tenant, **flexibility**, is crucial for personal and labour mobility. It essentially depends on whether unilateral termination of the tenancy by the tenant is possible within a reasonable period of time (or whether a tenant may be bound by a long term agreement which would force him to pay two rents if he has to move *e.g.* for professional reasons). Another, frequently underestimated, criterion is whether non-abusive subletting is generally allowed or may be prohibited by the owner even without good reasons; again, a possible prohibition strongly decreases the tenant’s mobility in case of work assignments in different locations.

²³ For a discussion, see *P. E. Kemp* (ed.), *Housing Allowances in Comparative Perspective*, 2007.

Public/social tenures allocated to need (*i.e.*, tenancies with public or “private social” landlords funded or at least subsidised by public authorities), may, with respect to the position of tenants, also be assessed with the criteria of affordability, stability and flexibility. As these will often be regulated to the advantage of the tenant, the **conditions of access** to public/social tenures become crucial; these depend on sufficient supply, the criteria of eligibility for tenants and the selection and allocation procedure, which should be fair, transparent and effective.

3. **Concretisation II: European Principles - Proposals for Regulating Duration and Rent**

As announced, we will now try to develop some more detailed principles on the basis of the functional criteria just outlined. These will be limited to classic private market tenancies; the specificities of public/social tenancies may be accommodated at a later stage. As a further caveat, it should be noted at the outset that there is of course not the one cogent deductive solution; instead, legislators are left with a big deal of discretion, albeit radical solutions which are in force in several states may be excluded. What follows therefore involves also our personal preferences, though the reference to the set of general principles enables, hopefully, rational choices and conclusions.

As regards duration, a reasonable balance between the stability of the lease for the tenant and the protection of owner’s property rights is crucial; if this balance is not respected by and large, neutrality of tenure is hampered from the very beginning. It is clear that all extreme solutions such as the English assured shorthold or the Swedish or Dutch “close to impossibility” of termination do not enable this balance. The German model of open ended contracts under which the landlord may in principle always give notice for qualified reasons with some months delay (or with a delay as stipulated by the contract) comes closer to the desired balance. However, as recent jurisprudence has confirmed, it enables terminations for personal use (*Eigenbedarf*) even after a very short duration of the contract only, which violates the tenant’s legitimate expectations and the stability principle.²⁴ The construction of longer guaranteed periods which may be found in Code Civil-derived legal systems is not always optimal either. For example, in Italy, after the 4+4 years guaranteed period, there is no more protection for the tenant, and the owner may make the offer of a new contract dependant on high rent increases. The French solution is more convincing in this context as even after the 3+3 years (or 6+6 years if the landlord is a legal person) guaranteed period, the landlord must prove specific conditions if he

²⁴ See with further references, K. Milger: Die Kündigung des Vermieters wegen *Eigenbedarfs*, *Neue Zeitschrift für Mietrecht* 2014, 769.

does not want to renew the contract. These include personal use, the intended sale of the dwelling (but the tenant has a pre-emption right!) or other serious reasons. However, it is our sense that for a private owner waiting up to 6 years before the restitution of a dwelling needed for personal use is excessive. Therefore, we would propose, as a middle ground solution, a default model according to which there are guaranteed renewable rental periods of 3 years each. After the end of such a 3 years period only, and following a notice to be given at least 6 months before, the owner is entitled to terminate the lease and may claim restitution of the dwelling for legitimate purposes including legitimate personal use, changed economic use of the building or other qualified reasons. This solution would be a general solution only, allowing for derogations in special circumstances such as leases for established transitory housing needs (including the case of students, placed workers etc) or leases to elderly or ill tenants or leases of rooms in the landlord's house. Of course, this solution would only apply to a "complying tenant" who respects his obligations, in particular the punctual payment of the rent and abstains from anti-social behaviour etc. Otherwise, just as what is the rule in almost all national systems, the landlord should be allowed to terminate the contract on an extraordinary basis within a short period of notice. Finally, to enable personal and professional flexibility, a tenant should always be in a position to terminate the lease within a reasonably short period of about 3 months. Otherwise, he might not be flexible enough on the job market, which may be bad for the economy as a whole.

As regards the rent, in order to establish a balance between the competing principles of profitability for the landlord and affordability (and stability) for the tenant, the market rent should be respected, at least by and large. The market rent may be measured by statistical devices such as the German Mietspiegel or comparable indices, but reasonable deviations of about 10% should be allowed in individual agreements. Rent control along these lines should be legitimate not only in case of rent increases but also as regards the initial rent laid down in the lease agreement (a solution which may currently be found only in a minority of Member States). However, to enable a higher degree of foreseeability and thus also of affordability and stability for the tenant, (normally annual) increases during the guaranteed 3 years period described above should be limited to the inflation rate index or comparable indices as in the French system. Again, this solution, too, would provide only a general model; important national specificities such as the Swedish collective agreement system should be admitted.

Along these lines, by drawing on the general principles described above, other legal issues of a tenancy including deposit and repairs may also be regulated, which we will try to show in later publications.

4. Concretisation III: European Tenancies

As a further step of concretisation, the model principles just outlined might enable the draft of European tenancies (ETs), i.e., fair and attractive model tenancy agreements at the disposal of landlords and tenants. Such an agreement could not be a uniform model but would need to be adapted to the legal requirements of each EU Member State so as to convert it into a lawful and enforceable contract. It is true that such an adaptation might not, however, be possible with all principles in some Member States including The Netherlands or Sweden due to contrary mandatory internal provisions; but for the majority of Member States, realizing most of the principles should be possible.

Ideally, the national implementation and concretization of the ETs should be done by landlord and tenant associations acting together under the auspices of European interest groups such as the International Union of Tenants (IUT), to give it a maximum of political weight and legitimacy. Alternatively, the draft could of course be done also by research institutions. An ET should work as a “European quality label” which ensures basic standards of fairness especially to migrants who have to access a foreign tenancy market; but it might indirectly also enhance the level of fairness for “internal” contracts. In substance, an ET concretised at national level should cover all issues which are part of a usual national tenancy agreement; thus, it should deal with all matters relevant for the parties (as sketched out for example in the Tenlaw “Tenants’ Rights Brochure”). Member States could be encouraged to promote ETs, e.g. by providing tax advantages to landlords who accept a national ET; just as what already happens in Italy with tenancies negotiated and approved by landlord and tenancy associations.

Conclusion

In sum, the comparative and European approach to tenancy law which has been developed in the Tenlaw project may generate benefits at various levels.

First, it helps uncover **good and bad regulatory practices and phenomena** in different States. This evaluation also generates a surplus value in that it enables a general assessment of the overall quality of legislation on private tenancies and the “housing governance” of public/social landlords; even a kind of quality ranking among EU states might ultimately be possible. Against this background, national legislators might ideally receive a direct incentive for ameliorations in an OMC perspective.

Second, the **key principle of neutrality of tenure** may be translated into the general principles of profitability and respect of property rights for the landlord, and of affordability, stability and flexibility of the tenancy for the tenant. These, in turn, may be developed into more detailed principles and rules such as the ones on duration and rent suggested here. Inspired by the objective of social-economic balance, these might be claimed to be preferable to the default regulatory solutions of most European countries. Moreover, the quality of national legislation and court practise could be improved by its “exposure” to European discussion, within the epistemic community of housing lawyers and experts and in salient cases even within the emerging European public. This aim could be supported through a permanent research institute on housing law in Europe - which is currently lacking and which the members of the Tenlaw consortium would of course be glad to establish.